[***N&C Transportation Ltd. v. Navistar International Corp., [2016] B.C.J. No. 2369***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M7G-Y311-JJ1H-X0NJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: June 13-17, 2016.

Judgment: November 16, 2016.

Docket: S144960

Registry: Vancouver

**[2016] B.C.J. No. 2369** | 2016 BCSC 2129

Between N&C Transportation Ltd., T&S Transportation Systems Inc., and Pacific Ocean Transportation Inc., Plaintiffs, and Navistar International Corporation, Navistar Inc., Navistar Canada Inc. and Harbour International Trucks Ltd., Defendants BROUGHT pursuant to the Class Proceedings Act, R.S.B.C., 1996 c. 50

(195 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Common interests and issues — Definition of class — Members of class or sub-class — Procedure — Representative plaintiff — Application by plaintiffs for certification of class proceeding allowed — Plaintiffs were transport companies that alleged heavy-duty trucks manufactured and sold by defendants were equipped with defective emissions control technology — Claim disclosed viable causes of action for *negligence* and failure to warn, negligent misrepresentation, waiver of tort, and breaches of Competition Act and Sale of Goods Act — Deletion of operators left identifiable class of purchasers with sufficient commonality — Key issue of whether technology was defective was appropriate common issue from which remainder of claims flowed, with exception of misrepresentation claims, which lacked sufficient commonality.**

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| Application by the plaintiffs, N&C Transportation, T&S Transportation Systems, and Pacific Ocean Transportation, for certification of their action against the Navistar and Harbour International defendants as a class proceedings. The defendants manufactured and sold heavy-duty trucks equipped with technology for reducing nitrous oxide emissions in order to meet regulatory standards. The plaintiffs were transport companies that operated as a single business. The plaintiffs purchased the trucks and alleged the emissions control technology was defective. The plaintiffs submitted that the trucks required extensive repairs, causing losses and damages. Their civil claim advanced causes of action for ***negligence*** and failure to warn, negligent misrepresentation, waiver of tort, and breaches of the Competition Act and Sale of Goods Act. The defendants denied the technology in their trucks was defective. They submitted that the test for certification was not met.  HELD: Application allowed.  It was not plain and obvious that the causes of action advanced in the plaintiffs' claim were bound to fail. Despite issues of vagueness and a lack of particulars, the pleading was not devoid of allegations that the defendants knew or ought to have known of the problems with their technology and the impact upon the operability of their trucks. Sufficient particulars were provided regarding the dangers posed by the trucks due to the alleged defects. It was not appropriate to determine the merits of the defendants' reliance on an exclusion clause or warranty provisions at the certification stage. The proposed class required deletion of operators, but otherwise encompassed sufficient commonality in the claims of new and used purchasers. The deletion of operators from the class definition meant that two of the three plaintiffs were not appropriate as representative plaintiffs. The plaintiffs' proposed methodology for determining the existence of a class-wide defect, combined with extensive circumstantial evidence, supported certification of the matter as a common issue, from which all other issues and claims flowed, save for the claims based on misrepresentation, which lacked sufficient commonality. A class action was the preferable procedure given the encapsulation of the key issue to the litigation in the common issue of whether the defendants' emission control technology was defective. |

**Statutes, Regulations and Rules Cited:**

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

Canadian Environmental Protection Act, 1999, [*S.C. 1999, c. 33*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB11-FFTT-X0V8-00000-00&context=),

Class Proceedings Act, [*R.S.B.C. 1996, c. 50, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=), s. 4(1), s. 4(1)(a), s. 4(1)(b), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e), s. 4(1)(e)(ii), s. 5, s. 5(1), s. 5(4), s. 5(5), s. 5(6), s. 29(1)

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=), s. 52

On-Road Vehicle and Engine Emission Regulations, [*SOR/2003-2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSY1-JWBS-62VB-00000-00&context=),

Sale of Goods Act, *R.S.B.C. 1996, c. 410*,

**Counsel**

Counsel for the Plaintiffs: R.S. Anderson, Q.C., P.K. Shergill, Q.C., N.T. Hooge, R.K. Dhaliwal.

Counsel for the Defendants: S.M. Kugler, D.C. Hendricks.

**Reasons for Judgment on Certification**

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| **R.A. SKOLROOD J.** |

**Introduction**

**1**  The plaintiffs apply for certification of this action as a class proceeding pursuant to the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*CPA*].

**2**  Broadly speaking, the action concerns heavy-duty trucks manufactured by the defendants that were equipped with a particular technology for reducing nitrous oxide ("NOx") emissions in order to meet regulatory standards. The plaintiffs purchased a number of these trucks and allege that the emissions control technology was defective, with the result that the trucks required extensive repairs and experienced significant down time, causing the plaintiffs to suffer loss and damage.

**3**  The plaintiffs allege that a number of other trucking companies have experienced similar problems with the defendants' trucks and that the matter is suitable for certification as a class proceeding.

**4**  The defendants deny that the emissions control technology in their trucks was defective and they submit that the test for certifying a class proceeding has not been met.

**The Parties**

**5**  The proposed representative plaintiffs, N&C Transportation Ltd., T&S Transportation Systems Inc. and Pacific Ocean Transport Inc. are companies owned and operated by Mohinder Virk and/or his wife Harjeet Virk. All of the companies are involved in the trucking industry and are operated as a single business. Except where it is necessary to identify one of the parties specifically, the plaintiffs will be collectively referred to as "N&C Transportation".

**6**  The defendant Navistar Inc. is an operating company engaged in the business of designing, manufacturing, testing and marketing trucks under the brand names Navistar and International. Navistar Canada Inc. is a subsidiary of Navistar Inc. that performs marketing and customer service activities in Canada. Navistar International Corporation is described as a publicly traded holding company, although its relationship to the other Navistar entities was not clearly explained in the evidence. Except where it is necessary to identify one of the parties specifically, these parties will be collectively referred to as "Navistar".

**7**  The defendant Harbour International Trucks Ltd. ("Harbour International") is a B.C.-based dealer of Navistar heavy-duty trucks from which N&C Transportation purchased many of its trucks.

**Background**

**Regulatory Framework**

**8**  In December 2000, the United States Environmental Protection Agency [EPA], which regulates vehicle emissions in that country, announced a new program for reducing heavy-duty diesel truck exhaust emissions. Details of the new program were set out in a regulatory announcement issued by the EPA, which included the following:

We are finalizing a PM [particulate matter] emissions standard for new heavy-duty engines of 0.01 grams per brake-horsepower-hour (g/bhp-hr), to take full effect for diesels in the 2007 model year. We are also finalizing standards for NOx and non-methane hydrocarbons (NMHC) of 0.20 g/bhp-hr and 0.14 g/bhp-hr, respectively. These NOx and NMHC standards will be phased in together between 2007 and 2010, for diesel engines. The phase-in will be on a percent-of-sales basis: 50 percent from 2007 to 2009 and 100 percent in 2010.

**9**  On January 1, 2001, the EPA published a formal rule titled "Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulphur Control Requirements" which put in place the new emissions standards.

**10**  Generally speaking, the new standards required a 90% reduction in NOx and PM emissions between 2004 and 2010.

**11**  In Canada, regulation of heavy-duty truck emissions is done under the *Canadian Environmental Protection Act*, *1999*, [*S.C. 1999, c. 33*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB11-FFTT-X0V8-00000-00&context=). Since approximately 2004, the general approach in Canada has been to harmonize with the emissions standards established in the United States. Harmonization is accomplished, in large part, through standards established under the *On-Road Vehicle and Engine Emission Regulations*, [*SOR/2003-2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSY1-JWBS-62VB-00000-00&context=).

**Navistar's EGR Technology**

**12**  In order to comply with the new emissions standards set by the EPA, the heavy duty truck industry developed two principal technologies or systems: Exhaust Gas Recirculation ("EGR") and Selective Catalytic Reductant ("SCR").

**13**  The EGR technology is described by Dr. Jim Cowart, an expert retained by the plaintiffs, in these terms in his expert report dated July 10, 2015:

...the combustion temperature in the combustion chamber of the engine may be reduced by re-circulating some exhaust gases (preferably cooled before re-entering) back into the fresh air intake side of the engine. EGR (Exhaust Gas Recirculation) both reduces the overall combustion temperature since EGR is mostly inert gas (already burned), as well as reduces the oxygen concentration in the engine's combustion chamber (since oxygen is consumed in combustion). Both of these affect NOx formation.

**14**  Dr. Cowart also describes the SCR technology:

The SCR system reduces vehicle-out levels of NOx emissions, by reducing NOx (NO and NO2) from the engine to atmospheric nitrogen and water using DEF (Diesel Exhaust Fluid) which contains urea that is converted to ammonia, NH3 before reacting with exhaust NOx...The SCR system uses a separate tank of DEF on the vehicle in order to dose the SCR catalyst with urea.

**15**  The design issue at the heart of N&C Transportation's claim is that Navistar chose to utilize EGR to achieve the reduced emissions, whereas its competitors used EGR combined with SCR. This is described by Timothy Tindall, Navistar's expert, in his expert report dated December 4, 2015, as follows:

The heavy-duty truck and engine industry pursued two different strategies in order to comply with the EPA's 2010 emissions requirements. Navistar elected to use existing EGR technology with modifications, combined with other engine modifications, and emissions credits to meet the new standard. Its competitors used EGR, but also added a new system, SCR.

**N&C Transportation's Purchase of Navistar EGR Trucks**

**16**  Mr. Virk deposes that in 2010, N&C Transportation was looking to expand its operations and purchase new trucks. As part of his investigation into possible options, he learned that Navistar was offering a comprehensive five year warranty on its EGR trucks. This was subsequently confirmed in discussions with a salesman from Harbour International.

**17**  Between October 2010 and September 2011, N&C Transportation purchased 14 Navistar EGR trucks from Harbour International. The base price for the majority of the trucks was $139,500. Mr. Virk says that the price paid for these trucks was higher than the price paid for class 8 trucks purchased from other manufacturers.

**Alleged Problems with the Navistar EGR Trucks**

**18**  In his affidavit #1, Mr. Virk describes the issues experienced with the Navistar EGR trucks as follows:

1. Not long after we started to use the Navistar EGR Trucks listed above, I began to notice, and the truck drivers my business employs began to complain about, a number of mechanical issues being experienced by the trucks on a repeated basis. These mechanical issues included:
2. engines overheating;
3. "check engine" warning lights staying on;
4. fan hubs running at all times (these are responsible for keeping the engine cool);
5. trucks losing power when they were driven uphill;
6. failures of the EGR valve and cooler, and related hoses and pipes, often resulting in coolant leaks; and
7. soot clogging the diesel particulate filter ("DPF"), requiring repeated cleaning and maintenance.
8. These mechanical issues were not isolated to one or two units, rather they arose in all of my Navistar EGR Trucks. As time wore on and repeated repairs failed to fix these mechanical issues, I became very concerned. The mechanical issues in the Navistar EGR Trucks created a dangerous situation for my drivers and potentially other motorists that shared the road with the Navistar EGR Trucks. For example, loss of power on an incline meant that the Navistar EGR Trucks could potentially roll back on a steep part of the highway while carrying a load of 33,000 pounds or more. Such a circumstance obviously creates a serious risk of motor vehicle accidents.

**19**  Sawraj Dhami is the president of 3D Transport Ltd. ("3D Transport"), another trucking company. Mr. Dhami swore an affidavit in which he deposes that 3D Transport purchased two used Navistar EGR trucks in 2012 from Harbour International. Mr. Dhami deposes that the trucks he purchased experienced similar mechanical issues to those described by Mr. Virk.

**Legislative Framework**

**20**  Certification of a proposed class proceeding is governed by s. 4 of the *CPA*:

**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.

**21**  Of note, s. 4(1) stipulates that the court must certify a proceeding if the elements set out in ss. 4(1)(a)-(e) are met.

**22**  A useful description of the process and test for certification was provided recently by Madam Justice Griffin in *Tonn v. Sears Canada Inc.*, [*2016 BCSC 1081*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K2F-CNC1-JKPJ-G2X7-00000-00&context=) [*Tonn*] at paras. 25-28:

[25] The goals of the *CPA* are access to justice, behaviour modification, and judicial economy. These goals are to be kept in mind in the certification process.

[26] The case law establishes that the standard to be met on an application for certification is not onerous. As summarized by Masuhara J. in *Seidel v. Telus Communications Inc.*, [*2016 BCSC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J17-BK31-F5T5-M24B-00000-00&context=):

[56] The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at 980; *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=) at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the application hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24-25. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts*: Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) at para. 102 [*Microsoft*].

[57] In this respect, I note the observation of Rothstein J., for the Court, in *Microsoft* at para. 105:

Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[Emphasis added.]

[27] The evidentiary threshold to be applied is therefore not a balance of probabilities, but rather the less stringent "some basis in fact" test. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately pursued as a class action.

[28] Although the burden is on the plaintiff, the opposing party may respond with evidence of its own to challenge certification. Where the defendant does so, it is proper for the court to scrutinize the plaintiff's evidence by reference to the defendant's evidence. However, care must be taken not to engage in an impermissible weighing of the evidence (*Marshall v. United Furniture Warehouse Limited Partnership*, [*2013 BCSC 2050*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YS-00000-00&context=) at para. 54, aff'd [*2015 BCCA 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21KH-00000-00&context=), leave to appeal ref'd [*[2015] S.C.C.A. No. 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H07-H3W1-F06F-21SP-00000-00&context=)).

**Preliminary Issue**

**23**  N&C Transportation raises a preliminary issue about the adequacy of Navistar's responsive materials. The issue arises out of the wording of s. 5 of the *CPA*, which sets out the requirements for a certification application. The relevant sections of s. 5 provide as follows:

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

...

1. Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.
2. A person filing an affidavit under subsection (2) or (4) must
3. set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
4. swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
5. provide the person's best information on the number of members in the proposed class.
6. The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

...

**24**  N&C Transportation says that the effect of this section, particularly subsections (4) and (5), is that the defendant in a proposed class proceeding must, in response to a certification application, file an affidavit that meets the requirements of subsection (5).

**25**  It submits further that Navistar's affidavit evidence is inadequate because the principal affiant on behalf of Navistar, Mr. Krohn, does not swear that he knows of no material facts that have not been disclosed nor does he provide any information about the number of members in the proposed class. N&C Transportation also submits that because Mr. Krohn ceased employment with Navistar in 2013, he is not, in any event, in a position to speak to Navistar's current knowledge of the material facts.

**26**  N&C Transportation did not seek any particular relief based on these alleged defects other than to say that they should cause the court to view Navistar's factual assertions sceptically.

**27**  Navistar submits that s. 5(4) is permissive rather than mandatory in terms of whether a defendant must file an affidavit. It cites *Ernewein v. General Motors of Canada Ltd.,* [*2005 BCCA 540*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2D4-00000-00&context=) [*Ernewein*] where Madam Justice Newbury, in addressing the evidentiary requirements for certification, said at para. 25:

... s. 5(1) of the Act requires an applicant for certification to file an affidavit containing the items specified at s. 5(5), and the recipient of the notice of motion may also file affidavit material: s. 5(4). ... [Emphasis added.]

**28**  According to Navistar, since it was not required to file an affidavit on the certification application, the requirements of s. 5(5) are not applicable. Alternatively, it submits that the certification process is intended to be flexible and it should be granted leave to file additional evidence to address any technical defects in its current materials. It points to s. 5(6) of the *CPA* as specifically providing for such flexibility.

**29**  In response to Navistar's submission based on Madam Justice Newbury's comments in *Ernewein*, N&C Transportation submits that those comments were *obiter* and are inconsistent with the clear wording of the statute. As such, they are not binding.

**30**  It is not necessary for me to decide whether s. 5(4) is mandatory or permissive given that here, Navistar did file affidavit evidence in response to N&C's application.

**31**  However, I agree with N&C Transportation that the affidavit evidence is deficient in that there is no sworn statement with respect to the disclosure of material facts as required by s. 5(5)(b). The importance of this requirement is addressed by the authors of *Class Actions in Canada,* loose-leaf ed. (Toronto: Canada Law Book, 2014) at 4.1460:

Counsel in BC must be careful of the special responsibility placed on each affiant to swear that they know of no fact material to the application that has not been disclosed. This is a heavy responsibility that departs somewhat from the traditional adversarial approach. The affiant for the party opposing certification may not conceal those facts that would tend to show that certification is preferable.

**32**  That said, both parties filed extensive evidence on the application which was canvassed in detail at the certification hearing, notwithstanding the fact that, as noted by Madam Justice Griffith in *Tonn*, the evidentiary standard to be met is relatively low and the court is not to engage in a detailed assessment or weighing of the evidence (at paras. 26-27).

**33**  I am satisfied that, on the evidence presented, I can determine the issues according to the applicable standard. Were I concerned that the defect in Navistar's evidence impeded my ability to do so, I would grant leave for it to file additional evidence in keeping with the flexible nature of the certification process. That, however, will not be necessary.

**Analysis**

**Do the Pleadings Disclose a Cause of Action?**

**34**  The parties agree that the test under s. 4(1)(a) is the same test that applies on a motion to strike a pleading under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*: is it plain and obvious that the notice of civil claim discloses no reasonable cause of action (*Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* [*Hunt*] at 960).

**35**  As a general rule, no evidence is admissible on this issue and the facts pleaded are assumed to be true. However, the facts as pleaded must be capable of supporting the cause(s) of action advanced: *Hunt* at 991.

**36**  The plaintiffs' amended Notice of Civil Claim advances the following causes of action against Navistar and Harbour International:

1. ***negligence***/failure to warn;
2. negligent misrepresentation;
3. waiver of tort;
4. breach of the *Competition Act*, [*R.S.C. 1985, c. C-34*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JXG3-X3FD-00000-00&context=); and
5. breach of express warranties and breach of implied warranties pursuant to the *Sale of Goods Act*, *R.S.B.C. 1996, c. 410*.

**37**  I will consider each of the proposed causes of action in turn.

***Negligence/Failure to Warn***

**38**  It is well established that a plaintiff advancing a claim in ***negligence*** must establish three elements:

1. a duty of care;
2. a breach of the standard of care; and
3. resulting loss or damage.

(See *Leger v. Metro Vancouver YWCA,* [*2013 BCSC 2021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YC-00000-00&context=) at para. 43.)

**39**  In its amended Notice of Civil Claim, N&C Transportation pleads the essential elements of a claim in ***negligence***. Specifically, it alleges that "Navistar owed a duty to the Plaintiffs and Class Members to design, test, manufacture and market safe and durable Navistar EGR trucks" (at para. 46). N&C Transportation then alleges that Navistar breached its duty of care and that it suffered loss and damage as a result.

**40**  Navistar however submits that the claim in ***negligence*** is bound to fail because:

1. N&C Transportation's claim is for pure economic loss, which is only recoverable if the allegedly defective product presents a real and substantial danger to persons or other property. Navistar submits that the amended Notice of Civil Claim alleges no material facts that, if proven, would establish a real and substantial danger; and
2. By virtue of the terms set out in its warranties, Navistar excluded liability for any obligations other than those expressly acknowledged in the warranties.

**41**  With respect to the first of Navistar's objections, it relies on a distinction drawn by the courts between goods that are merely shoddy in their design or manufacture versus good that are inherently dangerous. This distinction was discussed by the Court of Appeal in *M. Hasegawa & Co. Ltd. v. Pepsi Bottling (Canada)*, [*2002 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2FC-00000-00&context=) at paras. 36-37 and 57-58:

[36] As a matter of logic, it may seem incongruous that the existence of a duty of care should depend upon the kind of harm that might ensue from a lack of care by the defendant. The controlling test for existence of the *prima facie* duty is the parties' proximity or degree of neighbourhood. The kind of harm that might be suffered by a plaintiff, whether physical or economic, does not seem to be an appropriate test for deciding whether a duty exists, because a plaintiff, whether in a proximate relationship or not, might suffer either kind of harm.

[37] The Supreme Court of Canada has, however, decided that the kind of harm which may potentially be suffered does indeed determine the existence of the duty of care. It has held that the product manufacturer's duty is to take reasonable care to avoid causing either personal injury or physical danger to property. But the duty does not extend to putting into circulation products which are merely defective or shoddy, if they are not dangerous. There can be no doubt that on the law as presently understood, the potential nature of the harm determines the existence of the *prima facie* duty of care.

...

[57] The plaintiff contends that, under the second part of the ***Anns*** test, there is no valid policy reason why liability for pure economic loss should be denied in this case. With respect, I disagree. A legal rule which imposed liability for the manufacture or supply of defective, but non-dangerous, goods would create an implied warranty of product quality for the sale of commercial products, in the absence of contract. Such a rule would be an enormous change in the law, and would indeed create "liability in an indeterminate amount for an indeterminate time to an indeterminate class": per Cardozo C.J. in ***Ultramares Corp. v. Touche***, 174 N.E. 441 (N.Y.C.A. 1931) at p. 444.

[58] I can see no good reason for adopting the test proposed by the plaintiff, and much to recommend against it. I agree with the defendant's submissions that the law of contract and sale of goods already allocates risk for goods of poor quality, and that tort law should not interfere.

[Emphasis in original.]

**42**  Navistar's submission that N&C Tranporation's pleadings are insufficient is succinctly summarized at paras. 122 and 123 of its written submission:

1. In the present case, the Plaintiffs have not pleaded that Navistar's engines pose a real and substantial danger with any degree of particularity or air of reality. There is no plea that engines fail without warning to the vehicle operator and no plea that engines catch fire, explode, or run out of control. Despite Navistar's trucks having been on the market and operating on the highways for more than six years, there is also no plea of any actual injury or damage to property.
2. The Plaintiffs simply allege facts suggestive that the engine is unreliable followed by a bald conclusion that the vehicles are dangerous. The plea lacks the material facts required by Harrington, which are, the risks created by the product and whether they cause dangerous conditions.

[Emphasis in original.]

**43**  I agree that the allegations as set out in the amended Notice of Civil Claim that the Navistar EGR trucks are dangerous are somewhat vague and lacking in particulars. However, it cannot be said that the pleading is devoid of any allegation that the Navistar EGR trucks are dangerous. For example, at para. 24, it is alleged that "Navistar knew or...ought to have known that there were significant problems with the EGR technology, including a buildup of soot in the diesel particulate filter that would cause engine failure, and that the EGR technology lowered fuel economy, decreased durability and increased cooling demands on the engine, all creating Navistar EGR trucks that were dangerous and not suitable for their intended use". At para. 48, it is alleged that the defects in the Navistar EGR trucks "would cause the engines to fail and render the Navistar EGR trucks inoperable in circumstances that were foreseeably dangerous, including engine failure while in use at high speeds on well-used highways".

**44**  In addition to what is set out in the amended Notice of Civil Claim, N&C Transportation submits that, in the evidence adduced and in its written submissions, it has provided further particulars of how it says the Navistar EGR trucks are dangerous. Specifically, it alleges that the trucks are dangerous because they are prone to unexpectedly lose power while being operated at speed, often while travelling up inclines, and are prone to exhaust leaks and soot entering the cabs of the trucks, exposing drivers to dangerous carcinogens.

**45**  In *Hunt,* the Supreme Court of Canada pointed to *Minnes v. Minnes* (1962), 39 W.W.R. 112 where it was held that so long as a statement of claim, "as it stands or as it may be amended," discloses some question fit to be tried by a judge or jury, it should not be struck (*Minnes* at 122). Here, I am satisfied that the claim in ***negligence*** is one that is fit to be tried by the court and is not bound to fail. That said, I would order that N&C Transportation further amend the Notice of Civil Claim to provide particulars of how it says the Navistar EGR trucks are dangerous.

**46**  Navistar's second objection to the ***negligence*** claim is that it is precluded by reason of the express terms of its warranties. Navistar relies on the following language:

NO WARRANTIES ARE GIVEN BEYOND THOSE DESCRIBED HEREIN. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. THE COMPANY SPECIFICALLY DISCLAIMS WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ALL OTHER REPRESENTATIONS TO THE USER/PURCHASER, AND ALL OTHER OBLIGATIONS OR LIABILITIES. THE COMPANY FURTHER EXCLUDES LIABILITY FOR INCIDENTAL AND CONSEQUENTIAL DAMAGES ON THE PART OF THE COMPANY OR SELLER.

**47**  Navistar submits that the effect of this exclusion clause is to disclaim all liability in tort.

**48**  In my view, Navistar's reliance on the exclusion clause in effect asks the court to delve into the merits of the action, something that is not appropriate at the certifications stage. Moreover, it seeks to give effect to a defence that has not been pleaded, keeping in mind that no response to the Notice of Civil Claim has yet been filed.

**49**  Further, the interpretation and application of contractual provisions, including exclusion clauses, is not a pure legal issue that can be decided on the basis of the pleadings alone. As held by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, [*2014 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FXJ-PSX1-JNJT-B0JG-00000-00&context=) at para. 50:

... Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

**50**  Lastly, it is a live issue whether the language used in the exclusion clause, which does not expressly refer to claims in ***negligence***, can in fact apply to exclude such claims: see *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [*[1986] 1 S.C.R. 752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B6-00000-00&context=) at 794-800. This is a matter that again is more properly determined at trial and not at the certification stage.

**51**  For all of these reasons, I am not satisfied that it is plain and obvious that the claim in ***negligence*** is bound to fail.

**52**  I would add that, while Navistar did not seriously challenge the claim of a failure to warn, I am satisfied that this claim is adequately pleaded against both Navistar and Harbour International and is similarly not bound to fail.

***Misrepresentation***

**53**  The essential elements of a claim for negligent misrepresentation are well-established:

1. there must be a duty of care;
2. the representation in issue must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making the representation;
4. the representee must have relied reasonably on the misrepresentation; and
5. there must be resulting damage.

(See *The Queen v. Cognos,* [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 110).

**54**  I am satisfied that these requisite elements are adequately pleaded in the amended Notice of Civil Claim, specifically at paras. 26-32.

**55**  Navistar submits, however, that the misrepresentation claim is bound to fail because the parties entered into written agreements that expressly disclaimed all other representations and warranties. That disclaimer is found in the exclusion clause reproduced above at para. 35. Navistar says that, in exchange, it agreed that for a limited time it would repair or replace any covered part that was found to be defective. Navistar submits that, in the face of these contractual provisions, N&C Transportation had no reasonable basis for believing that Navistar owed obligations beyond those set out in the contracts and further, that Navistar could not reasonably foresee that N&C Transportation would rely on a representation not contained in the contracts.

**56**  In my view, this objection suffers from the same flaw as Navistar's position with respect to the ***negligence*** claim in that it advances a defence that has not yet been pleaded. Moreover, as I have previously found, the interpretation and application of the exclusion clause is a matter more properly left for trial.

**57**  The one exception is the allegation that Navistar committed a misrepresentation by presenting the Navistar EGR trucks to customers as class 8 trucks when in fact, due to their defects, the EGR trucks "were not, in fact, true class 8 trucks and/or were not suitable for the known uses of a class 8 truck" (para. 141 of N&C Transportation's written submission).

**58**  In my view, leaving aside the fact that this specific allegation is not pleaded, it is bound to fail. As Navistar submits, there is simply no issue that the trucks in question are, technically speaking, class 8 trucks. The fact that there may be defects in the design or manufacture of the trucks that render them unreliable and/or dangerous does not transform them into something other than class 8 trucks.

**59**  Apart from this one aspect, I am satisfied that the misrepresentation claim is not bound to fail.

***Waiver of Tort***

**60**  The Supreme Court of Canada described the waiver of tort doctrine in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) [*Pro-Sys*] as follows, at para. 93:

... Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus (2013), at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the theory that "in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

**61**  In *Watson v. Bank of America Corporation*, [*2014 BCSC 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61XK-00000-00&context=), Chief Justice Bauman, as he then was, noted that there has been considerable judicial and academic debate about whether waiver of tort exists as an independent cause of action in restitution or is parasitic of an underlying tort (see for example *Andersen v. St. Jude Medical, Inc.*, [*2012 ONSC 3660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-K0HK-237S-00000-00&context=) at para. 579). Chief Justice Bauman noted that, in light of that debate, courts have generally refused to strike the claim at the pleadings stage and instead generally leave the decision to the trial judge (*Watson* at para. 159).

**62**  In *Pro-Sys*, the Supreme Court of Canada declined to resolve the controversy, but held that it was not plain and obvious that the waiver of tort claim could not succeed (at para. 97).

**63**  In my view, the same is true for the waiver of tort claim in this case. I would add that Navistar did not seriously contend otherwise, except to say that waiver of tort cannot apply to the claim for breach of implied warranties under the *Sale of Goods Act*. N&C Transportation agrees with that limitation.

***Breach of the Competition Act***

**64**  N&C Transportation alleges a breach of s. 52 of the *Competition Act*, which provides in part:

**False or misleading representations**

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

**Proof of certain matters not required**

1. For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
2. any person was deceived or misled;
3. any member of the public to whom the representation was made was within Canada; or
4. the representation was made in a place to which the public had access.

...

**65**  Section 36 of the *Competition Act* creates a civil right of action for any loss or damage suffered as a result of conduct that is contrary to any provision of Part VI of the *Act*, which includes s. 52.

**66**  I agree with N&C Transportation that the allegations underlying the common law misrepresentation claims also disclose a cause of action for breach of s. 52 of the *Competition Act.* Again, Navistar does not seriously contend otherwise.

***Breach of Express Warranties and Implied Warranties Under the Sale of Goods Act***

**67**  At paras. 40 and 41 of the amended Notice of Civil Claim, N&C Transportation pleads the terms of the express warranty provided by Navistar and Harbour International:

1. Navistar and Harbour International provided limited warranty coverage for the Navistar EGR Trucks to the Plaintiffs and Class members or Sub-class members.
2. Pursuant to the terms of the express warranties, Navistar and Harbour International were obligated to conform the Navistar EGR Trucks to their express warranties, properly repair the Defects, and pay for or reimburse the Plaintiffs and Class members for costs incurred in repairing the defects.

**68**  N&C Transportation goes on to allege that Navistar and Harbour International breached the terms of the warranty by failing to properly repair the trucks and remedy the defects.

**69**  The specific language of the warranty is as follows:

This Custom Warranty Coverage is extended for 60 months or Unlimited Miles/Km/Hours from vehicle delivery date, whichever comes first. During this period selected, Navistar, Inc., will repair or replace any part of this vehicle covered component(s) which proves defective in material and/or workmanship in normal use, with new or ReNEWed parts...

**70**  Navistar submits that the N&C Transportation's claim does not fit within the terms of the warranties. It says that N&C Transportation has not alleged or identified any parts of the trucks that were defective in materials or workmanship. Rather, N&C Transportation complains that it is the design of the EGR system that is defective. Navistar submits that the warranty clearly does not cover defective design.

**71**  Navistar cites *Arora v. Whirlpool Canada LP*, [*2012 ONSC 4642*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFR1-JTGH-B06R-00000-00&context=), aff'd [*2013 ONCA 657*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S295-00000-00&context=) [*Arora*]. In that case, the plaintiffs sought to certify an action against Whirlpool Canada LP with respect to allegedly defective front-loading washing machines. One of the claims sought to be certified was a contractual claim based on warranty provided by Whirlpool covering "defects in materials or workmanship". Whirlpool took the position that the plaintiffs' claim alleged defects in design which were not covered by the express terms of the warranty.

**72**  The certification judge, Mr. Justice Perell agreed. At paras. 179-82 of the SCJ decision, he stated:

[179] Under *Tercon Contractors Ltd.,* [*[2010] 1 S.C.R. 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1H3-00000-00&context=) the approach to the enforcement of exculpatory provisions involves a three-stage analysis. In the first stage, the court asks whether, as a matter of interpretation, the clause applies to the circumstances. If the exclusion clause does apply, then, in the second stage, the court asks whether the exclusion clause was unconscionable at the time the contract was made. If the exclusion clause is held to be valid and applicable, in the third stage, the court asks whether the court should refuse to enforce the valid exclusion clause because of the existence of an overriding public policy (proof of which lies on the party seeking to avoid enforcement of the clause) that outweighs the very strong public interest in the enforcement of contracts.

[180] Under its warranty in the User and Care Guide, Whirlpool does not cover design defects and it limited its liability to pay for parts and to correct defects in materials or workmanship, and it excluded consequential damages. The second and third versions of the warranty expressly excluded implied warranties.

[181] The Plaintiffs do not sue to correct defects in materials or workmanship. They sue because they allege that the Whirlpool machines have a defective design. As a matter of contract interpretation, it is plain and obvious to me that their claim is not covered by the express warranty, that their claim is exculpated by the disclaimer language in the warranty, and there is no overriding public policy reasons (as there might be for a dangerous product) for not enforcing the express terms of the Whirlpool warranty.

[182] It is equally plain and obvious that the Plaintiffs cannot imply a term inconsistent with the express terms of the contract. A term will not be implied, if the term would be inconsistent with the existing wording of the contract; the implied term must fit with the existing contract...

**73**  The Court of Appeal upheld this finding (C.A. decision at paras. 22-23).

**74**  While I agree that the principal thrust of N&C Transportation's claim is that the overall design of the EGR system is defective, there are also elements of the claim that arguably fall within the scope of the warranty coverage for defects in materials and/or workmanship.

**75**  As set out above, para. 41 of the amended Notice of Civil Claim alleges that Navistar breached the express warranties by failing to "properly repair the Defects". At para. 25 of the amended Notice of Civil Claim "Defects" is defined to include:

1. Build-up of soot in engine filters;
2. Overheating of engines;
3. Leaking fuel pumps;
4. Damage to the recalculating valve;
5. Damage to the fan hub;

...

**76**  In its written reply submission, N&C Transportation describes the warranty claim in these terms:

...The plaintiffs claim that Navistar systemically breached the warranties they provided with respect to the component parts of the Advanced EGR emissions system. Properly interpreted, these warranties required Navistar to repair the mechanical issues and return the trucks to class members in good working order. Navistar failed to fulfill this obligation because the design of the Advanced EGR system was fundamentally flawed. Navistar did no more than replace components that were prone to fail again in the future.

**77**  These allegations remove the claim from a pure defective design case, and thus distinguish it from the claim in *Arora*. Moreover, as I have found with respect to the misrepresentation claim, the proper interpretation and application of the warranty provisions is a matter properly left for trial.

**78**  In my view, it is not plain and obvious that the warranty claim is bound to fail.

**Identifiable Class**

**79**  The plaintiffs' proposed class and sub-class definitions have evolved somewhat from when the Notice of Civil Claim was filed. At the certification hearing, the plaintiffs advanced the following class definitions:

Class definition

All persons resident in Canada that purchased and/or operated heavy duty Class B tractor trailer trucks using advanced exhaust gas recirculation technology ("EGR") that purported to meet the emission requirements introduced by the United States Environmental Protection Agency (the "EPA") applicable as of 2010 (the "EPA 2010 Requirements") and did not use EGR in combination with selective catalytic reduction technology ("SCR") which trucks were designed, tested manufactured, and marketed by the defendants, Navistar International Corporation, Navistar Inc. and Navistar Canada Inc. (the "Navistar EGR Trucks") from January 2009 to the date of certification (the "Class Period").

The Navistar EGR Trucks are equipped with "MaxxForce 11", "Maxxforce 13" or "Maxxforce 15" engines and include the following Navistar truck brands: "Paystar", "Workstar", "Transtar", "9900i", "Lonestar", and "ProStar".

Sub-class Definition

All persons resident in Canada that purchased and/or operated Navistar EGR Trucks sold by the Defendant, Harbour International Trucks Ltd., during the Class Period.

**80**  Navistar takes issue with the class definition on the grounds that:

1. It is unduly broad in that it should not include operators or purchasers of used trucks;
2. The class period is too long;
3. The class definition lacks commonality because it includes many different trucks and engines; and
4. The evidence does not establish that there are two or more persons who purchased new trucks and who have a common complaint.

**81**  Dealing first with the breadth of the proposed class, I agree with Navistar that the inclusion of "operators" in the class definition is problematic. The term "operator" is nowhere defined, thus it is not clear whether it would include drivers who otherwise have no ownership interest in a truck. Further, the amended Notice of Civil Claim does not advance any claims on behalf of operators, as distinct from owners or purchasers, and there is no obvious connection between the position of mere operators and the proposed common issues. I would therefore delete the phrase "or operated" from the class definition.

**82**  With respect to the purchasers of used trucks, Navistar submits that this group of purchasers is distinct from purchasers of new trucks. For example, the reasonable expectation of the two groups with respect to performance, reliability, etc. would be different.

**83**  While that may be true, I am satisfied that there is considerable commonality in the claims of the new and used purchasers. For example, the claims for negligent design, failure to warn and breach of warranty are common to both groups.

**84**  In any event, some difference in the interests of class members is not fatal to certification. For example, 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=) [*Hollick*], the Supreme Court of Canada held that "[t]he representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue" (at para. 21, emphasis in original). Moreover, to the extent that differences among class members arise or become material post-certification, they can be dealt with either through sub-classes or as individual issues (see: *Reid v. Ford Motor Company*, [*2003 BCSC 1632*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0G8-00000-00&context=) at para. 37).

**85**  I am therefore satisfied that the inclusion of purchasers of used trucks in the proposed class definition is appropriate. Having come to this conclusion, I am also satisfied that the numerosity requirement of two or more persons is also met. Navistar's objection on this ground was based on the fact that the only evidence of other purchasers came from Mr. Dhami of 3D Transport, who purchased used trucks. However, given my conclusion that inclusion of purchasers of used trucks are properly included in the class, it follows that the numerosity criterion is satisfied.

**86**  With respect to the length of the class period, Navistar submits that a start date of January 1, 2009 is too early given the evidence that the first trucks with the impugned EGR technology were sold beginning in 2010. It submits further that there should be a defined end date given the evidence that no new Navistar trucks with EGR technology alone have been sold since early 2014.

**87**  The concern about the early start date is answered by the fact that the class definition makes clear that it is only trucks that used EGR technology intended to meet the EPA 2010 Requirements that are caught by the definition. The 2009 date simply reflects the possibility that some of those trucks were sold in that year in anticipation of the new requirements coming into force. With respect to an end date, while Navistar's evidence is that it did not sell any new trucks with EGR alone technology since early 2014, that does not address the issue of used trucks which may well have continued after that date.

**88**  I am therefore satisfied that the proposed class period is appropriate.

**89**  Navistar's final objection is that the class definition lacks commonality because it encompasses numerous different makes and models. I agree with N&C Transportation that this objection is better dealt with when considering the common issues and does not go to the "technicalities of defining the class" (see: *O'Brien v. Bard Canada Inc.*, [*2015 ONSC 2470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FWB-9X41-DYFH-X4RJ-00000-00&context=) [*O'Brien*] at para. 173).

**90**  I therefore find that N&C Transportation has met the requirement set out in s. 4(1)(b) of the *CPA* of an identifiable class of two or more persons.

**91**  Navistar did not contest the definition of the proposed sub-class dealing with purchasers of trucks from Harbour International, thus I would approve that definition as well, subject to removing the phrase "or operated" from the definition.

**Common Issues**

**92**  The common issues proposed by the plaintiffs have also evolved. At the certification hearing, they advanced the following proposed common issues:

1. Did the Navistar EGR trucks contain a defect in their engine and exhaust systems that rendered the said trucks dangerous and/or unfit for their intended purpose?
2. Did the defendants know, or alternatively, should they have known, that the Navistar EGR trucks contain the aforesaid defect that rendered them dangerous and/or unfit for their intended purpose?
3. Did the sale of the Navistar EGR trucks to the plaintiff and class members breach the implied warranties as to quality and fitness provided pursuant to ss. 18(a) and (b) of the *Sale of Goods Act*?
4. Did the defendants, or any of them, owe a duty of care to the plaintiffs and class members?
5. Did the Navistar defendants breach the standard of care in designing and/or manufacturing the Navistar EGR trucks?

5(a). Did the Navistar defendants breach the standard of care in failing to adequately test the Navistar EGR trucks?

1. Did the defendants, or any of them, misrepresent the performance characteristics of the Navistar EGR trucks, including by omitting to disclose their knowledge of the engine and exhaust system defect and potential for associated damage to the said trucks?

6(a). If so, were the misrepresentations, or any of them, made negligently or fraudulently?

1. Can the reliance of the class members on the defendants' misrepresentations, as aforesaid, be inferred and, if so, was the reliance reasonable?
2. Did the defendants' representation(s) or omissions regarding the Navistar EGR trucks constitute a violation of s. 52(1) of the *Competition Act*?
3. Did the Navistar defendants, or any of them, breach the terms of the express warranty coverage provided in respect of the Navistar EGR trucks by failing to replace or otherwise remedy the defective nature of the trucks' engine and exhaust systems?
4. Is the disclaimer and exclusion clause in the Navistar warranty agreement documents for the Navistar EGR trucks applicable to any of the class members' pleaded causes of actions? If so, is the disclaimer and exclusion clause unenforceable by being unconscionable or contrary to public policy considerations?
5. Are the defendants, or any of them, liable, on a restitutionary basis, pursuant to waiver of tort doctrine, to account and disgorge to the class any profits earned on either: (a) the sale of the Navistar EGR trucks; or (b) the repairs performed on the exhaust and emissions systems of the Navistar EGR trucks that were not covered by express warranties?
6. If the answer to question #11 is yes, what is the aggregate amount the defendants are liable to disgorge to the class and should such an aggregate monetary award be made pursuant to s. 29 of the *CPA*?
7. Does the conduct of the defendants warrant an award of punitive damages?
8. If an aggregate monetary award is made pursuant to question #11, should the court award punitive damages and, if so, in what amount?

**93**  In *Tonn*, Madam Justice Griffin provides the following concise summary of the principles governing the common issue analysis at paras. 63-65:

[63] The principles relevant to this analysis were most recently enumerated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) at para. 108 [*Microsoft*] and are oft-referred to in the jurisprudence. The relevant principles are:

1. The commonality question should be approached purposively.
2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. However, necessity does not require that the issue be determinative of the class members' causes of action; it need only move the litigation forward.
3. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
4. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
5. 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.

[64] The principles above are meant to guide the court's analysis. However, the underlying question remains whether certifying a class proceeding would avoid duplication of fact-finding or legal analysis (*Western Canadian* at para. 39). The focus must be on whether there are any common issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

[65] The "some basis in fact" evidentiary standard continues to apply and the onus remains with the plaintiff. The plaintiff must adduce some cogent evidence demonstrating that the common issue, being either one of fact or law, is relevant to each class member.

**94**  I will deal with each of the proposed common issues in turn.

***Common Issue #1: Did the Navistar EGR trucks contain a defect in their engine and exhaust systems that rendered the said trucks dangerous and/or unfit for their intended purpose?***

**95**  The first proposed common issue addresses the key issue in the litigation. As held by the Court of Appeal in *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. 42:

... the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure.

[Emphasis in original.]

**96**  It is from this central issue that all other issues and claims raised by N&C Transportation flow.

**97**  Navistar submits that the issue of an alleged defect in the engine and exhaust systems of the EGR trucks is incapable of being answered on a class-wide basis and as such is not a proper common issue. Navistar bases its position on two principal arguments:

1. There is significant variation between the different years and models of the EGR trucks and no way of extrapolating between them to determine if there is a class-wide defect; and
2. There is no valid methodology put forward to determine general causation.

**98**  Navistar states its first objection to the proposed common issue succinctly at para. 186 of its written submission:

In the present case there is no common design to be assessed on a class-wide basis and no ability to extrapolate the results of one engine analysis to all engines. Determining the cause of one engine failure does not allow the Court to extrapolate and conclude that the cause of that failure is the cause of every other engine's failure.

**99**  In support of its position, Navistar relies on the evidence of Mr. Krohn, a former Navistar employee, about the changes made to the EGR trucks during the relevant time period. Mr. Krohn states at paras. 15 and 16 of his affidavit:

1. During the period of January 1, 2009 to December 31, 2013, Navistar sold thirteen separate model years of EGR-only engines: five separate model years of MaxxForce 11 engines, five separate model years of MaxxForce 13 engines, and three separate model years of MaxxForce 15-litre engines (which debuted in 2011).
2. The MaxxForce 11, MaxxForce 13 and MaxxForce 15-litre engines were sold as options in six different truck models: the Paystar, the WorkStar, the TranStar, the 9900i, the LoneStar and the ProStar, resulting in 39 different potential combinations of engine model years and trucks.

**100**  Mr. Krohn goes on to discuss the numerous options available on the various models which he says results in "hundreds of different vehicle configurations available to meet specific customer needs". He also describes what he characterizes as improvements to the design and manufacturing process of the EGR trucks.

**101**  Navistar cites *Ernewein* as a decision with some similarity to the case at bar. There, the chambers judge certified, as a class proceeding, a products liability claim in which the plaintiff alleged that the defendant had manufactured pickup trucks in which the location of the fuel tanks created a risk of harm to consumers in the event of side-impact collisions. The certification order was overturned on appeal.

**102**  Speaking for the Court of Appeal, Newbury J.A. held that the plaintiff had not adduced sufficient evidence to allow the court to find that the location of the fuel tanks gave rise to a common issue:

[32] ...no proper basis was advanced for the proposition that the location of fuel tanks outside the rails of the subject vehicles raised a question common to all the plaintiffs, the resolution of which question would significantly advance the litigation. Rather, the only evidence is that of the defendants' expert, Mr. Sinke, to the effect that because the C/K pickups between 1973 and 1991 incorporated "a number of unique fuel system designs", one cannot "generalize on how such vehicles will perform in particular crashes beyond stating that all the designs are reasonably safe and meet all applicable safety standards". The ability to generalize, or extrapolate, from one plaintiff's vehicle to another, is crucial to the existence of a common issue.

**103**  Similarly, in *Poulin v. Ford Motor Company of Canada*, [*2006 CanLII 38880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JSC5-M14H-00000-00&context=) (Ont. SCJ), aff'd [*2008 CanLII 54299*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF51-JK4W-M4Y1-00000-00&context=) (ON SCDC), the court declined to certify as a class proceeding an action concerning allegedly defective springs in the door latch mechanisms of various vehicles manufactured by the defendant Ford. In response to the certification application, the defendants submitted evidence that there were differences in the door latch mechanisms on different vehicles that needed to be analyzed separately.

**104**  In rejecting the certification application, MacKenzie J. said at para. 67:

...

The plaintiff has failed to establish on the evidentiary record that the different door latch mechanisms on the Affected Vehicles are of no consequence. ... Accordingly, a resolution of this issue relating to the plaintiff's vehicle does not resolve the question of whether other Affected Vehicles having a different door latch mechanism have a defective or unsafe door latch mechanism.

**105**  For its part, N&C Transportation cites a number of authorities in which the courts have certified class proceedings in product liability cases despite there being differences between various models and makes of the products in issue: *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=) at paras. 32-34, *Pro-Sys* at paras. 109-12, *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=) [*Chace*] at paras. 15-16 and *Barwin v. IKO,* [*2012 ONSC 3969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FGRY-B0JK-00000-00&context=) [*Barwin*] at para. 61.

**106**  In *Pro-Sys*, the defendant argued that there were too many differences amongst the proposed class members to satisfy the common issues requirement. Its objection was described by Justice Rothstein in these terms at para. 109:

... [*Microsoft*] argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these act occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.

**107**  In response to this objection, Rothstein J. said at paras. 110-12:

[110] The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[111] Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.

[112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton*, [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

**108**  In order to meet the common issue requirement, a plaintiff must establish that there is some basis in fact for the proposition that the product it owns shares a common defect with the products owned by all members of the class. A helpful summary of the evidentiary requirements for meeting this test was provided by Strathy J., as he then was, in *Williams v. Canon Canada Inc.*, [*2011 ONSC 6571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFK1-JBDT-B3M8-00000-00&context=) (SCJ), aff'd [*2012 ONSC 3692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FGRY-B08J-00000-00&context=) (Ont. Div. Ct.) at paras. 171-74 (SCJ):

[171] This brief review demonstrates the need for the plaintiff to demonstrate on certification some factual basis for the proposition that the product owned by the plaintiff shares a common defect with the products owned by all members of the class. The plaintiff need not establish that the defendant is liable for the defect, but it must be shown that the defendant's liability to the class can be extrapolated from a finding in relation to the representative plaintiff.

[172] Thus, in *Chase v. Crane Canada*, there was evidence of an unusually high failure rate amongst toilet tanks manufactured at a particular plant and expert evidence linking the failure to the process employed at that plant. In *Bondy v. Toshiba* and *Griffin v. Dell*, [*[2009] O.J. No. 418*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF61-JPP5-21XG-00000-00&context=) there was evidence that the plaintiffs' computers were shutting down or otherwise failing to perform in normal operating conditions and there was expert evidence linking those failures to deficiencies in design that were shared with other computers in the class. In both cases, there was a factual foundation for the proposition that findings concerning the plaintiffs' computers could be extrapolated to all the computers at issue. In *Koubi v. Mazda Canada*, [*[2010] B.C.J. No. 838*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6322-00000-00&context=) the actions taken by the manufacturer, which applied to the entire class, helped to establish that there was a defect and that it was common to all the vehicles at issue.

[173] On the other hand, in the cases that were not certified, the evidentiary record did not establish a basis in fact for the common issues. In *Chartrand v. General Motors*, [*[2008] B.C.J. No. 2520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0NX-00000-00&context=) the defect in the plaintiff's vehicle had not been established and there had been no recall of automatic transmission vehicles, which met all relevant standards. There was no evidence that the alleged defect could be determined on a class-wide basis. Similar conclusions were reached in *Poulin v. Ford Motor Co. of Canada* and *Ernewein v. General Motors of Canada Ltd*.

[174] The evidence to establish that the product is defective and that liability can be determined on a class-wide basis, may vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

**109**  As Justice Strathy indicates, the evidence required to meet the "some basis in fact" test will vary from case to case. I am satisfied that N&C Transportation has met the test in this case. I reach this conclusion for the reasons that follow.

**110**  There is considerable circumstantial evidence supporting the finding of a common defect, including the fact that Navistar alone chose to rely on the EGR technology to meet the new EPA standards, Navistar experienced an increase in warranty costs which it attributed in part to "the initial build of 2010 emission standard engines" (Navistar SEC Form 10-Q quarterly report for the period ending January 31, 2012) and the fact that in 2013, Navistar abandoned its EGR-only technology and switched to a combined EGR/SCR technology.

**111**  Moreover, in various financial disclosure documents published by Navistar in 2013 and beyond, it touted the increased quality and reliability of its new engines. Also of note, when comparing those new engines, with SCR technology, to the former EGR engines, Navistar referred to the older engines collectively as "2010 EGR emissions engines", without differentiating between different years, models or configurations.

**112**  It is also telling that, while Navistar refers to the numerous options available and the improvements made over time to certain components of the EGR engines, there is no evidence or explanation as to how the different options or improvements might have changed the performance of the EGR system or whether there was any change to the basic design of the system.

**113**  In any event, the existence of differences in some of the products encompassed within the proposed class is not fatal to certification. The courts have on numerous occasions certified class proceedings despite such differences: *Pro-Sys* at paras. 110-12; *Barwin* at paras. 61-65 and *Chace* at paras. 13-16.

**114**  Next, there is the evidence of Mr. Virk about the problems experienced with N&C Transportation's Navistar EGR trucks, as well as the similar evidence of Mr. Dhami of 3D Transport. While the majority of the trucks purchased by N&C Transportation were 2012 Navistar ProStar models, at least two were 2011 models, as was one of Mr. Dhami's trucks. This provides some support for a finding of similar defects or product failures across different model years and amongst different class members.

**115**  N&C Transportation also relies on the expert evidence of Dr. Cowart, the thrust of which is captured in the following statement found in his reply report dated January 27, 2016:

...the issue of defect was the overall strategy to employ increased levels of EGR for Advanced EGR engines in order to lower NOx emissions (without the use of exhaust based SCR NOx reduction technology) which has the potential to increase engine-out particulate emissions. Competitors from the same time frame used SCR exhaust based NOx reduction technology and thus, in all likelihood used less EGR since engine-out NOx could be further reduced with the exhaust based SCR system downstream from the engine.

**116**  Navistar in turn relies on the expert report of Mr. Tindall who is critical both of Dr. Cowart's methodology and his opinions. For example, Mr. Tindall states at para. 44 of his report:

The response to this question in the Cowart Report does not identify any specific or quantifiable issue, or the cause of any issue, that would be present in the Navistar EGR technology versus the EGR technology employed by other manufacturers, including those who used EGR in conjunction with SCR technology. In fact, the Cowart Report acknowledges that its author does not have sufficient technical information to provide a specific opinion as to the nature of the specific issues with the Navistar EGR system.

**117**  As I indicated to counsel during the course of the hearing, I had difficulty with aspects of Mr. Tindall's report in that it presents more as an advocacy piece than the objective report of a neutral expert. That said, N&C Transportation did not take issue with the admissibility of the report.

**118**  Regardless, what Mr. Tindall does in his report is join issue with Dr. Cowart on certain technical points. This is illustrated well in para. 45 of Mr. Tindall's report:

The Cowart Report postulates that increased soot loading of the diesel particulate filter associated with the Advanced EGR approach versus the SCR approach could be a problem. Increased soot loading may occur, but the diesel particulate filter and other controls are designed to accommodate the soot production of an engine and the subsequent soot loading on the filter, so this is not a technical issue.

**119**  To my mind, the fact that the experts have joined issue on a number of matters simply underscores the point that there are valid issues to be tried. It also serves to distinguish this case from cases like *Ernewein* where again the Court of Appeal found that there was no evidence that would support a finding of a common issue between all class members. It should be noted that the Court came to that conclusion because the only evidence put forward by the plaintiff in support of the common issue was a report prepared by the former U.S. Secretary of Transportation, attached to a lawyer's affidavit, concerning the risks associated with the fuel tanks on the pickup trucks. As the Court found, the report did not comply with the Rules of Court governing expert opinion evidence and as such was not admissible.

**120**  Here, there is expert evidence on both sides of the equation and, as the courts have said on many occasions, disputes between experts should not be resolved at the certification stage, but are to be left to the trial judge who will have the benefit of the full evidentiary record: *Pro-Sys* at para. 126.

**121**  Navistar's second objection to the first proposed common issue is that there is no methodology proposed to determine the existence of a defect on a class-wide basis. Specifically, Navistar submits that Dr. Cowart simply identifies additional data that would be useful in order for him to provide a more considered opinion about a possible link between the problems experienced by N&C Transportation with its Navistar EGR trucks and a common defect in the EGR system generally. In contrast, Mr. Tindall opines that there is no class-wide methodology for determining the existence of a class-wide defect due to the numerous changes, improvements and option configurations in the EGR engines.

**122**  The requirement for an appropriate methodology was discussed at some length by the Court of Appeal in the recent decision of *Miller v. Merck Frosst Canada Ltd.*, [*2015 BCCA 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GNP-DGD1-JJYN-B1W2-00000-00&context=) [*Miller*] which concerned the alleged effects of certain prescription medications. The chambers judge certified the action as a class proceeding and the defendant manufacturer appealed.

**123**  Speaking for the Court, Mr. Justice Savage reviewed a number of leading decisions that had considered the methodology issue, including *Pro-sys* where Rothstein J. said at para. 118:

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

**124**  In *Miller* Mr. Justice Savage when on to state:

[33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in *Andriuk*, [*[2014] A.J. No. 555*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93F1-JNJT-B23S-00000-00&context=) not every case will require expert evidence (para. 11).

[34] The methodology requirement must also be considered in light of the policy objectives of class actions: the object is to promote fair and efficient resolution of the common issues. If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified. It is that concept which underpins the methodology requirement described in *Microsoft*.

...

[48] Unsurprisingly, the type of evidence required to overcome the common issue methodology hurdle will be different in every factual scenario. In *Microsoft*, the economic context demanded expert testimony about the applicability of multiple regression analyses; in this case, there is other evidence available to suggest that there is a way the plaintiff can establish general causation at trial as I have noted.

**125**  As Savage J. notes, the focus of this aspect of the inquiry is whether there is any plausible way in which the plaintiff can meet the requirement of establishing general causation. I am satisfied that there is.

**126**  In his second report, Dr. Cowart suggests a methodology for testing whether a class-wide defect exists in the EGR trucks. He proposes operating two small fleets of Navistar EGR trucks, one equipped with the standard EGR system sold to class members and the other with and EGR control calibration that is lower than the baseline production group. The operation of the two fleets would then be monitored to see if there were differences in the durability and reliability of the different engines. In addition to this approach, in his first report Dr. Cowart identifies various types of data, the analysis of which may assist in determining whether there is a class-wide defect.

**127**  I agree with Navistar that there are flaws in the approach proposed by Dr. Cowart. For example, it does not account for the fact that engine reliability and durability may be affected by the different uses to which the trucks are put and differences in the conditions in which they operate.

**128**  However, the fact that Dr. Cowart has proposed a methodology for determining whether a class-wide defect exists combined with the extensive circumstantial evidence referred to above is sufficient, in my view, to establish that there is some basis in fact to support a finding of a common, class-wide defect.

**129**  For these reasons, I am satisfied that the proposed common issue #1 is appropriate for certification.

***Common Issue #2: Did the defendants know, or alternatively, should they have known, that the Navistar EGR trucks contain the aforesaid defect that rendered them dangerous and/or unfit for their intended purpose?***

**130**  The parties agree that proposed common issue #2 is inextricably linked to common issue #1. It is also relevant to a number of the other claims advanced by N&C Transportation. As such, determination of this issue would assist in moving the litigation forward and it is a proper common issue.

***Common Issue #3: Did the sale of the Navistar EGR trucks to the plaintiff and class members breach the implied warranties as to quality and fitness provided pursuant to ss. 18(a) and (b) of the Sale of Goods Act?***

**131**  The claim for breach of implied warranties is asserted against Harbour International.

**132**  In opposing this proposed common issue, Navistar again asserts that i) any implied warranties were disclaimed by contract and ii) there could be no common warranty of fitness for the intended purpose given that its trucks were used by purchasers for many different purposes.

**133**  As I have already found, the enforceability and scope of the disclaimer set out in Navistar's warranties are matters that are properly left for trial. Similarly, as I have also found, the fact that there may be differences within the class, including different uses of the trucks in issue, does not disqualify the matter for certification.

**134**  I am satisfied that common issue #3 is appropriate for certification.

***Common Issues #4, 5 and 5(a): Did the defendants, or any of them, owe a duty of care to the plaintiffs and class members? Did the Navistar defendants breach the standard of care in designing and/or manufacturing the Navistar EGR trucks or in failing to adequately test the Navistar EGR trucks?***

**135**  The issues of duty of care and standard of care lie at the heart of every product liability/***negligence*** claim and are proper issues to be certified if the central issue of the existence of a defect is certified: *Jones v. Zimmer GMBH*, [*2013 BCCA 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M32G-00000-00&context=) at para. 3-4. Given my determination with respect to proposed common issue #1, it follows that these common issues should also be certified.

***Common Issue #6, 6(a), 7 and 8: Did the defendants, or any of them, misrepresent the performance characteristics of the Navistar EGR trucks, including by omitting to disclose their knowledge of the engine and exhaust system defect and potential for associated damage to the said trucks? If so, were the misrepresentations, or any of them, made negligently or fraudulently? Can the reliance of the class members on the defendants' misrepresentations, as aforesaid, be inferred and, if so, was the reliance reasonable? Did the defendants' representation(s) or omissions regarding the Navistar EGR trucks constitute a violation of s. 52(1) of the Competition Act?***

**136**  I have previously found that the misrepresentation claim as pleaded is not bound to fail. However, that does not mean that certification of the proposed common issues related to the claim necessarily follows as a matter of course.

**137**  In the amended Notice of Civil Claim, N&C Transportation defines the representation underpinning its claim as follows:

In marketing the Navistar EGR Trucks, Navistar and/or Harbour International represented to the Plaintiffs and Class Members that the Navistar EGR Trucks were safe, durable and fit for use as Class 8 trucks in the ordinary course of the trucking business.

**138**  However, in its written submissions, N&C Transportation identifies three separate categories of alleged misrepresentations:

1. "Advertising Representations" referring to statements made in Navistar marketing materials;
2. "Maintenance Manual Representations" referring to statements made in the operation and maintenance manual provided to purchasers of Navistar trucks; and
3. "Class 8 Truck Representations" referring to Navistar and Harbour International representing that the Navistar Trucks were capable of functioning as true class 8 trucks.

**139**  With respect to the Class 8 Truck Representations, I have already found that this claim lacks merit and does not survive the analysis under s. 4(1)(a) of the *CPA*, thus these alleged representations are not capable of supporting a common issue for the purpose of certification.

**140**  N&C Transportation acknowledges that the issue of reliance, which is an essential element of a claim for negligent misrepresentation, likely cannot be determined as a common issue with respect to the Advertising Representations, but issues relating to the scope and the intent of the representations (for example: were they made negligently or fraudulently) can be dealt with as common issues.

**141**  It cites *Green v. Canadian Imperial Bank of Commerce*, [*2014 ONCA 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S2BP-00000-00&context=) at paras. 97-105, aff'd in [*2015 SCC 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JDY-50V1-F65M-61YB-00000-00&context=) at paras. 124-28, in support of this approach. In that case, certain shareholders of the defendant bank brought an action against the bank and a number of senior officers claiming that the bank had misrepresented its financial positon in its public financial disclosure documents. The plaintiffs advanced claims under the Ontario *Securities Act*, [*R.S.O. 1990, c. S.5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G11-JN6B-S0DF-00000-00&context=), and for common law negligent misrepresentation.

**142**  The chambers judge declined to certify the proposed common issues relating to the negligent misrepresentation claim because reliance is an essential element of such a claim, but is not something that can be determined on a common basis (*Green v. Canadian Imperial Bank of Commerce*, [*2012 ONSC 3637*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FGRY-B06F-00000-00&context=) at para. 600). The chambers judge further held that the *Securities Act* claims were statute barred, although he would have certified the proposed common issues relating to those claims but for the limitation issue.

**143**  The Court of Appeal ([*2014 ONCA 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S2BP-00000-00&context=)) allowed the appeal in part. With respect to the negligent misrepresentation claim, the Court was of the view that five of the proposed seven issues relating to this claim could properly be certified because they "refer to the conduct and the intent of the defendant CIBC" (C.A. at para. 104). Justice Feldman stated at para. 104:

I see no reason why those issues cannot and should not be certified as against CIBC in order to advance the litigation...The trial judge may order individual trials to determine the issues of reliance and damages in accordance with s. 25 of the *CPA*.

**144**  N&C Transportation proposes a similar approach here.

**145**  Navistar again seeks to rely on its contractual disclaimer of liability as a defence to the misrepresentation claims. However, as I have found, the proper interpretation and application of the exclusion clause is a matter to be dealt with at trial and not on a certification application.

**146**  Leaving aside the exclusion clause, Navistar's principal objection is the lack of commonality amongst the various representations alleged to have been relied on by the putative class members. It points to the fact that certain of the representations identified by N&C Transportation are found in investor focussed documents rather than marketing materials and that other representations are from a brochure for a recreational vehicle engine unrelated to the engines in issue in the action. Navistar submits further that there is no evidence that the plaintiff or any class member ever saw or relied on any of the materials.

**147**  Navistar cites *Marshall v. United Furniture Warehouse Limited Partnership,* [*2013 BCSC 2050*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YS-00000-00&context=) [*Marshall*], aff'd [*2015 BCCA 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21KH-00000-00&context=), leave to appeal ref'd [*2016 CarswellBC 707*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H07-H3W1-F06F-21SR-00000-00&context=), where Madam Justice Fisher refused to certify a class action concerning cashable vouchers offered by the defendant. With respect to the claim for negligent misrepresentation, Justice Fisher said at para. 227:

First, as I have already reviewed, the evidence provided in this application demonstrates that there was no common representation made to all class members, such that the establishment of what representation was made cannot be done on a class-wide basis. Second, the element of reliance is an individual issue that cannot be resolved on a common basis in the context of this case. As noted by Strathy J. in *Singer v Schering-Plow Canada Inc*, [*2010 ONSC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=) and *McKenna v Gammon Gold Inc*, [*2010 ONSC 1591*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JGPY-X4YJ-00000-00&context=), leave to appeal on this issue ref'd [*2010 ONSC 4068*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-234T-00000-00&context=) (Div Ct), certification has been granted in claims based on negligent misrepresentation where the representations were limited, specific, and clearly defined, and made in circumstances where reliance could reasonably be inferred: see *Singer* at para. 164, which provides a list of such cases, and *McKenna* at paras. 135-137. Examples include *Hickey-Button* and *Payne* ([*2009 BCSC 530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M253-00000-00&context=)), to which I have already referred. I will only add that even where reliance can be inferred, the defendant has the right to rebut such an inference (*Hub Excavating Ltd v Orca Estates Ltd*, [*2009 BCCA 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M22B-00000-00&context=) at para. 54), and this may require individual assessments, depending on the context.

**148**  Navistar also refers to *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=) where Mr. Justice Strathy (as he then was) refused to certify as a class proceeding claims brought in respect of the advertising and labelling programs of two major sunscreen manufacturers.

**149**  Mr. Justice Strathy reviewed the cases relied on by the plaintiffs, including *Kripps v. Touche Ross & Co.*, [*[1997] 6 W.W.R. 421*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B12X-00000-00&context=) (C.A.), leave to appeal dismissed [*[1997] S.C.C.A. No. 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FC1F-M2T3-00000-00&context=) and then said at paras. 155-56:

[155] This case is distinguishable for two reasons. First, there was a single uniform representation made to each and every plaintiff -- the statement that the financial statements were a fair presentation of the company's financial position. That is unlike the present case where there are numerous and different statements made, with no commonality across the range of products marketed by the defendants. Second, I do not read the British Columbia Court of Appeal's reasons as relieving the plaintiff of the obligation to prove causation in the sense of reliance on the statement and resulting damages. The court stated that the plaintiff need not prove that the misrepresentation was the predominant cause of his or her behaviour, but it must still be proven to have been a factor. Like proof of any other fact, it may be established by inference from other facts. In the case of a person acquiring securities under a prospectus one might reasonably infer that a "clean" auditor's report is a motivating factor. Tested the other way, if the auditor had stated that the financial statement *did not* fairly represent the state of the company, investors might have acted differently.

[156] In this case, there is no evidence before me that would cause me to conclude that reliance could be proven by inference. The evidence is entirely to the contrary. There is no evidence that the defendant's messages are delivered to a market that is uniform and behaves in predictable ways. On the contrary, the evidence is clear that the market is segmented and marketing messages are received and processed in different ways by different consumers.

**150**  He went on to say at para. 164:

Claims based on misrepresentation are capable of giving rise to common issues that are capable of certification: *Bondy v. Toshiba of Canada Ltd.*, [*[2007] O.J. No. 784*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDX1-JX8W-M03P-00000-00&context=), [*39 C.P.C. (6th) 339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDX1-JX8W-M03P-00000-00&context=) (S.C.J.) (alleged misrepresentation of computer's speed and processing capability); *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [*[2006] O.J. No. 2393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24DM-00000-00&context=), [*267 D.L.R. (4th) 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24DM-00000-00&context=) (C.A.) (misrepresentation in college's course description); *Murphy v. BDO Dunwoody LLP*, [*[2006] O.J. No. 2729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24VY-00000-00&context=), [*32 C.P.C. (6th) 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24VY-00000-00&context=) (S.C.J.) (misrepresentation in accountant's financial projections for investment funds); *Haddad v. Kaitlin Group Ltd.,* [*[2008] O.J. No. 5127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF61-JBT7-X25W-00000-00&context=) (S.C.J.) (misrepresentation in marketing materials for subdivision and golf course); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [*[2003] O.J. No. 2069*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M0CX-00000-00&context=), [*33 C.P.C. (5th) 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M0CX-00000-00&context=) (Div. Ct.), rev'g [*[2002] O.J. No. 2858*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1SW-00000-00&context=). [*25 C.P.C. (5th) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1SW-00000-00&context=) (S.C.J.) (misrepresentation in financial statements; *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=), [*14 C.P.C. (5th) 292*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-FCYK-21TF-00000-00&context=) (S.C.J.) (misrepresentation in a prospectus); *Maxwell v. MLG Ventures Ltd.*, [*[1995] O.J. No. 1136*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-JCBX-S10V-00000-00&context=), [*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=) (Gen. Div.) (misrepresentation in offering circular). These claims have typically involved very specific, clearly defined and limited representations made in circumstances in which reliance could reasonably be inferred.

**151**  I agree with Navistar that the proposed common issues that relate to the misrepresentation claims cannot be determined on a class-wide basis. *Green* may well signal a willingness on the part of the courts to certify common issues within a misrepresentation claim that go to the nature and intention of the representations, while leaving issues such as reliance and causation to be dealt with in individual trials. However, *Green* falls within that class of cases identified by Mr. Justice Strathy in *Singer* that involve specific and defined representations made in circumstances in which reliance can be inferred. The representations at issue in *Green* were found in quarterly reports prepared and issued by the bank for the specific purpose of advising investors, and potential investors, of the bank's financial position.

**152**  Here, as noted, N&C Transportation purports to rely on a number of different types of representations, some found in financial disclosure documents, some in marketing documents and some in maintenance and operational manuals. On their face, these different representations were intended for different audiences. For example, the financial disclosure documents, like the documents at issue in *Green*, would be aimed at investors, the marketing documents at potential purchasers and the maintenance and operational manuals at actual purchasers. In my view, these representations lack the degree of commonality found in cases in which certification has been granted.

**153**  Moreover, there is no evidence that the plaintiff received or saw any of the materials referred to. In his affidavit, Mr. Virk refers only to oral representations made by a Harbour International sales person and not to any materials or representations from Navistar. The only evidence about the distribution of materials comes from Mr. Krohn who deposes that every class 8 truck sold by Navistar comes with an operator's manual. Presumably, a purchaser of a Navistar truck only receives the manual after they have completed the purchase. Regardless, Neither Mr. Virk nor Mr. Dhami of 3D Transport depose to receiving or relying on the manual.

**154**  I agree with Fisher J.'s conclusion in *Marshall* where she said at para. 227: "... the evidence provided in this application demonstrates that there was no common representation made to all class members, such that the establishment of what representation was made cannot be done on a class-wide basis". That conclusion applies with equal force to the facts of this case.

**155**  For these reasons, I decline to certify proposed common issues #6, 6(a) and 7. With respect to common issue #8, which deals with s. 52(1) of the *Competition Act,* it suffers from the same lack of commonality as the misrepresentation issues and is also therefore unsuitable for certification.

***Common Issues #9 and 10: Did the Navistar defendants, or any of them, breach the terms of the express warranty coverage provided in respect of the Navistar EGR trucks by failing to replace or otherwise remedy the defective nature of the trucks' engine and exhaust systems? Is the disclaimer and exclusion clause in the Navistar warranty agreement documents for the Navistar EGR trucks applicable to any of the class members' pleaded causes of actions? If so, is the disclaimer and exclusion clause unenforceable by being unconscionable or contrary to public policy considerations?***

**156**  Both parties agree that the claim for breach of the express warranty is only advanced against Navistar thus this common issue, if certified, should be amended accordingly.

**157**  The evidence demonstrates that the same language exists in the warranties provided by Navistar for all of its EGR trucks, thus N&C Transportation submits that the issue of interpretation of that language is common across the class. It submits further that a determination of the meaning of the operative language would substantially advance each class member's claim based on the express warranty.

**158**  Navistar submits that common issue #9 is too vague and imprecise to be certified. Does it mean that repairs that should have been done under the warranty were not, or that the repairs were done but not done properly? If it is the latter meaning, Navistar submits that a truck by truck, repair by repair analysis would have to be conducted, making for a clear absence of commonality.

**159**  In its written reply submission, N&C Transportation makes the point that its claim is based on the fact that the design of the EGR system was fundamentally flawed, which meant that Navistar was effectively unable to comply with its warranty obligation to repair the trucks and return them to class members in good working order. N&C Transportation describes this as a systemic breach of the warranties.

**160**  As I have already found, the proper interpretation and application of the warranties is an issue for trial, the determination of which will, in my view, assist in advancing the litigation. Common issue #9 is therefore a proper issue for certification.

**161**  Common issue #10 was proposed somewhat late in the day in response to Navistar's reliance on the exclusion provisions found in the warranties. I agree with N&C Transportation that the question of whether the exclusion clause is unenforceable on the basis of unconscionability and/or public policy can be determined on a class wide basis: see *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. 71 and *Seidel v. Telus Communications Inc.*, [*2016 BCSC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J17-BK31-F5T5-M24B-00000-00&context=) [Seidel] at para. 170**.** Common issue #10 is therefore appropriate for certification as well.

***Common Issues #11 and 12: Are the defendants, or any of them, liable, on a restitutionary basis, pursuant to waiver of tort doctrine, to account and disgorge to the class any profits earned on either: (a) the sale of the Navistar EGR trucks; or (b) the repairs performed on the exhaust and emissions systems of the Navistar EGR trucks that were not covered by express warranties?. If the answer to question #11 is yes, what is the aggregate amount the defendants are liable to disgorge to the class and should such an aggregate monetary award be made pursuant to s. 29 of the CPA?***

**162**  Navistar does not challenge common issue #11, assuming it survives the s. 4(1)(a) analysis, which I have found that it does.

**163**  With respect to common issue #12, which deals with aggregate damages, these are addressed in s. 29(1) of the *CPA:*

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

1. monetary relief is claimed on behalf of some or all class members,
2. no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
3. the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

**164**  In *Seidel,* Mr. Justice Masuhara held that in order for there to be certification of a common issue on an aggregate monetary award, "there must be a "credible or plausible" expert methodology to assess the extent of the award" (at para. 183). Navistar submits that N&C Transportation has not adduced any evidence of an appropriate methodology for assessing aggregate damages.

**165**  Mr. Justice Masuhara went on to review at some length the evidence put forward with respect to methodology, which included expert reports relied on by both parties. Despite some flaws in the methodology proposed by the plaintiff, Mr. Justice Masuhara concluded that "there is a reasonable prospect that the aggregate damage provisions in the *CPA* can be satisfied" (at para. 210).

**166**  In response to Navistar's submission about the lack of evidence of methodology, N&C Transportation cites *Cassano v. Toronto-Dominion Bank,* [*2007 ONCA 781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64DJ-00000-00&context=) which involved allegations that the defendant bank charged undisclosed and unauthorized fees to Visa credit card holders on foreign currency transactions. There, the Ontario Court of Appeal allowed an appeal from an order dismissing a certification application.

**167**  The chambers judge based his decision, in part, on his conclusion that the assessment of damages would require an individual assessment of cardholder behaviour to determine whether knowledge of the fees in issue would have affected cardholders' use of the cards, which was relevant to the damages suffered.

**168**  The Court of Appeal disagreed. It said at para. 45:

... establishing the extent of TD's liability does not require making individual inquiries of cardholders to determine what they would have done if they had known of the fees. Rather, the aggregate of TD's liability may reasonably be expected to be capable of proof by resort to TD's records of the amount of fee income it collected during the relevant time frame.

**169**  N&C Transportation submits that the same is true for this case and that "the aggregate monetary award would be a relatively simple arithmetic exercise based on the defendants' financial records and other evidence" (N&C Transportation written submission, para. 288).

**170**  N&C Transportation also points to the following passage from *Pro-Sys*, at para. 134:

The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

**171**  In my view, this is the answer to Navistar's objection. Having held that the availability of a restitutionary remedy is a proper common issue, it follows that the question of the quantum of the aggregate damages should also be certified. However, as made clear by the Supreme Court in *Pro-Sys,* the issue of aggregate damages will only arise if there has been a determination of liability and, even then, it will be open to the trial judge to determine that aggregate damages are not available.

**172**  In the circumstances, it is appropriate to certify common issue #12 subject to the above limitation.

***Common Issues #13 and 14: Does the conduct of the defendants warrant an award of punitive damages? If an aggregate monetary award is made pursuant to question #11, should the court award punitive damages and, if so, in what amount?***

**173**  Proposed common issues #13 and 14 deal with punitive damages. I note that the wording of common issue #14 changed several times and the current wording is what was proposed by N&C Transportation's counsel at the certification hearing.

**174**  Mr. Justice Masuhara described the principles governing the certification of common punitive damage issues in *Godfrey v. Sony Corporation*, [*2016 BCSC 844*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1KG-00000-00&context=) at paras. 189-92:

[189] Punitive damages are awarded where the defendant's conduct "has been egregious, deliberate and intentional and so extreme in nature as to be deserving of condemnation and punishment and where compensatory damages alone would be inadequate to punish the defendant for this conduct": *Andersen v. St. Jude Medical, Inc.*, [*2010 ONSC 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JKHB-63B5-00000-00&context=) at para. 31. Punitive damages must be considered in light of the other punishments faced by the defendant, because punitive damages should only be awarded if all other penalties are "found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation": *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. 123.

[190] Punitive damages may be certified as a common issue where the assessment of the defendant's conduct is focused on systemic wrongdoing against the class, rather than wrongdoing towards individual members: *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=) at para. 34. The question at the common issues stage is whether certification of punitive damage issues will avoid duplication of fact-finding or legal analysis: *Sherry v. CIBC Mortgage Inc.*, [*2015 BCSC 490*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60MK-00000-00&context=) at para. 20.

[191] In this case, I am satisfied that the issue of whether the defendants' conduct warrants an award of punitive damages can be assessed on a class-wide basis without considering the circumstances of individual class members because the defendants' alleged wrongful conduct was systemic in nature.

[192] However, the quantum of punitive damages cannot be assessed until compensatory damages are assessed. This is because punitive damages are only available if all other penalties are inadequate to accomplish the objectives of retribution, deterrence and denunciation: *Whiten* at para. 123.

**175**  Mr. Justice Masuhara went on to adopt the bifurcated approach to punitive damages outlined 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=) at para. 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 on the defendants' conduct, and there is nothing in this case that will require 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.

**176**  This approach also makes sense in this case. Accordingly, issue #13 is properly certified and should be determined at the common issues trial. Sticking with the approach of Mr. Justice Masuhara in *Godfrey,* the class's entitlement to punitive damages, and the quantum of any award, will be determined in a class-wide basis once the amount of compensatory damages, if any, has been determined. The question at that stage will be, again borrowing somewhat from *Godfrey*:

If the conduct of the defendants warrants punishment, should an award of punitive damages be made against the defendants and, if so, in what amount?

**Is a Class Proceeding the Preferable Procedure?**

**177**  The framework for considering whether a class proceeding is the preferable procedure for determining the common issues was discussed by the Supreme Court of Canada in *Hollick* where Chief Justice McLachlin stated that the plaintiff must "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (at para. 30 [emphasis in original], citing M.G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992*, (1993), at p. 27).

**178**  In the more recent decision of *AIC Limited v. Fischer*, [*2013 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X24N-00000-00&context=), the Supreme Court described the *Hollick* approach as follows, at paras. 22-23:

[22] In *Hollick*, McLachlin C.J. indicated that the preferability inquiry had to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice (para. 27). This should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case. Thus, when undertaking the comparative analysis, courts must focus on the statutory requirement of preferabilty and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.

[23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), at p. 1269, cited in Rubenstein, at s.<check-sect/> 4:85, fn. 2.

**179**  The Court in *AIC* confirmed that the plaintiff in a proposed class proceeding must establish that there is some basis in fact to find that a class proceeding is preferable. The Court said at paras. 48-49:

[48] The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings -- The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.

[49] With regard to the second aspect of the preferability requirement -- that is, the comparative analysis -- the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. However, the representative plaintiff cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think that a class action would be preferable. Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* [*(2004), 236 D.L.R. (4th) 348*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-F5T5-M2K8-00000-00&context=) (Ont. S.C.J.): "... the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis . ... It must be supported by some evidence" (para. 67). However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.

**180**  In *O'Brien*, Perell J. rejected the defendant's argument that because the damages claimed by individual class members were valued at $500,000 each, individual litigation was preferable. Mr. Justice Perell said at paras. 227-229:

[227] The likelihood of the success of this argument is much diminished in light of the Supreme Court of Canada's judgment in *AIC Limited v. Fischer*, *supra* because (a) assuming there is even one worthwhile common issue, it is quite easy for a class action to be preferable in comparison to the alternatives even when the class members' individual claims are monetarily substantial; (b) assuming there is even one worthwhile common issue it is very difficult to convince a court that the class action would be unmanageable; and (c) assuming there is even one worthwhile common issue, then the dice are loaded so to speak in favour of answering Justice Cromwell's five questions in favour of a class proceeding being the preferable procedure.

[228] Put somewhat differently, and asking a rhetorical question, assuming that there was a worthwhile common issue and a representative plaintiff supported by a class counsel willing to take on the risk of litigating the common issue, why would or should a court decline to achieve the access to justice and the economies for the parties and the administration of justice available from prosecuting a class proceeding as far as it can be taken?

[229] Assuming that there is a meaningful common issue and recalling that s. 6 of the *Act* already directs that the court shall not refuse to certify a proceeding as a class proceeding solely on the ground that the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues, the answer to this rhetorical question is that preferable procedure criterion is another low hurdle for a plaintiff seeking to certify his or her action as a class proceeding.

**181**  I note that in O*'Brien,* Perell J. declined to certify the class proceeding because the common issue criterion was not satisfied.

**182**  N&C Transportation submits that a class proceeding is the preferable procedure and that certification would meet the *CPA* objectives of judicial economy, behaviour modification and access to justice. It points to the observations of the Court of Appeal in *Chace* at para. 17 as being particularly apposite to this case:

...

Crane's denial of ***negligence*** cuts both ways. The precise reasons why an unusually high number of tanks from this plant have failed is an issue of considerable complexity. it will involve extensive and controversial expert evidence. The cost of proving ***negligence*** in the face of Crane's denial will be high in comparison to the modest damage sustained in most individual cases.

**183**  *Chace* was a case about the alleged negligent manufacture of toilets that resulted in excessive cracking and leakage. Here, the damages claimed by the plaintiff and class members is not negligible but, submits N&C Transportation, the same concern about the complexity and cost of proving Navistar's ***negligence*** applies.

**184**  Navistar submits that a class proceeding is not the preferable procedure because any common issues are dwarfed by individual issues, thus the objectives of judicial economy and access to justice will not be achieved. In support of its position, Navistar returns to its point that due to the numerous different designs and configurations of the EGR trucks, as well as the significant differences in operating conditions for each truck, it will be impossible to extrapolate across the class.

**185**  I am satisfied that a class proceeding is the preferable procedure in this case. As I noted previously, the key issue in the litigation is encapsulated in common issue #1, that being whether Navistar's EGR emission control technology was defective. If the case was not certified and the plaintiff and other class members were left to pursue Navistar individually, the same issue would lie at the heart of those individual actions, thus resulting in a significant and expensive duplication of effort, undermining the objective of judicial economy.

**186**  On this point, it is useful to note that on its own evidence, Navistar is currently subject to approximately 50 individual actions in the United States and two in Canada "that relate to its EGR technology" (Affidavit of Cindy Phung sworn December 3, 2015, exhibits "A" and "B"). In addition, there are at least nine class actions in the United States that were consolidated in October 2014 pursuant to the U.S. multi-district litigation process. This consolidation, which was sought by Navistar, supports the notion that there are common issues concerning the EGR technology that are best resolved in a single proceeding rather than by way of numerous individual proceedings.

**187**  Paraphrasing somewhat Perell J. in *O'Brien* at para. 228, where there is a worthwhile common issue and an appropriate representative plaintiff (see below), the court should not lightly decline to certify the action as a class proceeding and thereby undermine and impede access to justice and eliminate the economies for the parties and the justice system that would otherwise be achieved through a class proceeding.

***Is N&C Transportation a Proper Representative Plaintiff?***

**188**  Navistar submits that T&S Transportation Systems Inc. ("T&S") and Pacific Ocean Transport Inc. ("Pacific") are not proper representative plaintiffs because they did not purchase Navistar trucks. N&C Transportation submits that T&S and Pacific are proper plaintiffs because they suffered loss and damages due to Navistar's wrongdoing and based on their commercial arrangement with N&C Transportation. Pursuant to that arrangement, as described by Mr. Virk, T&S and Pacific operate the trucks owned by N&C Transportation to make deliveries.

**189**  I have found that it is not appropriate to include operators in the class definition (see para. 70). Since the representative plaintiff(s) must be a member of the class, I agree with Navistar that T&S and Pacific are not proper representative plaintiffs.

**190**  With respect to N&C Transportation, Navistar submits that it is not a proper representative plaintiff because it is in a conflict of interest position by virtue of the fact that it continued to have its drivers operate the Navistar trucks, despite its claim that the trucks are dangerous. Navistar submits that this is in violation of the *Commercial Vehicle Drivers Hours of Service Regulations*, [*SOR/2005-313*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TST1-JC5P-G12G-00000-00&context=) (*Motor Vehicle Transport Act*) [*SOR/2005-313, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5WMT-25H1-JSJC-X0FX-00000-00&context=) (the "CVD Regulations"). Navistar says that N&C Transportation is either operating in violation of the CVD Regulations or is falsely alleging that the Navistar trucks are dangerous, either of which would put it in a position of conflict and disqualify it from acting as the representative plaintiff.

**191**  There is no basis for this objection. If there is a regulatory issue about the conduct of N&C Transportation, and there is no evidence that Transport Canada has identified such an issue, it has no bearing on the civil claims being advanced by N&C Transportation. Moreover, Navistar has failed to identify how this issue puts N&C Transportation in conflict with other class members.

**192**  I am satisfied that N&C Transportation is a proper representative plaintiff.

***Litigation Plan***

**193**  Section 4(1)(e)(ii) of the *CPA* requires that the plaintiff have a suitable plan for advancing the proceeding on behalf of the class. In its written submission, Navistar identifies a number of alleged flaws in the litigation plan proposed by N&C Transportation, however at the hearing it acknowledged that the class proceeding process is fluid and that the plan may be amended after certification.

**194**  That approach is consistent with the authorities: *Fakhri et al. v. Alfalfa's 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 para. 77, aff'd [*2004 BCCA 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G070-00000-00&context=). As such, I do not propose to say anything further at this stage about the litigation plan other than I am satisfied that N&C Transportation and class counsel have turned their minds to the requisite procedural requirements.

**Conclusion**

**195**  In summary, the action is certified as a class proceeding subject to the following:

1. the phrase "or operated" is deleted from the class definition;
2. N&C Transportation will further amend the Notice of Civil Claim to provide further and better particulars of its allegation to that the Navistar EGR trucks are dangerous;
3. Common issues #6, 6(a), 7 and 8 are not certified as they are incapable of being determined on a class-wide basis;
4. Common issue #14 will be reworded as follows:

If the conduct of the defendants warrants punishment, should an award of punitive damages be made against the defendants and, if so, in what amount?

and,

1. T&S Transportation Systems Inc. and Pacific Ocean Transport Inc. are not proper representative plaintiffs.

R.A. SKOLROOD J.

**End of Document**

[***Nerland v. Toronto-Dominion Bank, [2016] I.L.R. para. G-2714***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-6223-00000-00&context=)

Canadian Insurance Law Reporter Cases

Supreme Court of British Columbia

Before: Duncan J

Decision: January 14, 2016.

Docket No. S133893

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2010s* > *2016***

**[2016] I.L.R. para. G-2714** | [*[2016] B.C.J. No. 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HXW-S171-JX8W-M07Y-00000-00&context=) | [*2016 BCSC 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HXW-S171-JX8W-M07Y-00000-00&context=)

Philip Gordon Nerland v. Toronto-Dominion Bank

**Case Summary**

**Tort — *Negligence* — Fall — Chair — Occupier's liability — Plaintiff fell from chair at defendant bank — Plaintiff reached for papers on teller's desk and chair slipped out from under him — Plaintiff sued defendant under Occupiers Liability Act or in *negligence* — Expert report indicated chair would not come out from under plaintiff unless he shifted forward and raised chair's back legs off floor — Court found plaintiff exerted conscious effort to tip chair — Case fell outside of scope of Act, as chair was not "activity" but was chattel — Defendant owed plaintiff duty of care — Duty of care was not breached — Chair was relatively safe and there were no other incidents involving it — Defendant met standard of reasonableness — Defendant was not liable for plaintiff's injuries — Action was dismissed — — Occupiers Liability Act,** [***RSBC 1996, c. 337, s. 1***](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P5-00000-00&context=)**, 3.**

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| **Facts:** The 61-year-old plaintiff was injured after falling to the floor from a chair while at a branch of the defendant bank. The plaintiff was told to sit on a chair at the "sit down wicket." The plaintiff alleged that he leaned forward to take hold of some documents on the desk in front of him and the chair went out from under him. The floor beneath the chair was tile. The chair was upholstered wood with plastic tips at the bottom of each leg. The plaintiff had no medical issues at the time of the incident. He was 5'11" tall and weighed approximately 225 pounds. The plaintiff sued the defendant, relying on the *Occupiers Liability Act* (the "Act") or in ***negligence***. The parties agreed on the quantum of damages and only liability remained to be determined.  HELD: The plaintiff's action was dismissed.  The expert's report indicated that the chair would not have come out from under the plaintiff unless he had his buttocks in the front half of the seat or farther forward and moved it onto the front legs. He would then have had to tip the back legs at least eight inches off the floor to cause the chair to come out from under him. The Court found that the plaintiff would have had to exert conscious effort to tip the chair and that the plaintiff did this in order to reach the documents left for him on the table. The Court found that the circumstances of this case fell outside of the scope of the Act. There was no invitation to use the chair for anything other than to sit in, the Court noted. Pursuant to case law, the chair was not an "activity" but was a chattel, and thus excluded from the definition of "premises" in section 1 of the Act. With regard to the claim in ***negligence***, it was clear that the defendant owed the plaintiff, its customer, a duty of care. The Court did not find that the duty of care was breached. The chair was provided for the plaintiff to sit in and was reasonably safe for that purpose. There was no evidence of prior or subsequent incidents with similar chairs. The defendant's placement of a mat under the chair after the incident was not an admission of liability. It was the plaintiff's action in tipping the chair forward that caused the fall. In order to ensure that chairs do not tip in this way, the defendant would have to fix them permanently to the floor or appoint an employee to closely monitor the activities of customers in chairs. The standard was one of reasonableness, however, and the defendant met that standard. The defendant was therefore not liable for the plaintiff's injuries. |

**Counsel**

J.D. Vilvang, QC, for the plaintiff; D.T. McKnight and D. Hwang for the defendant

**Reasons for Judgment**

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| **J.M.I. DUNCAN J.** |

**Introduction**

**1**  On December 14, 2012, Philip Nerland (the plaintiff) went to the Yaletown branch of the Toronto-Dominion Bank (the defendant) to meet with Mark Beirnes. The two men met in Mr. Beirnes' office, then relocated to the public area of the branch. The plaintiff sat down on a chair at the "sit down wicket" while Mr. Beirnes went to another area of the bank. The plaintiff alleges that as he leaned forward to take hold of some documents on the desk in front of him, the chair went out from under him. The plaintiff fell to the floor, striking his head, neck, elbow and shoulder. He sustained serious injuries.

**2**  The parties have agreed on damages. This trial is concerned with liability.

**3**  It was common ground at trial that the flooring in the Yaletown branch is a mix of tile and carpet. The tile is primarily in the customer areas, including at the sit down wicket, and the carpet is in the offices and the area where the tellers stand.

**4**  The sit down wicket is essentially a desk. The teller sits on one side and has access to a computer, a PIN machine and a phone. While the area appears to be designed at least in part for wheelchair accessibility, there is a chair for customers facing the teller.

**5**  There are 13 upholstered chairs with wooden legs in the branch. All have hard plastic tips, or glides, affixed to the bottom of each leg. The glides serve to protect the flooring. All but one or two of these chairs are used in carpeted offices. One of the chairs is situated at the sit down wicket, where the floor is tiled. At the time of the incident, there was no liquid or other substance on the tile floor at the sit down wicket.

**The Plaintiff**

**6**  The plaintiff is 61 years of age. He is a business consultant. The plaintiff is 5'11" tall and weighed approximately 225 pounds in December 2012. He had no medical problems at that time which affected his balance. He wore glasses but was having no trouble with his vision. Apart from possibly taking a sleeping pill the night before the incident, the plaintiff had no drugs or alcohol in his system.

**7**  On the day of the incident the plaintiff went to the defendant's Yaletown branch by pre-arrangement with Mark Beirnes. The plaintiff had been at the branch before. It was well lit. The weather was overcast but not rainy.

**8**  The plaintiff first met with Mr. Beirnes in the latter's office, then went out into the public area. Mr. Beirnes directed or indicated for him to sit on a chair at the sit down wicket, adjacent to the teller wickets in the branch. The plaintiff sat down. He leaned forward to pick up some documents from the desk. They were closer to the far side of the desk. As he reached forward the chair went out from under him. The plaintiff struck the right side of his neck, elbow and shoulder on the desk. He does not believe he tilted the chair deliberately.

**9**  The plaintiff was taken by surprise when he fell. He may have lost consciousness as a result for at most 10 or 15 seconds, but he cannot be sure. He said that Mr. Beirnes appeared concerned and offered to call an ambulance, but the plaintiff declined. The plaintiff got up, possibly with assistance from bystanders. He said the bank manager, Ms. Lachocki, came over to him and said words to the effect of "we meant to put a carpet down, this has happened before".

**10**  Once the plaintiff got his bearings, he signed some documents and left the branch.

**11**  The plaintiff has been back to the defendant's Yaletown branch since he fell. On January 9, 2013, he observed the chair at the sit down wicket had been placed on a mat or carpet.

**12**  On cross-examination, the plaintiff could not recall if he was at the sit down wicket to obtain bank drafts but did not disagree that could be true. He did not recall if he pulled the chair out to sit down. The plaintiff said he initially rested his back against the chair back and then moved forward to take hold of the papers Mr. Beirnes put down for him.

**13**  Counsel for the defendant referred the plaintiff to his examination for discovery evidence where he said his torso was in the front half or two-thirds of the chair. He agreed that was partly true, but clarified that initially he sat farther back in the chair.

**14**  The plaintiff said he sat with his forearms on the desk. He reached forward for the documents with his right hand and had his left hand on the desk. As he leaned forward the chair moved backwards. He does not know if the back legs lifted off the ground.

**15**  The plaintiff was not certain if he could have pulled the chair much closer to the desk, as there is a panel of some sort in the way. He agreed he could have stood up to reach the documents or waited for Mr. Beirnes to return.

**16**  Counsel for the defendant drew the plaintiff's attention to his amended notice of civil claim, which stated he leaned forward and the chair tilted so the rear legs came off the ground. The plaintiff reiterated that he does not know if the back legs had come off the floor. He had no recollection of the mechanics of how the chair toppled, apart from the front legs slipping out from under him. He agreed if he was just sitting in the chair, the back legs would not lift.

**17**  The plaintiff did not examine the chair after he fell. He agreed he might have been embarrassed and certainly felt hurt. He had a sore elbow and a sore neck and head. He hit his head in the fall and did not know the extent of his injuries until later that day or the next day.

**18**  The plaintiff maintained that he had a very clear recollection of what the bank manager said to him when he was on the ground. He recalled Mr. Beirnes looming over him while the manager spoke to him. The plaintiff disagreed with defence counsel's suggestion that the bank manager never mentioned putting a mat down.

**Mark Beirnes**

**19**  Mark Beirnes has worked at the Yaletown branch since November 2012. He first met the plaintiff in March 2010 at the Bentall branch and had between three and five dealings with him before the incident. He recalled the dealings were primarily in his office though it was possible one meeting could have been at the sit down wicket.

**20**  The plaintiff came in to see Mr. Beirnes around mid-day with a business partner. Mr. Beirnes took the plaintiff to his office and discussed credit card options. The plaintiff required some bank drafts so they proceeded from the office to the sit down wicket.

**21**  Mr. Beirnes had the plaintiff sit down in the chair and went around to the other side of the desk. The plaintiff had a list of drafts with the dollar numbers, which Mr. Beirnes entered into the computer. The plaintiff was seated forward with his elbows and arms on the desk, not seated back against the back rest.

**22**  After about five minutes, Mr. Beirnes got up to process the drafts. He thought it possible that he had placed documents on the desk for the plaintiff to sign before he got up. He described a crashing sound and hearing the chair turn over and hit the ground, and then the plaintiff hit the ground. He went back to see what had happened and saw the plaintiff on the ground. He went around the desk to see if the plaintiff needed help getting up. Mr. Beirnes did not offer to call an ambulance.

**23**  The branch manager came out of her office right after the fall when the plaintiff was on the ground, and some customers in the branch also came over. Someone righted the chair and the plaintiff got back up and sat on it. Mr. Beirnes thought the plaintiff looked surprised and shocked and he indicated he felt a bit winded but declined any help. He did not appear to be injured, nor did he appear confused, dazed or unconscious. To the contrary, he was alert. When he got up he was back to normal and signed the documents.

**24**  Shortly after the incident someone in the branch placed a mat on the floor where the incident occurred. Mr. Beirnes said the mat is not there now. He did not feel the matter warranted an incident report. He was not aware of any prior incidents with chairs and no one had complained of them to him. Bank policy requires an incident report if there is an injury or an incident that warrants police, medical or fire department attendance. Safety and security personnel must be notified. In this case it was the branch manager's decision not to file a report and Mr. Beirnes did not discuss the decision with her. They did not talk about the incident until they were aware a lawsuit had been filed in around July 2013. Mr. Beirnes agreed he had more or less put the matter out of his mind and that his memory of events diminished over time.

**25**  Mr. Beirnes spoke with the plaintiff within a month or two of his fall. The plaintiff said he had concussion symptoms. Mr. Beirnes did not then think of completing an incident report. He did not discuss the plaintiff's injuries with the manager until after the lawsuit was filed. He agreed in retrospect the discussion about the injuries should have led to an incident report as well as efforts to retain any video of the incident from the bank's security company. Mr. Beirnes subsequently learned the security video had been erased.

**Karen Lachocki**

**26**  Karen Lachocki is the manager of the Yaletown branch. On the day of the plaintiff's fall she was in her office talking on the phone with a customer when she heard a bang. She looked through her window into the branch and saw a chair tipped over. She put her client on hold and left her office. When Ms. Lachocki got to the sit down wicket the chair was upright and the plaintiff was standing. She asked him if he was okay and he told her he was fine. The plaintiff did not appear injured so she left him to resume her business with the customer she had placed on hold.

**27**  After the plaintiff left the branch, Ms. Lachocki looked at the chair. It appeared normal to her. It is the same as a number of chairs the Yaletown branch received in the summer of 2012 after renovations. Ms. Lachocki said the chairs were never modified after delivery and there were no problems with them before the incident with the plaintiff.

**28**  Ms. Lachocki had a conversation with a staff member who suggested or asked if a mat should be placed under the chair at the sit down wicket. She said "fine". Ms. Lachocki does not know if the mat stayed down as she thought janitors or staff moved it. The last time she checked was in the last month or so prior to trial and it was not there.

**29**  Ms. Lachocki vehemently denied telling the plaintiff she was sorry, that "it" had happened before and they were going to put a mat down. She was not aware if the bank had a policy concerning admissions of fault in relation to insurance coverage but denied there was any directive in that regard. Ms. Lachocki denied a history of chairs tipping at the branch.

**30**  The defendant's policy concerning incident reports is to require one be sent to head office in Toronto for police, robbery or medical emergency incidents. In Ms. Lachocki's view, the incident with the plaintiff did not qualify for an incident report because he denied any injury. Her health and safety staff member filed a report once when a staff member was injured by jamming a finger in a drawer. Ms. Lachocki did not ask if the health and safety member might have filed a report about this incident and she did not check with anybody else.

**31**  The branch has security cameras but they are angled at customers' faces and Ms. Lachocki did not think they would capture the area where the chair was. She did not request a video of the incident until the branch was notified of the lawsuit in the summer of 2013 because the plaintiff said he was okay. The security company, Frisco Bay, only keeps security footage for 30 days.

**The Defence Expert**

**32**  The defendant tendered Wayne Brox, an engineer, to give opinion evidence in four areas:

1. the standards governing the design and stability of chairs;
2. the standards governing the slip resistance of tile floors;
3. what is considered a slip resistant tile floor; and
4. to give engineering analysis and opinion as to the degree to which the exemplar chair can be tipped forward before it loses stability.

**33**  Counsel for the plaintiff agreed Mr. Brox was qualified to give expert opinion evidence in the first three areas but disputed his qualifications to give engineering analysis and opinion about how far the chair can be tipped forward before it loses stability. While I agreed with counsel for the plaintiff that Mr. Brox has had no kinetic training and is not a biomechanical engineer, nor has he viewed people actually using the chair in question at the branch, I found that as a result of his training and experience he could give opinion evidence in the fourth area.

**34**  Mr. Brox's opinion was based on a number of assumptions including:

1. the plaintiff's height and weight at the time of the incident;
2. that the type of tile floor in the branch had not changed since the incident;
3. that the chair was about 8 to 12 inches away from the desk at the time of the incident;
4. that the plaintiff was seated in the front half to front third of the chair seat rather than with his back resting against the back of the chair;
5. that the plaintiff leaned forward to sign some documents and believes the back legs of the chair came off the floor and slipped out from underneath him;
6. that the floor was dry and free of any other substances.

**1. The Floor**

**35**  Mr. Brox visited the branch on October 23 and November 3, 2014. He noted the floor was tiled with 12 by 12 ceramic tile with a flat and smooth surface. It appeared to be in excellent and serviceable condition. Mr. Brox measured the slip resistance of the floor with an English XL variable incidence tribometer with a test foot made of neolite, a type of plastic.

**36**  Mr. Brox was not aware of any statutory requirement prescribing the slip resistance of floors or flooring in general. He noted the building code requires that the surface of ramps, stairways and other means of egress be slip resistant, but that term is not defined. Overall, a floor surface with a slip resistance value of 0.5 or greater is generally accepted to be slip resistant, although the science of slips and falls appears to support a slip resistance of approximately 0.35 for normal ambulation. Mr. Brox measured the slip resistance of the tile in the branch to be 0.64 in two directions (north and east) and 0.65 in the other two (south and west).

**2. The Chair**

**37**  The chair involved in the incident with the plaintiff was not specifically marked or identified so Mr. Brox examined one of a number of identical customer chairs from the branch. He described the exemplar chair as a wood-framed, four-legged arm chair with an upholstered seat and back. A manufacture date indicated it was manufactured by a Canadian company on June 13, 2012. Mr. Brox found the chair robust and sturdy.

**38**  There are no statutory standards governing chairs, apart from flammability, labelling or other similar requirements. There is a voluntary standard through ANSI, the American National Standards Institute, which is similar to the Standards Council of Canada. Since the chair did not break and was not damaged, Mr. Brox found the only relevant ANSI standard to be the one governing front stability.

**39**  To test the chair's stability Mr. Brox placed it on a level surface and put an obstruction in front of the legs to prevent it from sliding forward. Pressure of 135 pounds was applied to the seat while a horizontal force was applied in an attempt to tip the chair over the obstruction. The ANSI standard requires the chair to accommodate a horizontal force of 4.5 pounds. The chair Mr. Brox tested accommodated nearly 18 pounds without tipping over, passing the front stability requirement by a significant margin.

**40**  Mr. Brox also conducted a series of tests with the chair and a male of approximately the same height and weight as the plaintiff at the time of the incident. The model sat with his buttocks against the back of the seat, in the middle of the seat and at the front of the seat.

**41**  When the model had his buttocks against the back of the seat, he was unable to tip the chair forward.

**42**  When the model sat with his buttocks in the middle of the seat he could tip the chair forward and raise the back legs of the chair between 6 1/2" and 9" off the floor, or 18 to 25 degrees, without the chair tipping over. Once the tip exceeded 9" the chair toppled forward and out from under the model.

**43**  Finally, when the model sat with his buttocks near the front of the seat he could intentionally tip the chair forward and raise the back legs from 5" to 8" without the chair tipping over, or 14 to 22 degrees. Only when the model tipped the chair forward and the back legs came off the floor more than 8" or approximately 22 degrees did the chair topple forward and out from under the model.

**44**  In Mr. Brox's opinion, the chair was an inherently stable seat that could not be tipped without external force. The action to tip or rock the chair was not, in Mr. Brox's opinion, effortless, and when a person is seated properly a simple shift of weight will not normally cause the chair to tip. His opinion was that the plaintiff tipped the chair so far forward it toppled out from under him and the fall was not due to any defect in the chair itself.

**45**  On cross-examination, Mr. Brox agreed that the model in the video clip was aware the purpose of the testing was to tip the chair. The model had his feet placed on the floor in a way that he could brace himself when the tipping occurred. The model was also sitting upright in the chair with his hands close to his body during testing, rather than with his forearms on the desk as the plaintiff described.

**46**  Mr. Brox agreed that using an inanimate object to test the chair's stability was different than using a live subject because it was more difficult to test the force exerted by a live subject to tip the chair. Mr. Brox conceded there was some fluidity to an accident of the kind the plaintiff had and it could have happened in a fraction of a second without time to react. As the testing went on, the model became more cognizant of the chair's properties and the dynamics at play. Mr. Brox did not test the slip resistance of the glides on the bottom of the chair legs against the tile floor.

**The Video Clips**

**47**  In addition to Mr. Brox's measurements of how far the back legs of the chair could come off the floor without tipping the chair, the video clips illustrate the apparent effort required to raise the back legs of the chair off the floor.

**48**  When the model was seated with his buttocks against the back of the chair, the chair is stable with all four feet on the floor.

**49**  When the model moved his bottom to the middle of the chair, and moved his upper body and feet in what is obviously an effort to tip the chair forward, the back legs of the chair came off the ground and the chair tipped forward.

**50**  When the model moved his bottom to the front of the chair, the back legs appeared to come off the ground somewhat more easily than when he was seated with his bottom near the middle of the chair. To put it another way, the model appears to exert far less effort to tip the chair forward when he has his bottom at the front of the chair, as compared with when it is in the middle of the chair.

**Credibility and Reliability**

**51**  The plaintiff had no clear recollection as to how the chair came out from under him. He leaned forward to reach for some documents and the chair moved backwards. He did not know if the back legs had come off the floor. He testified that Ms. Lachocki told him after he fell that it had happened before and they meant to put a mat down. If that statement was actually made, it would assist the plaintiff in proving the defendant had knowledge the chairs were unsafe.

**52**  I am not persuaded that Ms. Lachocki made any such statement. First, she vehemently denied saying such a thing. Second, she struck me as a rather terse individual who was unlikely to say anything more than was necessary to ensure the plaintiff did not need medical assistance. Furthermore, at the time of the fall she was on the phone with a customer and had put that person on hold to check what had happened. I find it unlikely she said or did anything more than the bare minimum to assess the situation given that Mr. Beirnes, another bank employee, was present.

**53**  It is somewhat surprising that neither Ms. Lachocki nor Mr. Beirnes took any steps to document the incident, particularly after Mr. Beirnes became aware the plaintiff was suffering from concussion symptoms a month or two later. If either of them had observed the mechanics of the accident and given a contrary account to the plaintiff's, their failure to record the incident might have affected the weight to be given to their evidence.

**54**  Finally, Mr. Brox, the engineering expert, presented as an objective witness in accordance with his duty as an expert, and made appropriate concessions on cross-examination.

**Findings of Fact**

**55**  The type of chair in question, as depicted in the expert report, appears to be an unremarkable and stable piece of furniture. Based on the videos tendered by the defendant, the chair would not have come out from under the plaintiff unless he had his buttocks in the front half of the seat or farther forward and moved it onto the front legs. Depending on how far forward the plaintiff was seated, he would have to tip the back legs at least 8" off the floor to cause the chair to come out from under him.

**56**  I am not persuaded, having viewed the videos, that a person could tip the chair without exerting conscious effort. Therefore, I find the plaintiff was in the front half of the seat or farther forward and deliberately tipped the chair forward onto its front legs to reach the documents Mr. Beirnes had left on the desk at the sit down wicket.

**57**  The question to be addressed next is whether the plaintiff's fall is in whole or in part the fault of the defendant.

**Routes to Liability**

**The *Occupiers Liability Act***

**58**  The plaintiff's action is based on the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337* [*OLA*] and, in the alternative, in ***negligence***. Counsel argued the defendant owed the plaintiff a duty under the *OLA*. Section 3 of the *OLA* provides:

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

1. The duty of care referred to in subsection (1) applies in relation to the
2. condition of the premises,
3. activities on the premises, or
4. conduct of third parties on the premises.
5. Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
6. create a danger with intent to do harm to the person or damage to the person's property, or
7. act with reckless disregard to the safety of the person or the integrity of the person's property.

**59**  Under the *OLA*, "premises" is defined as including land and structures, but not the chattels therein:

"**premises**" includes

1. land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),
2. ships and vessels,
3. trailers and portable structures designed or used for a residence, business or shelter, and
4. railway locomotives, railway cars, vehicles and aircraft while not in operation.

**60**  A threshold question in this case is whether the chair is a chattel, and thus excluded from the scope of the *OLA*. There is a body of jurisprudence supporting the view that the collapse of a chair does not fall within the scope of the *OLA*, because a chair is a chattel. The most frequently cited case is *Wiley v. Tymar Management Inc.*, [*[1994] B.C.J. No. 3045*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0KN-00000-00&context=) (S.C.), aff'd [*[1997] B.C.J. No. 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0PW-00000-00&context=) (C.A.), where Madam Justice Allan held that a chair breaking underneath a patron in a bingo hall did not give rise to a statutory duty under the *OLA*:

[30] In my opinion, sitting in a chair is not an "activity" conducted on the premises within s. 3(2) of the Act and a chattel such as a chair is clearly excluded from the definition of "premises" in s. 1 of the Act.

**61**  *Howells v. Southland Canada, Inc.*, [*[1995] B.C.J. No. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M265-00000-00&context=) (S.C.) and *Visser v. Loblaws Inc. (c.o.b. The Real Canadian Superstore)*, [*2001 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4DY-00000-00&context=) followed *Wiley*.

**62**  Counsel for the plaintiff submits this case is different from the foregoing line of authority concerning chairs and the *OLA*, because it is the interaction of the chair with the floor that grounds liability and the floor is part of the premises. Furthermore, counsel submits this is not a case about simply sitting on a chair, but about the plaintiff engaging in the activity of reaching forward to sign documents in an area he was directed to sit in by Mr. Beirnes. Viewed in that manner, counsel for the plaintiff submits the situation is more analogous to cases under the *OLA* where the use of a ladder was found to fall within the scope of activity on premises.

**63**  Counsel for the plaintiff cites *Lee v. Ghadery*, [*[1999] B.C.J. No. 2934*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1RS-00000-00&context=) (S.C.), where a Walmart employee climbed a ladder to retrieve some merchandise for the plaintiff. The plaintiff held the ladder steady. The employee had neglected to secure the ladder and the plaintiff was injured as a result. Mr. Justice Josephson found the defendants liable at common law, but noted in *dicta* that although the ladder, being a chattel, is excluded from the definition of "premises", the use of the ladder might constitute an activity conducted on the premises within the meaning of s. 3(2)(b) of the *OLA*.

**64**  The defendant provided the plaintiff with a chair to sit on to conduct his banking business. There was no invitation, express or implied, to use the chair for anything beyond that. I find in these circumstances the chair was a chattel and thus outside the scope of the *OLA*.

***Negligence***

**65**  The plaintiff's alternate argument is that the defendant is liable in ***negligence*** for his injuries.

**66**  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=), leave to appeal ref'd [*[2014] SCCA No. 423*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCD-KK01-JNJT-B18R-00000-00&context=), Madam Justice Smith for the Court said:

[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.

[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".

[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.

[Emphasis added by Smith J.A.]

**67**  It is clear that the defendant owed the plaintiff, its customer, a duty of care. The standard of care is one of reasonableness, not the removal of every possible danger. The plaintiff maintains that the defendant's act of putting a chair with hard plastic glides on a tile floor where it would be clearly foreseeable that a customer would lean forward while sitting created an unreasonable risk of harm.

**68**  As noted earlier in these reasons, I find that the plaintiff deliberately tipped the chair forward onto its front legs to reach the documents on the desk. Counsel for the plaintiff maintains that this is relatively normal and foreseeable human conduct. As long as the front feet of the chair remain stationary, a person can maintain balance. It is only where the chair slips out unexpectedly that a person is likely to fall. It was this unexpected slip, caused by the combined effect of the plastic glides and tile floor, which caused the plaintiff to fall.

**69**  The defendant says the chair is not an inherently unsafe object. There is no evidence the defendant had experienced any problems or issues with the type of chair on tile flooring. The tile floor was tested and found to exceed slip resistance standards. The plastic glides on the bottom of the chair legs are unremarkable. The chair tipped because its back legs were raised over eight inches, as per the testing done by Mr. Brox. For the legs to be raised that high, the plaintiff must have known or felt that the back legs were off the floor and that must have required some effort. The defendant says the plaintiff chose to use the chair in an unsafe manner to reach the papers on the desk.

**70**  The defendant further submits it was not foreseeable that an adult seated on a chair would tip it forward onto two legs and injure himself. There were no prior incidents of tipping proven, and there is no duty to warn of the obvious that if you tip a chair forward onto its front legs, you run the risk the chair could topple out from under you.

**71**  As to the remedial measure of one of the defendant's employees placing a mat at the sit down wicket, the defendant submits that this is not proof that such steps were necessary to make the premises reasonably safe and it was not an admission of liability, per *Anderson (Guardian ad litem of) v. Erickson* [*(1992), 71 B.C.L.R. (2d) 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S19X-00000-00&context=) (C.A.) at paras. 31-32.

**72**  Counsel for the defendant also relies on *Cahoon v. Wendy's Restaurant*, [*2000 BCSC 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X0KK-00000-00&context=). The plaintiff tripped when he stepped off a curb. He pursued an action under the *OLA* and relied on the defendant's subsequent remedial measures of repainting lines to indicate the edges of the curb in the area where the plaintiff fell to establish the area was not reasonably safe. Mr. Justice Burnyeat observed:

[21] Any "remedial" steps taken by the defendants are not to be considered as proof that such steps were required to make the premises "reasonably safe." The defendants only have to make the premises "reasonably safe." The defendants do not have to provide an environment which guarantees against all possible accidents. Steps taken after an accident may well only change an already reasonably safe area to an area which is more than reasonably safe. On the other hand, steps taken after an accident may well convert an unsafe area to an area which is then reasonably safe. What is done after the fact is merely a factor to be considered in answering the question of whether the area at the time of the accident was reasonably safe for occupants of the premises.

**73**  Burnyeat J. continued:

[26] ... However, even if I wrong in my finding about where the accident occurred, I am still satisfied that the ramp and the area immediately beside the ramp was also reasonably safe for occupants such as Mr. Cahoon. With even a minimal amount of attention paid, the edge of the sidewalk and the actual edge of the ramp were there to be seen. The test to be applied is one of reasonableness not perfection. The plaintiff was under a duty to be aware of his surroundings and I am satisfied that there was nothing about the premises which would mislead the plaintiff in any way. This accident could have been avoided by a modicum of awareness on the part of the plaintiff. Instead, I find that the plaintiff was in a rush to get [to] his meeting and to retrieve his vehicle from an unauthorized parking spot and that he exited the door "on the run" and without the care and awareness that was incumbent upon him.

**74**  Finally, the defendant submits that if it is somehow liable, the plaintiff was contributorily negligent and should be apportioned a much greater degree of fault than the defendant.

**Conclusion**

**75**  The defendant owed the plaintiff a duty of care, but I can find no breach of it in the circumstances of this case. The chair provided to the plaintiff to sit on at the sit down wicket was reasonably safe to sit on. I found no evidence of any prior or subsequent incidents with similar chairs. The placement of a mat under the chair at the sit down wicket at some point after the plaintiff fell was not an admission of liability and I do not find it a persuasive factor.

**76**  I find the plaintiff exerted the effort required to tip the chair forward onto its two front legs to such a degree that it toppled out from under him. His action in tipping the chair forward caused the fall, not the plastic chair glides. The plaintiff could have waited for Mr. Beirnes to return to hand him the documents or he could have stood up to reach across the desk for them. To prevent customers from tipping chairs forward (or indeed backwards) the defendant would either have to fix the feet of the chairs permanently to the floor or appoint an employee to closely monitor the activities of customers while seated in chairs. The standard of care is reasonableness, not the elimination of every possible danger.

**77**  The plaintiff's action is dismissed.

J.M.I. DUNCAN J.

**End of Document**

[***Radke v. M.S. (Litigation guardian of), [2005] B.C.J. No. 2077***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B20J-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Bennett J.

Heard: February 28 and March 1 - 4, 2005.

Judgment: September 27, 2005.

Vancouver Registry No. M032854

**[2005] B.C.J. No. 2077** | 2005 BCSC 1355 | 48 B.C.L.R. (4th) 178 | 142 A.C.W.S. (3d) 535 | 2005 CarswellBC 2264

Between Christopher Radke, plaintiff, and M.S., an infant by his litigation guardian J.S., Malik Rama, Insurance Corporation of British Columbia, Robert Kurtz, Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of British Columbia and Attorney General of Canada, defendants, and Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of British Columbia and Attorney General of Canada and Constables Jane and Jack Doe, third parties

(106 paras.)

**Case Summary**

**Civil evidence — Witnesses — Credibility — Professional responsibility — Professions — Other — Police — Tort law — Torts by the Crown — *Negligence* — Tortfeasors — Contribution between tortfeasors — Apportionment of liability.**

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| Action by Radke in damages for injuries he sustained in an accident involving MS, a young offender driving a stolen car, and the police who chased the stolen car. Kurtz, a uniformed officer, noticed the parked stolen car on his way to another call. He requested an unmarked police car to attend the scene while he disabled the stolen car. A marked car showed up and he told the officer driving it to leave. Kurtz left the scene to attend to his other call and returned to the stolen car fifteen to twenty minutes later. Officer Uzelac was in a marked police car parked north of the stolen car. Officer Chow was on the scene in an unmarked car, waiting for someone else to disable the car. Several youths, including MS, returned to the stolen car before the officers had a chance to disable it. They took the car and Kurtz followed. The stolen car went through a green light and a stop sign, driving at 30 to 40 kph. Kurtz turned on his lights and siren. The stolen car increased its speed to 60 to 70 kph, then slowed to about 20 kph at a stop sign. The stolen car ran the stop sign, then accelerated, and struck Radke's vehicle, knocking it on to the lawn of a house. Radke heard the police siren faintly about five seconds before he was struck. Another driver, three car lengths ahead of Radke, claimed he heard the sirens for ten to twenty seconds but did not pull over. Radke was seriously injured. A passenger of the stolen car, Sing, testified MS was not speeding and hoped the police would not follow them when they started driving. Sing stated the car was traveling 80 to 90 kph when it crossed the intersection immediately before hitting Radke's car. Sing claimed he and another passenger, Parker, were yelling at MS to stop but he did not respond. Sing had convictions for possession of stolen property and weapons and assault and was on his way to look at buying stolen property from MS and Parker when the accident occurred.  HELD: Action allowed.  MS was 85 percent liable, and British Columbia was 15 per cent liable for Radke's injuries. Sing's criminal record and the fact he was on his way to possibly buy stolen property called his credibility into question. Sing had no expertise at estimating speeds of cars. Officer Kurtz's evidence about the speed of the stolen car was accepted, except where it related to the time of impact. The stolen car was traveling at 70 kph when it struck Radke's vehicle. MS's erratic driving was a consequence of the police pursuit, as he was not driving erratically until the pursuit commenced. Kurtz did not give due consideration to the public safety factors in the police pursuit policy. The offence being committed was not serious and there was no one in position to assist him with the pursuit. Kurtz did not disable the stolen car as soon as was reasonable. There was no reason to wait until an unmarked vehicle arrived to disable the stolen car, as Kurtz's uniform would have alerted the offenders to the police presence anyway. He should not have continued pursuit when MS began driving erratically. Kurtz breached his duty of care, contributing to Radke's injuries. Kurtz was not grossly negligent, so he was not personally liable to Radke and, therefore, the Government of Canada was also not liable. Radke acted reasonably and was not negligent. |

**Statutes, Regulations and Rules Cited:**

Emergency Vehicle Driving Regulations, B.C. Reg. 133/98, ss. 3(1), 3(2), 3(3), 4(1)

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, ss. 122*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0DV-00000-00&context=), 177

Police Act. [*R.S.B.C. 1996, c. 367, ss. 11*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0RN-00000-00&context=), 14, 21

Royal Canadian Mounted Police Act. [*R.S.C. 1985, c. R-10, s. 18(a)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBP1-JNY7-X0J2-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Christopher R. Bacon

Counsel for the Defendants, M.S., an infant by his Litigation guardian J.S., Malik Rama, Insurance Corporation of British Columbia: Peter K. Hamilton

Counsel for the Defendants and Third Parties, Kurtz, Attorney General of British Columbia and Attorney General of Canada: Helen J. Roberts & Bobby Bharaj

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| **BENNETT J.** |

INTRODUCTION

**1**  On Sunday, February 16, 2003, M.S., a young offender, was driving a stolen car. Constable Kurtz, a member of the Royal Canadian Mounted Police commenced a chase of the stolen vehicle. The vehicle ran a stop sign at the intersection of Willingdon Avenue and Union Street in Burnaby, B.C. and struck the vehicle driven by Christopher Radke. Mr. Radke was seriously injured. The issues in this case are the liability of the RCMP officer, the Government of Canada and the Government of British Columbia.

**2**  It is conceded that primary liability falls to M.S., the driver of the stolen vehicle.

FACTS RELATING TO THE ACCIDENT

**3**  Constable Kurtz has been with the RCMP since July 2001, and has been assigned to Burnaby since that time. On the morning of February 16, 2003, Constable Kurtz was assigned to a call regarding a breaking and entering on Dundas Street near Gamma Avenue. The breaking and entering was not "in progress" meaning there was no suspect in the immediate vicinity, nor was there any emergency at this location. En route, at around 10:30 a.m., he drove past a Honda Civic which was parked facing south on the west side of Gamma.

**4**  Constable Kurtz suspected the car was stolen and asked the dispatcher to check the licence plate number. The dispatcher reported back right away that, indeed, the car had been reported stolen in North Vancouver. Upon learning this, Constable Kurtz called for an unmarked cover vehicle to watch him as he disabled the vehicle, a process that would take 15 to 20 seconds and would involve removing the car's distributor cap. Constable Kurtz did not consider it safe to disable the vehicle alone.

**5**  Constable Chow, who has been an RCMP officer since 2001, was assigned to assist Constable Kurtz. He was driving an unmarked panel van. He was told to meet Constable Kurtz at the gravel parking lot on the east side of Confederation Park.

**6**  Constable Pride, who has been with the RCMP since 2002, had only been working in Burnaby for two weeks. He arrived at the scene around 10:30 in a marked car. Constable Kurtz told Constable Pride to get his car off Gamma in case the suspects returned and noticed the police presence. Constable Kurtz then went to the breaking and entering call, where he attended for 15 to 20 minutes.

**7**  Constable Uzelac, who has been with the RCMP since 2001, was assigned to assist in setting up a perimeter around the stolen car. He arrived at 10: 45 a.m. in a marked police unit and parked on North Beta Avenue and Penzance Drive, north of where the stolen car was parked. Constable Uzelac had grown up in the area and is very familiar with Burnaby.

**8**  Constable Chow arrived at the gravel parking lot at approximately 10:51 a.m. He understood that someone else was coming to help disable the car.

**9**  At this juncture, no one was positioned south of the stolen vehicle. Dispatch radioed Constable Kurtz to assign someone to a position south of the vehicle, but he did not respond to the call and instead engaged in a conversation with Constable Chow. He then drove to the parking lot where Constable Chow was parked.

**10**  Constable Kurtz was coordinating the other officers. He could not say why he did not disable the vehicle at 10:30, when Constable Pride was able to cover him. He said it did not occur to him to disable the vehicle at the first opportunity because he intended on finishing the breaking and entering call first.

**11**  Constable Kurtz does not recall a plan to set up a perimeter and said that was not what he was doing. Once the vehicle was disabled, he was going to surround it to see if someone came back for it.

**12**  Before he could disable the vehicle, however, someone did come back for it; shortly after 10:51, three males, described by the officers as "kids", were seen walking north on Gamma towards the car. The officers then saw the car move southbound on Gamma. Constable Chow began to follow the car down Gamma, while Constable Kurtz went down a side street in an effort to cut off the suspects.

**13**  The car passed Constable Kurtz at the corner of Albert Street and, instead of having Constable Chow follow them in the unmarked vehicle, he pulled out and began following the stolen vehicle himself. Constable Kurtz was unable to say why he did certain things. He only recalled wanting to box in the car and that he hoped other cars were in position do so, even though no police cars were stationed to the south.

**14**  The stolen vehicle slowed, but went through a stop sign at Albert Street (which is the first intersection). It went through a green light on Hastings Street, crossed Pender Street, slowed to 20 km/h at the stop sign at Frances Street, but did not make a full stop. At this point, Constable Kurtz activated his lights and siren. The vehicle had been travelling 30-40 km/h to this point, except when it slowed for stop signs. Once the chase commenced, the speed of the stolen vehicle increased to 60 km/h and then reached a maximum of 70 km/h, in Constable Kurtz's estimation. The stolen vehicle turned right (westbound) on to Union Street and almost hit the south side curb of Union Street. The rear and front passenger doors opened at this point and Constable Kurtz thought the passengers might jump out.

**15**  Constable Kurtz testified that the vehicle slowed to 20 km/h at the next intersection. His report to dispatch at the time says that the vehicle went through the intersection at 40 km/h. Constable Kurtz testified that the car slowed to 20 km/h and then sped up to 40 km/h. However he acknowledged that travelling through a stop sign at either 20 or 40 km/h was hazardous.

**16**  The vehicle continued towards Willingdon Avenue and slowed, according to Constable Kurtz, as if to turn north, but instead went through the intersection where it collided with the vehicle Mr. Radke was driving, knocking it on to the lawn of a house on Union Street.

**17**  The area was residential, with a school and soccer field nearby. The roads were wet. There was a woman walking her dog at Frances and Pender Streets. There were no other cars or pedestrians in the area.

**18**  Earlier that day, M.S., who was 15 years old at the time, went to Michael Sing's house with Mike Parker. M.S. was driving a white Honda Civic that had been stolen. After picking up Mr. Sing, they drove to the McDonald's at Gamma and Hastings, parking the car on Gamma. As they walked back to the car from the restaurant, Mr. Sing saw a police car drive into the park. They got into the car and as they approached the Albert Street intersection, the saw the police car again. This was Constable Kurtz.

**19**  Mr. Sing said they were not speeding and were hoping the police would not follow them. They went through the Hastings intersection at about 40-50 km/h on the green light. He said as soon as the police lights went on, M.S. hit the gas and continued to accelerate until he went around the corner at Union. Mr. Sing said that as the car turned the corner, he was going to "bail", meaning jump out of the car. Mr. Sing said M.S. continued accelerating down Union and was going 80-90 km/h when it crossed the intersection at Willingdon. Mr. Sing said he and Mike Parker were yelling at M.S. to stop but he did not respond. Mr. Sing thought the car they hit was travelling at the speed limit. Mr. Sing hit his head on the windshield and then tried to walk away from the scene.

**20**  Mr. Sing has convictions for possession of stolen property, possession of a weapon and assault. He was aware the car was stolen when he rode in it, and he was going to look at buying some stolen property from M.S. and Mike Parker. These are matters which are relevant to Mr. Sing's credibility.

**21**  The only real divergence between the evidence of Mr. Sing and the evidence of Constable Kurtz relates to their estimates of the speed of the vehicle driven by M.S. This is the main factual issue I must resolve.

**22**  The other relevant evidence related to this issue is the recording of radio communication made by RCMP dispatch (the "Dispatch Recording"). This recording was transcribed and marked as an exhibit. In the transcript reproduced below, B represents the transmission of Constable Kurtz, except for the second last B, which is the transmission of Constable Uzelac, while C represents the transmissions of the dispatcher. The words in italics are those words originally marked as "inaudible" on the transcript as they were heard in court:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | B: |  | (inaudible) I got them Burnaby, I have (inaudible) 3 males. Whiskey, Juliet Echo 842 and we're gonna be straight through southbound on Gamma I'm not in pursuit. I am following, not in pursuit. |  |
|  | C: |  | Southbound Gamma, no pursuit, following only at this time. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | B: | Clearing. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | B: |  | Burnaby, everybody keep the air clean, I'm gonna be in pursuit now, he just blew the stop sign. We're gonna be westbound on Union. Westbound on Union. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Westbound Union, go with your locations. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | B: |  | West, they're getting' ready to bail, get, everybody get in the area they're gonna bail. |  |

Through the stop sign at Beta, speed is forty.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | Speed is 40 k, through the stop sign at Beta, still westbound. |  |
|  | B: |  | Okay we're through Alpha, still westbound, speed is 60. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Through Alpha, westbound, speed 60. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | B: |  | Burnaby Bravo 8, second car in pursuit, I'll take chase from there. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Copy that, Bravo 19 pursuing, Bravo 8 calling. |  |
|  | B: | MVA, MVA, MVA at (inaudible). |  |

**23**  While I do not think Mr. Sing was intentionally lying about the speeds that the vehicle was travelling, there was no evidence of his experience in judging the speed of motor vehicles. His estimates of speed were based on seeing houses pass by. He was trying to jump out of the car and trying to get M.S. to stop. Given his excited state, I do not think his estimates of speed are reliable.

**24**  Constable Kurtz was broadcasting the speed as he was driving. It was clear on the evidence of both Mr. Sing and Constable Kurtz that once the pursuit started, the stolen vehicle accelerated.

**25**  There is also a dispute regarding the speed of the vehicle when it struck Mr. Radke. In his evidence, Constable Kurtz stated that the top speed the vehicle was travelling was 60-70 km/h. It was clear that the vehicle was accelerating. Constable Kurtz testified that the vehicle slowed at Willingdon and he thought it was turning right. He testified that the vehicle was travelling at 40-50 km/h through the intersection. At discovery, on the other hand, he said it was travelling at 30-40 km/h. There is no mention of the speed of the vehicle as it approached Willingdon in the Dispatch Recording.

**26**  Mr. Sing said the vehicle did not slow down at Willingdon. His description of M.S. was that of someone transfixed. This is consistent with the accelerating speed of the vehicle, which is not disputed.

**27**  The traffic report prepared by Constable Fookes states that "the witness" estimated the speed of the vehicle as 70 km/h when it struck Mr. Radke's vehicle. According to her report, the civilian witnesses who were interviewed did not see the Honda Civic. The witness who estimated the speed of the stolen vehicle at 70 km/h is unknown; however it is reasonable to infer that it was Constable Kurtz as no one else, other than the occupants, saw the stolen vehicle. In any event, by agreement (see Exhibit 7) the report of Constable Fookes was admitted as prima facie proof of the truth of its contents and proof that the statements therein were made. I am alive to the hearsay issue, and use this note only to corroborate the evidence of Mr. Sing.

**28**  Based on the evidence, I conclude that the speeds were those reported by Constable Kurtz to the dispatcher and recorded in the Dispatch Recording, which is the most reliable evidence at it was contemporaneous with the event. I do not accept Constable Kurtz's evidence that the vehicle slowed at Willingdon as if to turn north. Mr. Sing's evidence on this point regarding his description of M.S. and the speed was compelling and consistent with the reports of Constable Fookes, referred to above.

**29**  Thus, I make the following findings of fact relating to the pursuit: the stolen vehicle was travelling under the speed limit initially. The speed limit was 50 km/h. It slowed, but did not stop, at the stop sign at Albert Street. It slowed to 20 kms km/h, but did not stop, at the stop sign at Frances Street, at which point the pursuit commenced. Constable Kurtz turned on both lights and siren. The vehicle picked up speed. The vehicle sped around the corner at Union Street and almost hit the south-side curb, causing M.S. to lose some control of the vehicle. The vehicle accelerated, driving through the stop sign at Beta Avenue at 40 km/h. It continued to accelerate and drove through the stop sign at Alpha Avenue at 60 km/h. Finally, it drove through the stop sign at Willingdon Avenue and struck Mr. Radke's vehicle when travelling at approximately 70 km/h. The entire pursuit lasted 46 seconds.

**30**  Frances, Union, Alpha and Beta are residential side streets. Willingdon, at that point, is a six-lane major thoroughfare in Burnaby.

EVIDENCE OF MR. RADKE

**31**  Mr. Radke was en route to his workplace at Regency Toyota, which is located at Lougheed Highway just west of Willingdon. He is employed there as a painter and was meeting a friend to help him with a car.

**32**  He was travelling south on Willingdon at the speed limit, which was 50 km/h. There was another car two to three car lengths ahead of him. About five seconds before he crossed the intersection with Union, he heard a faint siren and began checking to see where it was coming from. He looked in front, in the rear view mirror and as he was looking around he was struck by a white car. He first saw the car as it reached him.

**33**  Mr. Radke did not pull over immediately upon hearing the siren because he wanted to look for the siren before he stopped. He took his foot off the accelerator, but did not stop. He knows he has to pull over when a siren approaches, but he did not see anyone coming from behind him. He acknowledged that if he had stopped immediately, he would not have been hit by the car, but said it happened quickly.

**34**  His car landed in the front yard of a house on Union Street. He suffered serious injuries.

FACTS RELATING TO POLICE POLICY IN PURSUITS

**35**  All the police testified to their understanding of police pursuit procedure, including their understanding that the primary objective of that procedure is the safety of the public. It is worth noting that all of the police officers involved had less than two years experience.

**36**  Constable Kurtz was aware that the public safety came first when considering a police pursuit and that all steps must be taken to avoid a pursuit, including disabling a vehicle. Despite this knowledge, however, he did not disable the vehicle as soon as was reasonable - that is when other uniformed constables were on the scene. He says he wanted to wait for the unmarked vehicle. This makes no sense. He was in uniform and he intended to disable the vehicle. Thus, regardless of whether he was being covered by an officer in a police car or by one an unmarked car, if suspects returned to the vehicle while he was disabling it, they would be put on notice rather quickly that the police had found the vehicle. There was no reason to wait to disable the vehicle.

**37**  Constable Kurtz agreed that it would have been preferable for Constable Chow to have followed the stolen vehicle in the unmarked van, since this would not have alerted the suspects that they had been discovered and would give other officers time to get into position.

**38**  Constable Kurtz was aware that being in a residential area is a factor to take into account, along with the use and nature of the road, in assessing the risk to public safety when considering a pursuit. He also was aware that public safety was paramount. He had to take into account all of the circumstances on the road.

**39**  Constable Kurtz was aware that the seriousness of the offence was also a factor. In this case he saw people he referred to as "kids" driving a stolen Honda Civic. He thought this theft was a dual or hybrid offence. There was no evidence as to the value of the Honda Civic, but it was a 1994 model, according to the traffic report. I could not assume that it was worth more than $5,000, which would have made the offence strictly indictable. On the other hand, it would be unreasonable to expect Constable Kurtz to know the year of the stolen vehicle. As indicated, he thought the offence was hybrid. A dual or hybrid offence is indictable unless the Crown elects to proceed summarily. Constable Kurtz acknowledged that a property crime is less serious than a crime such as kidnapping.

**40**  Constable Kurtz felt it was a low risk situation because there was no vehicular or pedestrian traffic. He stated that a high risk situation for a pursuit would have been one undertaken on a Monday at 3:00 p.m.

**41**  Constable Kurtz was aware of the Headquarters Operational Manual and the provisions of the Motor Vehicle Act, *R.S.B.C. 1996, c. 318* and Regulations.

**42**  Gamma Avenue has two lanes with parking on the shoulders. Union Street has two-way traffic, but if cars are parked on both sides of the street, there is only room for one car to drive down the street. It is a residential neighbourhood with a high school and fields. February 16 was a Sunday. School was obviously not in session. The pedestrian and vehicular traffic was light.

ADMISSION OF DOCUMENTS

**43**  The plaintiff seeks to tender three documents which are objected to by the defendant. These are 1) a report prepared by the RCMP Public Complaints Commission on "Police Pursuits and Public Safety", 2) an interim and 3) a final report by the Commission for Public Complaints Against the RCMP prepared as a result of complaints launched in this case.

**44**  The plaintiff submits that the documents are admissible as they fall within the public documents exception to the hearsay rule. The plaintiff specifically states that he is not tendering the Commissioner's reports as expert evidence.

**45**  The defendant argued the issue primarily on the footing that the documents are in fact expert opinion and not admissible as such.

**46**  I will deal first with the 1999 report relating to Police Pursuits and Public Safety. This report reviews the RCMP policy regarding pursuits and the pursuits that took place in the five years prior to the report. It is highly critical of the police pursuits policy. The policy in place at the time of the accident and admitted as evidence was prepared several years after this report was published. The plaintiff has not pleaded that there is anything wrong with the current policy. Thus, this document is simply not relevant to the case before me. If evidence is not relevant, it is not admissible.

**47**  The interim and final reports prepared by Ms. Shirley Heafey, the Chair of the Commission for Public Complaints Against the RCMP, are tendered in evidence by the plaintiff under the "public document" exception to the hearsay rule.

**48**  This exception, which admits documents as prima facie truth of the contents, is founded in the following principle stated in R. v. Aickles (1785), 1 Leach Cr. L. 390 at 392 and approved by the Supreme Court of Canada in R. v. Finestone, [*[1953] 2 S.C.R. 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0SH-00000-00&context=):

The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.

**49**  Thus, the circumstantial guarantee of trustworthiness justifying the admission of hearsay for the truth is found in the assumption that those assigned an official duty to record will see it as important and perform the duty honestly and accurately.

**50**  Further, the exception exists because it is inconvenient to require public officials to attend court to prove the contents of the document. See R. v. A.P. [*(1996), 109 C.C.C. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F528-G1CV-00000-00&context=), [*92 O.A.C. 376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F528-G1CV-00000-00&context=) (C.A.).

**51**  In J. Sopinka et al., The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) at 247 the authors state:

Founded on the belief that public officers will perform their tasks properly, carefully, and honestly, an exception to the hearsay rule was created for written statements prepared by public officials in the exercise of their duty. When it is part of the function of a public officer to make a statement as to a fact coming within his [or her] knowledge, it is assumed that, in all likelihood, he [or she] will do his [or her] duty and make a correct statement. The circumstances of publicity also adds another element of trustworthiness. Where an official record is necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected provides an additional guarantee of accuracy. Before this exception to the hearsay rule comes into play, the following preconditions, cumulatively providing a measure of dependability, must be established:

1. The subject matter of the statement must be of a public nature;
2. The statement must have been prepared with a view to being retained and kept as a public record;
3. It must have been made for a public purpose and available to the public for inspection at all times;
4. It must have been prepared by a public officer in pursuance of his duty.

**52**  However, the application here relates not to records but to the information reviewed and summarized in an inquiry and the recommendations flowing from the inquiry.

**53**  In the context of an inquiry, the following sets out the test for a public document; as noted by Macdonald J. in Robb v. St. Joseph's Health Care Centre [*(1998), 87 OT.C. 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JJD0-G330-00000-00&context=), [*31 C.P.C. (4th) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JJD0-G330-00000-00&context=) (Ont. Ct. of Justice - Gen. Div.) at para. 12:

I have considered the authorities which have reviewed what constitutes a public document. In R. v. Kaipiainen [*(1953), 107 C.C.C. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3DJ-00000-00&context=), the Court of Appeal of Ontario cited with approval Lord Tucker's public documents test, outlined in Thrasyvoulos Ioannou v. Papa Christoforos Demetriou, [1952] A.C. 84. In order for a document to be considered public, it must be shown, either intrinsically from the contents of the document itself or from other evidence, that: (a) a judicial or semi-judicial inquiry was held; (b) the inquiry was held with the purpose that the report would be made public; (c) the report was at all times open to public inspection; and (d) the statements in a document tendered in evidence should be statements with regard to matters which it was the duty of the public officer who held the inquiry to inquire into and report on (Kaipiainen, supra, at p. 377).

**54**  In Robb, supra the plaintiffs sought to tender the Royal Commission of Inquiry into the Blood Systems (the Krever Inquiry) and the Report of the Information Commissioner (the Grace Report). In that case, Macdonald J. said the following regarding the admissibility of these reports as public documents, at paras. 19-24:

The Krever Report contains the opinion of Commissioner Krever based on a record that is not before this court. The report contains Commissioner Krever's conclusions and opinions based upon what he observed as having occurred, upon what he found to have been done correctly and incorrectly, and upon what he found should have been done but was not done. Commissioner Krever did not apply the standards of proof of evidence which are applicable to the conduct of a civil trial. I accept the submission of Mr. Morrison that Commissioner Krever's conclusions and opinions are based on evidence and opinions given at the hearings, much of which would not be admissible in a civil or criminal trial. This was recognized by Commissioner Krever himself. He made the following observations at the outset of the Inquiry on November 22, 1993:

It [the Inquiry] is not and will not be a witch hunt. It is not concerned with criminal or civil liability. I shall make findings of fact. It will be for others, not for the commission, to decide what actions if any are warranted by those findings.

I shall not make recommendations about prosecution or civil liability. I shall not permit the hearings to be used for ulterior purposes, such as a preliminary inquiry, or Examination for Discovery, or in aid of existing or future criminal or civil liability ...

See Canada v. Canada (F.C.A.) at 261.

And on November 24, 1995 the Commissioner said:

I want to repeat what I have said before on more than one occasion that this is not a trial. No one, no person, or organization is on trial. This is not an adversary proceeding in which a party makes allegations against another party. It is an inquiry, inquisitional in nature.

Canada v. Canada (F.C.A.) at 261.

Accordingly, the Krever Inquiry was described by Commissioner Krever himself as "... an inquiry into facts that will form the foundation of important policy recommendations" (Canada v. Canada, [*[1996] F.C.J. No. 864*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M441-DXHD-G06W-00000-00&context=), (Trial Div.), quoted at para. 89).

To my mind, these comments illustrate that Commissioner Krever proceeded on the basis that he did not intend for his findings to be used in subsequent civil proceedings. But this alone is not sufficient to decide the issue. The public documents exception to the hearsay rule was never intended to be applied to admit into evidence at a trial documents such as the Krever Report.

The hallmark of a judicial or quasi-judicial decision is that it determines a lis inter partes. At the Krever Inquiry, there was no lis inter partes. The authorities which consider the nature of judicial inquiries make this point very clearly. For example, in Re Copeland and McDonald [*(1978), 88 D.L.R. (3d) 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RG1-JC5P-G03H-00000-00&context=) (F.C.T.D.), Cattanach J. found that a commission of inquiry appointed to investigate certain activities of the R.C.M.P., and which was directed to report to the Governor in Council, was a fact-finding body and did not determine any lis inter partes. Accordingly, it was not judicial or even quasi-judicial. In Bird v. Keep, [1918] 2 K.B. 692 (C.A.), Swinfen Eady M.R. found that the trial judge properly excluded the findings of a coroner's "inquisition." One reason for this was his finding at p. 698 that "[t]he coroner's inquisition is not like a judgment in rem. Nothing is done which is conclusive upon any person affected by it. ... An inquiry before a coroner is merely in the nature of a preliminary investigation. It is not of any binding force."

It is no answer to say, as has occurred in this case, that the plaintiffs are unable to bring forward the evidence that would prove their claims in these three actions. The statement of their counsel cannot constitute evidence and, in any event, there is nothing at law to prevent the plaintiffs from bringing forward such evidence and proving it on the balance of probabilities. The plaintiffs cannot be said to be prejudiced by the onus, fundamental to the conduct of a civil trial, to bring forward evidence which supports the case alleged by the plaintiffs.

To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended.

There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

**55**  This reasoning was adopted in this Court by Humphries J. in L.R. v. British Columbia, [*(2003), 12 B.C.L.R. (4th) 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G02T-00000-00&context=), [*2003 BCSC 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G02T-00000-00&context=) at paras. 49-50.

**56**  This reasoning also applies in this application. There was no "lis" that the Commission was dealing with between the parties. The facts found are based on reports, notes, and interviews conducted by staff members and not subjected to cross-examination. The standard of proof for the consideration of evidence by the Commission is clearly not the same as a court of law. The Commission's mandate is to make recommendations which may or may not be accepted.

**57**  The reports by the Commission do not possess the circumstantial guarantee of trustworthiness required to come within the public document exception to the hearsay rule.

**58**  I agree with Justice Macdonald that this exception was never intended to apply to the reports of Commissions of Inquiry such as those put forward here.

**59**  Therefore the interim and final reports of Chair Heafey are not admitted into evidence.

LIABILITY

**60**  It is agreed that the action against Malik Rama, the owner of the stolen vehicle, be dismissed. The claim against Constables Jane and John Doe is likewise dismissed. The third party claim against British Columbia was discontinued. The remaining issues are as follows:

1. Was Constable Kurtz negligent?
2. If so, what is the liability of the Province of British Columbia?
3. Was Constable Kurtz grossly negligent?
4. If so, what is the liability of Constable Kurtz and the provincial and federal governments?
5. Does the Insurance Corporation of British Columbia bear any liability as an independent defendant?
6. Is Christopher Radke contributorily negligent towards his injuries?
7. Was Constable Kurtz Negligent?

**61**  In Blaz v. Dickinson [*(1996), 9 O.T.C. 301*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F65M-62HK-00000-00&context=), [*2 P.L.R. 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F65M-62HK-00000-00&context=), (Ontario Court -General Division), Cumming J. set out the basis for a finding of ***negligence*** as follows, at para. 32:

To establish liability for ***negligence***, a plaintiff must demonstrate:

1. s/he was owed a duty of care by the defendant;
2. the defendant should have observed a particular standard of care in order to fulfil that duty;
3. the defendant was in breach of the duty of care by failing to fulfil the relevant standard of care;
4. the breach of the duty caused the damage or loss to the plaintiff; and
5. such damage or loss was not too remote a consequence of the breach so as to render the defendant not liable for its occurrence.

See G.H.L. Fridman, The Law of Torts in Canada, vol. 1

(Toronto: Carswell, 1989) at 223; A. Linden, Canadian

Tort Law, 5th ed. (Toronto: Butterworths, 1993) at 93.

DUTY OF CARE

**62**  It is not disputed that Constable Kurtz owed Christopher Radke a duty of care.

STANDARD OF CARE

**63**  The issue of the appropriate standard of care was considered by Kirkpatrick J. (as she then was), in Doern v. Phillips (Public Trustee of) [*(1994), 2 B.C.L.R. (3d) 349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0FN-00000-00&context=), [*[1995] 4 W.W.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0FN-00000-00&context=), and she held at para. 69:

... [T]here 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 on him or her, according to the circumstances of the case.

DID CONSTABLE KURTZ BREACH THE STANDARD OF CARE

**64**  It is necessary to set out the statutory authority under which informs the conduct of a police officer.

**65**  The relevant duties of a police officer are set out in s. 18(a) 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=) as follows:

1. It is the duty of members who are peace officers, subject to the orders of the Commissioner,
2. to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
3. to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
4. to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
5. to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

**66**  Section 122 of the Motor Vehicle Act permits exceptions for police pursuits. It reads as follows:

1. Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:
2. exceed the speed limit;
3. proceed past a red traffic control signal or stop sign without stopping;
4. disregard rules and traffic control devices governing direction of movement or turning in specified directions;
5. stop or stand.
6. The driver of an emergency vehicle must not exercise the privileges granted by subsection (1) except in accordance with the regulations.
7. REPEALED: S.B.C. 1997-30-2 effective April 21, 1998 (B.C. Reg. 133/98).
8. 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:
9. the nature, condition and use of the highway;
10. the amount of traffic that is on, or might reasonably be expected to be on, the highway;
11. the nature of the use being made of the emergency vehicle at the time.

**67**  The Emergency Vehicle Driving Regulations, B.C. Reg. 133/98, also apply. The relevant sections are:

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| --- | --- | --- | --- | --- |
| 3 | (1) |  | To engage in or continue a pursuit, a peace officer must |  |

1. have emergency equipment activated, and
2. have reasonable grounds to believe that
3. the driver or a passenger in the vehicle being or to be pursued has committed, is committing or is about to commit an offence, and
4. the seriousness of the offence and the need for immediate apprehension outweigh the risk to the safety of members of the public that may be created by the pursuit.
5. In considering whether there are reasonable grounds under subsection (1)(b), the driver of the emergency vehicle must consider any pertinent factors, including the following, if relevant:
6. the nature and circumstances of the suspected offence or incident;
7. the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;
8. the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;
9. the nature, condition and use of the highway;
10. the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.
11. For the purposes of subsection (1)(b),
12. the need for immediate apprehension will be low if
13. the driver or a passenger in the vehicle pursued has not committed an indictable offence, or
14. identification or apprehension of the suspected offender may be achieved by other means at that or a later time,
15. the greater the distance, speed or length of time required or likely to be required for the pursuit, the greater the risk to the safety of members of the public, and
16. an attempt to evade apprehension is not a factor to be considered in determining the seriousness of the offence or the need for immediate apprehension.

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| 4 |  | (1) A peace officer operating an emergency vehicle for purposes other than pursuit may exercise the privileges granted by section 122(1) of the Motor Vehicle Act if |  |

1. the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and
2. the peace officer operates emergency equipment.

**68**  The following policy and procedures were admitted into evidence by consent: RCMP Headquarters Operational Manual IV.II.H and I (dated June 12, 2002) and RCMP "E" Division Operations Manual II.6.E.1 (dated February 13, 2003).

**69**  The following are the relevant excerpts from these policy manuals. First, from the Headquarters Manual:

1. EMERGENCY VEHICLE OPERATIONS

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|  | H.1.a. |  | Emergency vehicle operations include pursuits, closing the distance and emergency vehicle response. |  |
|  | H.1.b. |  | The Incident Management Intervention Model (IMIM) must guide any decision to initiate, continue or terminate an emergency vehicle operation. The following principles apply: |  |

1. The primary objective of any intervention is public safety.
2. Police officer safety is an essential element of public safety.
3. The IMIM must always be applied in the context of a careful risk assessment.
4. Risk assessment must take into account the likelihood and extent of fatalities, injury and damage to property.
5. Risk assessment is a continuous process and risk management must evolve as situations change.
6. The best strategy is to use the least intervention to manage the risk.
7. Prudent intervention causes the least amount of harm or damage.

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|  | H.2.a. | Initiating a Pursuit |  |

1. A pursuit may occur when a suspect driver refused to stop for a peace officer and attempts to evade apprehension.
2. A pursuit may only be initiated and continued when other alternatives are not available and the seriousness of the situation and the necessity of immediate apprehension is judged to outweigh the level of danger created by the pursuit.

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|  | H.2.b. | Termination of a Pursuit |  |

1. A pursuit must be terminated when the risk to life becomes too great, the pursuit become futile or other means of apprehension are possible.

**70**  Next are the relevant excerpts from the "E" Division Operations Manual:

1. INVESTIGATIVE TECHNIQUES

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|  | E.1. | Pursuits/Emergency Vehicle Operation |  |
|  | E.1.a. | General |  |

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|  | E.1.a. | 1. |  | Pursuant to the Emergency Vehicle Driving Regulations (EVDR) by Order of Lieutenant Governor in Council No. 0522, signed 1998-04-21, the Police Services Division Guidelines were endorsed by the Attorney General. |  |
|  | E.1.a. | 2. |  | "Attempting to close the distance" means the act of "catching-up" to an offender, but does not include a pursuit. |  |
|  | E.1.a. | 3. |  | "Pursuant", means the driving of an emergency vehicle by a peace officer while exercising the privileges granted by Section 122(1) MVA for the purpose of apprehending another person who: |  |

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|  | E.1.a. | 3. | 1. |  | refuses to stop as directed by a |  |
|  |  |  |  |  | peace officer; and |  |

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|  | E.1.a. | 3. | 2. |  | attempts to evade apprehension. |  |

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|  | E.1.a. | 4. |  | For the purposes of this directive, the terms "pursuit" as referred to in HQ Ops. Man. II.6.E.5 (Hazardous Pursuits) and "pursuit" are synonymous. |  |

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|  | E.1.c. | Risk Assessment - |  |

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|  | E. 1.-c. | 1. |  | Public safety is the paramount consideration when a member is operating a police vehicle while exercising the exemptions granted under Sec. 122 of the Motor Vehicle Act. |  |
|  | E.1.c. | 2. |  | Threats to public safety can change rapidly, and continual assessment is required throughout the pursuit or while a member is attempting to close the distance. |  |
|  | E.1.c. | 3. |  | Assessment is based on whether there are reasonable grounds to engage in or continue a pursuit, or an attempt to close the distance, balance against the risk of harm to the public. |  |

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|  | E.1.d. | Factors to Consider |  |

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|  | E.1.d. | 1. |  | When making an assessment as to the reasonable grounds to engage in or continue a pursuit, a member must consider the following factors: |  |

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|  | E.1.d. | 1. | 1. |  | nature and circumstances of the |  |
|  |  |  |  |  | suspected offence or incident; |  |

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| --- | --- | --- | --- | --- | --- | --- |
|  | E.1.d. | 1. | 2. |  | the risk of harm posed by the manner |  |
|  |  |  |  |  | in which the police vehicle is being |  |
|  |  |  |  |  | operated; |  |

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| --- | --- | --- | --- | --- | --- | --- |
|  | E.1.d. | 1. | 3. |  | the risk of harm posed by the |  |
|  |  |  |  |  | distance, speed or length of time |  |
|  |  |  |  |  | required or likely to be required to |  |
|  |  |  |  |  | exercise the privileges under Sec. |  |
|  |  |  |  |  | 122 MVA; |  |

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|  | E.1.d. | 1. | 4. |  | the nature, condition and use of the |  |
|  |  |  |  |  | highway; |  |

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|  | E.1.d. | 1. | 5. |  | the volume and nature of pedestrian |  |
|  |  |  |  |  | and/or vehicle traffic that is or |  |
|  |  |  |  |  | might reasonably be expected to be in |  |
|  |  |  |  |  | the area; |  |

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|  | E.1.d. | 2. |  | The need for immediate apprehension will be low if: |  |

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| --- | --- | --- | --- | --- | --- | --- |
|  | E.1.d. | 2. | 1. |  | the driver or passenger in the |  |
|  |  |  |  |  | vehicle has not committed an |  |
|  |  |  |  |  | indictable offence; or |  |

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|  | E.1.d. | 2. | 2. |  | identification or apprehension of the |  |
|  |  |  |  |  | suspect offender may be done by other |  |
|  |  |  |  |  | means at that or a later time |  |

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|  | E.1.d. | 3. |  | The greater the distance, speed or time required to apprehend an offender, the greater the risk to public safety. |  |
|  | E.1.d. | 4. |  | A suspect's attempt to evade apprehension is not a factor in determining the seriousness of the offence, or the need for immediate apprehension. |  |

**71**  The statutes and policy provisions provide the context within which to assess whether there was ***negligence*** on the part of Constable Kurtz.

**72**  I add that no expert evidence was provided on the issue of how a reasonable police officer would conduct himself or herself. However, while not saying expert evidence would be inadmissible, in this case, given the facts, the statutes, the policy and case law, I do not need expert evidence to assess whether ***negligence*** existed.

**73**  In assessing the conduct of Constable Kurtz it is necessary to determine whether he complied with the policy.

**74**  In 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=) (S.C.), Clancy J. summed up the approach in this way, at para. 65:

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 they meet the requirements of s.118 of the Motor Vehicle Act. There must be a recognition that officers are required to exercise judgment in balancing the competing interests of arresting wrongdoers and protecting citizens.

**75**  Therefore, Constable Kurtz's compliance or non-compliance with the pursuit policy is a factor, albeit an important factor, in determining whether he was negligent. See also Doern, supra, at para. 69; Doern v. Phillips Estate [*(1997), 43 B.C.L.R. (3d) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M231-00000-00&context=), 2 D.L.R. 108 (C.A.), at para. 15-16.

**76**  When assessing ***negligence*** in the context of a police pursuit a balancing of interests must occur. Society accepts that in exercising lawful duties, police may at times interfere with innocent bystanders: See Blaz, supra, at 50. It is important not to lose sight of the fact that police officers are exercising judgement often quickly and in highly stressful circumstances. One must not to analyze the circumstances, from the relative calm of a courtroom, without keeping this in mind.

**77**  At the risk of over-simplification, the following principle factors may be derived from the relevant statutes and policy relating to police pursuit:

1. The primary and overriding principle is public safety.
2. A pursuit may only be initiated when other alternatives are not available.
3. There must be a risk assessment in terms of the public safety before a pursuit is initiated.
4. The risk assessment is ongoing throughout the pursuit.
5. The factors to consider in the risk assessment include:
6. the seriousness of the offence;
7. driving conditions;
8. volume and nature of pedestrian and vehicular traffic that is or might be reasonably expected;
9. whether the suspect can be identified by other means;
10. the likelihood of fatalities, injury and;
11. damage to property.

**78**  Constable Kurtz could have and should have disabled the stolen vehicle as soon as Constable Pride was present. He did not.

**79**  He did not direct any of the officers who attended to take a position south of the vehicle nor did he provide dispatch with the necessary information so dispatch could direct where the officers should park. It is obvious that in order to cover off the travel of the vehicle (or the suspects on foot), someone should have been in a south position.

**80**  Next, Constable Kurtz followed the vehicle and knew that there were three "kids" (to use his description) in the car. While the car did not stop at two stop signs, it slowed significantly and indeed was driving under the speed limit.

**81**  Constable Kurtz commenced the pursuit, knowing no officer was in position ahead of him. As soon as the pursuit commenced, the stolen vehicle immediately accelerated. It turned westbound at Union, clearly not under control of the driver. The passenger doors opened, causing risk to the passengers. The vehicle continued to accelerate and within three blocks crossed a major intersection.

**82**  Constable Kurtz testified that he continuously assessed the risk factors.

**83**  His assessment before he started the pursuit did not give due consideration to the factors in the police pursuit policy. The stolen vehicle was not being driven in a manner that threatened public safety. The offence being committed, which he thought was a dual or hybrid offence (and he was probably right), was not a serious offence. There was no one in position to assist him, which raised the risk to the public significantly.

**84**  Once he put on his lights to pull the vehicle over and saw that the driver's response was to accelerate in a residential area and drive through stop signs while heading towards one of, if not the busiest street in Burnaby, a proper risk assessment would have informed him of the significant danger to the public posed by continuing the pursuit. Constable Kurtz clearly did not follow police policy when initiating the pursuit or by continuing it once the vehicle began accelerating and driving dangerously.

**85**  Taking into account his failure to conduct proper risk assessments at two critical times, I find Constable Kurtz did not act within the standard of the reasonable police officer, acting reasonably and within the statutory powers imposed upon him in the context of all of the circumstances of this case. I find Constable Kurtz breached his duty of care.

**86**  The ***negligence*** was clearly a contributing cause to the injuries suffered by Mr. Radke. While I acknowledge M.S was not obeying traffic signs, it was not until the pursuit commenced that he began driving dangerously. His dangerous driving and the accident was a consequence of the police pursuit.

1. Liability of the Province of British Columbia

**87**  Section 11 of the Police Act, *R.S.B.C. 1996, c. 367*, is as follows:

11(1) The minister, on behalf of the government, is

jointly and severally liable for torts committed by

1. provincial constables, auxiliary constables, special provincial constables and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, and
2. municipal constables and special municipal constables in the performance of their duties when acting in other than the municipality where they normally perform their duties.

**88**  It is not disputed that this Act is applicable to this case. Section 14 of the Act allows governments to contract with the Royal Canadian Mounted Police and, when such agreements are entered into, deems the RCMP to be a provincial police force. The section is set out below:

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

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

**89**  There is no dispute that if Constable Kurtz is found negligent, the Province is jointly and severally liable.

1. Was Constable Kurtz Grossly Negligent?

**90**  Section 21 of the Police Act limits the personal liability of Constable Kurtz. It is set out below:

21(1) In this section, "police officer" means a person holding an appointment as a constable under this Act.

1. No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
2. Subsection (2) does not provide a defence if
3. the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross ***negligence*** or malicious or wilful misconduct, or
4. the cause of action is libel or slander.
5. Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
6. a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
7. a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
8. the minister, in a case to which section 11 applies.

**91**  Therefore, in order for Constable Kurtz to be personally liable, he must be found to be grossly negligent. Counsel for Constable Kurtz submits that the plaintiff did not plead gross ***negligence*** and therefore the claim should be defeated on that basis. In fact, the plaintiff did plead that Constable Kurtz was grossly negligent (see para. 7A of the pleadings).

**92**  Gross ***negligence*** is not defined in the statute. The difference between ***negligence***, gross ***negligence*** and criminal ***negligence*** is difficult to discern. Gross ***negligence*** has been called "a very great ***negligence***" (see Studer v. Cowper (next friend of), [*[1951] S.C.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0GF-00000-00&context=)). It is more than ordinary ***negligence***, but less than criminal ***negligence***. See 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=).

**93**  In assessing whether Constable Kurtz's degree of ***negligence*** amounted to gross ***negligence***, the standard of "a very marked departure" from the standard of care of the reasonable police officer may be applied (see McCulloch v. Murray, [*[1942] S.C.R. 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FBV7-B55N-00000-00&context=)). All of the circumstances must be considered. Here, of importance in particular, was the short duration of the pursuit. Once Constable Kurtz commenced the pursuit (a decision which was not grossly negligent), he had 46 seconds to assess whether to continue the pursuit. Further, while the statutory and policy guidelines were not followed in the context of a proper risk assessment, they were not totally abandoned either. Constable Kurtz had his lights and siren operating, he was broadcasting the pursuit and he was driving in a manner that did not put the public at risk.

**94**  I therefore conclude that Constable Kurtz was not grossly negligent and therefore not personally liable.

1. Liability of Canada

**95**  The parties agree that if Constable Kurtz is not found personally liable then the Government of Canada is not liable.

1. Liability of the Insurance Corporation of British Columbia (ICBC)

**96**  ICBC was sued as an independent defendant. Counsel for Constable Kurtz submits that ICBC remains liable. Counsel for Mr. Radke does not consent to the dismissal against ICBC because of a potential costs issue. However, he does not maintain the action either.

**97**  There was no argument directed at the uninsured motorist provisions. ICBC was initially sued because the driver of the stolen vehicle had not been identified. It is now agreed that M.S. was the driver and his liability was never contested.

**98**  I do not see how ICBC can be independently liable for damages in these circumstances. Therefore the action against ICBC is dismissed.

1. Was Christopher Radke Contributorily Negligent?

**99**  Mr. Radke heard the faint sound of a siren five seconds before he was struck. He slowed down but did not pull over. He looked around for the origin of the siren.

**100**  Mr. Phillips, who was approximately three car lengths ahead of Mr. Radke, heard the sirens for anywhere between 10-20 seconds. He looked around, but did not pull over.

**101**  Section 177 of the Motor Vehicle Act reads as follows:

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.

**102**  It was argued that by not pulling over immediately, Mr. Radke contributed to his injuries. Authorities were cited where, for example, there was blatant disregard of a police officer's emergency equipment by motorists.

**103**  In this case, Mr. Radke acted reasonably. He heard the siren for only seconds, he could not see an emergency vehicle, he slowed down and indeed he took more precautions than the other driver on the road. Counsel submitted that had he stopped he would have avoided the accident. But it is equally true that had he not slowed as a precaution he also would likely have avoided the accident. He was not entering a marked intersection. I find that Christopher Radke was not negligent.

**104**  The final question is apportionment of liability, which is relevant as between tortfeasors (see McVea (Guardian ad litem of) v. British Columbia (Attorney General) [*(2005), 209 B.C.A.C. 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3YV-00000-00&context=), [*2005 BCCA 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3YV-00000-00&context=)).

**105**  In Doern, supra Kirkpatrick J. found the police 25 percent liable. The facts of that case were more egregious than this one. Weighing the circumstances of this case, the liability of British Columbia is 15 percent and the liability of M.S. is 85 percent.

**106**  Counsel advised they wished to make submissions on costs.

BENNETT J.

**End of Document**

[***Roger Garside Construction Ltd. v. Stirling, [2013] B.C.J. No. 1777***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B28K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J. Steeves J.

Heard: May 27, 28 and June 24-27, 2013.

Judgment: August 13, 2013.

Docket: 11-2035

Registry: Victoria

**[2013] B.C.J. No. 1777** | 2013 BCSC 1457 | 24 C.L.R. (4th) 165 | 231 A.C.W.S. (3d) 952 | 2013 CarswellBC 2431

Between Roger Garside Construction Ltd., Plaintiff and Rew Harvey Stirling and Karolyn Christine Jones, Defendants

(235 paras.)

**Case Summary**

**Construction law — Contracts — Building contracts — Types of contracts — Cost plus contract — Formation — Consensus ad idem — Terms — Estimates — Action by plaintiff builder for lien for monies allegedly owing under contract for renovation work on defendants' home allowed — Counter-claim by defendants for breach of contract and *negligence* dismissed — Parties disagreed about amount of estimate and whether it was cost-plus or fixed-price contract — There was no evidence of preset price or quotation about cost, which supported conclusion work would be done on cost-plus basis — Plaintiff had not agreed project could be completed for $90,700 and it was probable he had provided quote of 187,010 — $189,788 — Plaintiff was entitled to lien of $223,178.**

**Construction law — Payment — Owner's right to set-off against — Action by plaintiff builder for lien for monies allegedly owing under contract for renovation work on defendants' home allowed — Counter-claim by defendants for breach of contract and *negligence* dismissed — Parties disagreed about amount of estimate and whether it was cost-plus or fixed-price contract — There was no evidence of preset price or quotation about cost, which supported conclusion work would be done on cost-plus basis — Plaintiff had not agreed project could be completed for $90,700 and it was probable he had provided quote of 187,010 — $189,788 — Plaintiff was entitled to lien of $223,178.**

**Construction law — Liens — Right to lien — Action by plaintiff builder for lien for monies allegedly owing under contract for renovation work on defendants' home allowed — Counter-claim by defendants for breach of contract and *negligence* dismissed — Parties disagreed about amount of estimate and whether it was cost-plus or fixed-price contract — There was no evidence of preset price or quotation about cost, which supported conclusion work would be done on cost-plus basis — Plaintiff had not agreed project could be completed for $90,700 and it was probable he had provided quote of 187,010 — $189,788 — Plaintiff was entitled to lien of $223,178.**

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| Action by the plaintiff builder for a lien for monies allegedly owing under a contract for repair and renovation work on the defendants' home. Counter-claim by the defendants for breach of contract and ***negligence***, including failure to properly manage the project. There was no written contract. The parties disagreed about the scope and cost of the work and whether it was a cost-plus or fixed-price contract. The plaintiff argued the contract was a cost-plus agreement, with a 12 per cent management fee. The plaintiff claimed $234,398; the defendants asserted nothing was owed. The defendants' evidence was that in December 2009 the plaintiff estimated the costs of renovation to be $200,000 -- $250,000. On June 24, 2010, the defendants paid $246,000 under a series of preliminary fixed-priced contracts and one cost-plus contract. The next discussion of contracts was on July 29, 2010, at which time the plaintiff wanted to change the ongoing contract to a cost-plus agreement and the defendants initially agreed. The defendants claimed the plaintiff quoted them a cost of $90,700 to complete the project, which constituted a fixed-price agreement, starting July 29. The defendants relied on an itemized list, with figures supplied by the plaintiff and on letters from the plaintiff's counsel that stated a quoted amount of $90,000 was based on estimates of the work requested to that point. The plaintiff denied quoting this amount and asserted the contract began June 24, and included work done from February to May 2010. The plaintiff had also provided the defendants with a printout regarding the total, unpaid project costs on July 29, which alone were over $90,000. The plaintiff relied on his day timer entry on that day that noted a quote of $187,010 -- $189,788. In December 2010, the plaintiff submitted an invoice for $185,154. The defendants asserted the defendant's management fee had been left open and there were also numerous deficiencies in the work.  HELD: Action by plaintiff allowed.  Counter-claim by defendants dismissed. There was some understanding between the parties work was to continue after the June 24 invoice; that was the staring date for the disputed contract. As there was no evidence of a preset price or quotation about cost, the circumstances supported a conclusion that the work would be done on a cost-plus basis. There was also at least acquiescence by the defendants that the work included from February to May 2010 would be paid for and this was also part of the cost-plus contract. The letters of the plaintiff's counsel did not support the conclusion the plaintiff had agreed the cost of completing the project would be $90,000. It was more likely than not that the plaintiff had made the entry regarding the quote of $187,010 -- $189,788 on July 29. The list relied on by the defendants was not accurate as to costs. Further, the defendants had failed to adequately review or understand the outstanding costs information from the plaintiff on July 29. The plaintiff had not agreed the project could be completed for $90,700 and it was probable he had provided a quote of 187,010 -- $189,788. Given the defendants had experience with a management fee of 12 per cent on their previous cost-plus agreement, it was likely they were aware it would also apply to the disputed contract. The final December invoice did not end the plaintiff's obligation to address deficiencies. A total of $9,160 in deficiencies were the plaintiff's responsibility. The plaintiff was not negligent in failing to keep high-standard records, or in his management of the project. The lien had not been filed late. The plaintiff was entitled to a lien of $223,178, plus pre- and post-judgment interest. |

**Statutes, Regulations and Rules Cited:**

Builders Lien Act, [*SBC 1997, CHAPTER 45, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JKPJ-G009-00000-00&context=)(1), s. 1(2), s. 1(3), s. 20

Court Order Interest Act, [*RSBC 1996, CHAPTER 79, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JCBX-S1FM-00000-00&context=), s. 8

**Counsel**

Counsel for Plaintiff: N.W. Lott.

Counsel for Defendants: A.P.M. Berns.

[Editor's note: A correction was released by the Court August 16, 2013; the changes has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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| **J. STEEVES J.** |

**Introduction**

**1**  The plaintiff did some repair and renovation work on the defendants' home in 2010. There were five previous fixed-price contracts and one cost-plus contract between the parties, and there is no issue in this claim on those contracts. A subsequent, seventh contract is very much in dispute. The parties now disagree about the scope and cost of the work as well as whether it was a cost-plus or fixed-price contract. There was no written contract or other written evidence of what was agreed.

**2**  The plaintiff originally sought a declaration that he is entitled to a lien pursuant to the *Builders Lien Act,* R.S.B.C. 1997, c. 45 (*BLA*), in the amount of $228,197.93 against the lands and premises owned by the defendants, among other remedies. At trial the claim was $234,398.03 for materials, labour, a management fee of 12% and taxes. The defendants counterclaim for breach of contract and ***negligence***, including failure to properly manage the project.

**3**  According to the plaintiff, it had a cost-plus agreement with the defendants to do repairs and renovations to the defendants' home. All of the work was authorized and known to the defendants as was a management fee of 12%. Any deficiencies, as alleged by the defendants, were not significant (such as dust on windows) or they arose because the defendants terminated the contract, thus preventing the plaintiff from completing the project. The amount owed by the defendants became due and owing on October 12, 2011, but the defendants have paid nothing.

**4**  The defendants' opening and evidence accepted that there was a cost-plus agreement for the work in dispute. In argument, however, they submitted it was a fixed-price contract. With respect to any management fee, it is submitted by the defendants that the plaintiff agreed to forgo that fee until the end of the project and then the defendants could pay what they considered appropriate. They also say that they needed cost certainty; a budget was agreed to and then exceeded by the plaintiff by a significant margin. They were never told the project was over budget and they were not regularly invoiced. Further, the plaintiff failed to properly manage the project, was negligent in performing the work and did not hold sub-trades responsible for damage they caused. Finally, there were deficiencies and some work was not completed at all.

**5**  The defendants submit that when the agreed contract price is considered with the deficiencies (and with unspecified damages in ***negligence***), they owe no money to the plaintiff.

**Background**

**General**

**6**  The plaintiff, Roger Garside Construction Ltd., is owned and controlled by Roger Garside. He has been in the construction industry for about 47 years. For the last 15 to 20 years he has done renovations and additions on custom homes. I will refer to Mr. Garside as representing the plaintiff. Neither he nor his company has had to come to court before to collect on an account.

**7**  Mr. Garside, through his company, manages 15 to 20 projects per year; some of them are small and some are in the order of millions of dollars. In general he manages the flow of work and ordering of materials as well as working with engineers and inspectors. The actual work is done by subcontractors that are appropriate for each job. One of the subcontractors is Mr. Garside's son.

**8**  The plaintiff does work by means of two kinds of contracts. The first is a fixed-price contract whereby the plaintiff prepares estimates or quotations for work on a particular job and then has an agreement with the owner of a property to do the work for a specific price. The second kind of contract is a cost-plus contract. In that case the costs of the materials and subcontracted labour are paid by the owner and the owner also pays a percentage to the plaintiff for managing the contract. The percentage can range from 10% to 15% depending on the size of the contract. A significant amount of the plaintiff's work is done on the basis of cost-plus contracts, sometimes it is 100%.

**9**  Mr. Garside uses a day timer book to keep track of various tasks in his work. It includes reminders written by Mr. Garside, measurements he has taken, orders he needs to make, phone numbers of subcontractors, some costs, customers and various other matters. As will be seen, it is not a complete or detailed record of all of the work done by Mr. Garside or all of the information related to that work. The plaintiff puts considerable weight on one entry in the day timer as demonstrating a quotation of the cost of the work. This information was only available one week before trial, and it was not available during discovery.

**10**  Andrew Stirling, one of the defendants, is a helicopter pilot. He has no construction experience to speak of. His work as a helicopter pilot is on a Monday to Friday basis, during the day. On occasion he has to stay overnight when he is travelling for work. Karolyn Jones, the other defendant, works for the Canadian Coast Guard as a Staff Officer. She had some minor construction experience in the past. The two defendants have lived as husband and wife since about 2005.

**11**  In late 2009, the defendants purchased a new home on Birch Road in the District of Saanich. The defendants remained in their previous home on West Saanich Road until August 2010 while repairs and renovations were completed in the Birch Road property. The latter are the subject of this litigation.

**12**  According to Mr. Garside's day timer, he met with Ms. Jones at the Birch Road property on November 21, 2009. At that time the defendants were considering buying the property. They wanted to discuss the repairs that would be necessary and they wanted to make some changes. It is agreed that Mr. Garside was asked by Ms. Jones for an estimate of the work and his estimate was $200,000 - $250,000. This figure is not recorded in Mr. Garside's day timer or in any other documents.

**13**  Over the next few days and into December 2009 there were more meetings and discussions between Mr. Garside and the defendants. Some of these took place at the Birch Road property, some took place at the defendants' West Saanich Road property and others took place in local restaurants. There are detailed lists of various tasks in Mr. Garside's day timer on December 11 and December 12, 2010. On December 12, 2010, there is a note, "160 K Birch Rd." In Mr. Garside's evidence he could not recall the significance of this note.

**14**  The parties then agreed on five fixed-price contracts on the Birch Road property. They are as follows, according to the dates of the invoices from the plaintiff (the estimates were the same amounts as the ultimate invoice amounts and the dates of the estimates are in brackets):

1. January 8, 2010 (remove stucco from garage): $7,665.00 (December 16, 2009).
2. January 8, 2010 (remove exterior cladding and sunroom from house): $45,748.50 (December 16, 2009)
3. February 16, 2010 (repair rot damage in garage): $2,730.00 (January 15, 2010).
4. February 16, 2010 (repair rot damage in-house): $28,245.00 (January 15, 2010).
5. June 24, 2010 (Windows and stucco replacement): $157,720.50 (March 10, 2010).

**15**  The date of the last of these invoices, June 24, 2010, is of some significance, as discussed below.

**16**  The defendants also asked the plaintiff to do some work on the West Saanich Road property to get it ready for selling. Mr. Garside sent a crew over and the work was done quickly. The work was billed to the defendants on a cost-plus basis on March 9, 2010. The invoice of that date was for $4,224.42, including a management fee of 15%. There was no estimate for this contract in evidence. The final invoice included a work sheet with the materials and subcontracts listed. The defendants testified that they did not know about the management fee until they received the invoice.

**17**  For the most part, the above five fixed-price contracts and one cost-plus contract work were completed without any problems, and the defendants promptly paid the amounts owing to the plaintiff. As an example, for the cost-plus contract for work at West Saanich Road, Ms. Jones testified that she was pleased with the work and "happy" to pay the invoice because the work was done quickly and it helped with the sale of the West Saanich property.

**18**  It is the subsequent arrangement between the parties that is in dispute. The parties have very different versions of the facts of that arrangement, including details of some of the above events and the facts of other events. As well, whether their contractual arrangement was on a cost-plus or fixed-price basis became an issue in argument. I will begin with the plaintiff's version of what occurred and then I will set out the defendants' version.

**Plaintiff's evidence**

**19**  As above, Mr. Garside met with Ms. Jones for the first time at the Birch Road property on November 21, 2009.

**20**  They walked around the property and through the house. Mr. Garside testified that overall the house was in a "leaky condo" situation. There was rot in some of the exterior walls and there had been water damage to the interior wood floors. He was asked for and he provided an estimate of $200,000 - $250,000 for the work that was discussed. He then met with both defendants, and they ultimately agreed on the five fixed-price contracts and the one cost-plus contract. Work proceeded on the Birch Road property with the knowledge of the defendants and the five fixed-price contracts there were completed without any problems.

**21**  The work on the Birch Road property continued after June 24, 2010, the day the last fixed-price contract was invoiced and paid. According to Mr. Garside, this work was done on the basis of a cost-plus contract that started in June 2010, perhaps May 2010. In his mind it coincided with the end of the last fixed-price contract for the work on the Birch Road property. As below, the defendants say the date was July 29, 2010, and it was a fixed-price contract.

**22**  Mr. Garside explained in his evidence why the parties proceeded on the basis of a cost-plus contract. He testified that the work on the Birch Road property had come to a stage where there were a number of decisions to be made about floor tiles, fixtures and other things. These required a lot of detail and choices about what, for example, fixtures would be used. Mr. Garside also testified that the defendants were busy, as was he, and everyone felt that the previous contracts had worked well. He suggested a cost-plus contract for the further work because it gave the defendants freedom to select or not select items as the job evolved and blocks of work could be done separately. There was more than one meeting to discuss this idea, according to Mr. Garside. He estimated 10 to 20 meetings over all.

**23**  According to Mr. Garside, he discussed this with Ms. Jones and she said that his proposal made sense, the parties agreed to proceed on this basis and they agreed to a 12% management fee as well. There is no written contract to this effect, there are no letters, emails or other correspondence, nor is there any reference to a cost-plus agreement in Mr. Garside's day timer. He explained this by saying that, as a result of their previous dealings, the defendants trusted him and he trusted them. Mr. Garside agreed in his evidence that the defendants were concerned with cost.

**24**  There were a number of meetings to make decisions about various issues such as tiles, painting and landscaping. According to Mr. Garside, there was a lot of talk about costs and he always brought a summary of the costs to date for the defendants to see. There were no invoices from the plaintiff, and there is no evidence that the defendants asked for more information or objected to the cost until as discussed below. The defendants did ask Mr. Garside from time to time if he needed payments, but he declined those offers. Other than the evidence above, there is no other information in Mr. Garside's day timer about costs. As well, as will be seen, the parties do not have clear memories of all of their conversations, in particular the dates and the particulars of those meetings.

**25**  The defendants retained a designer who prepared reports and options in May 2010. Mr. Garside testified that many changes were made by the defendants after that date including selection of tiles and paint, wood floor, carpet, living room fireplace and a number of others. He also said that he thought that November 10, 2010, was the date when the work on the Birch Road property was substantially complete although there were still some things left to do that were "not minor." These included a countertop in the kitchen and problems with the cabinets.

**26**  There was an important meeting on July 29, 2010, in which the work was discussed and, according to Mr. Garside, he advised the defendants that the cost would be between $187,010 and $189,788. In his day timer for July 29, 2010, these figures are noted beside "Quoted to Andrew." The plaintiff places considerable weight on this note. It also includes a list of the following work items: flooring, concrete, ceilings, light fixtures, septic, excavating, wiring, flooring and tile, labour, "move pole" and drainage.

**27**  The plaintiff's day timer was not available for discovery but it was an outstanding request by counsel for the defendants at the end of discovery. However, the request was not recorded by the court reporter, and the absence of the day timer was not noticed by counsel for both parties until one week before trial. At that point the document was disclosed and, for the first time, the quote of $187,010 - $189,788 was known to all. This included Mr. Garside as he had not mentioned the quote in discovery. He testified that a lot of things became known when the day timer was disclosed. The information recorded by Mr. Garside in his day timer is very much in dispute.

**28**  At the meeting on July 29, 2010, Mr. Garside presented a printout of the costs to that date. This was a 13 page document itemizing the subtrades, materials, permits and the cost for each item. The total cost was $253,757.51. On the front page of this document are two handwritten notes. The first says "meeting" and the second is "$63,969.33." The plaintiff's bookkeeper, Cathy Ogilvie, testified that she made these notes on the document but she could not recall in her evidence why she wrote them.

**29**  At the meeting the defendants wrote notes on their copy of the printout on the back page including a list of work items totaling $90,700. This is discussed below in detail, but the defendants claim there was agreement on a cost of $90,700 to "get them in their house." In his evidence Mr. Garside said that he never mentioned that figure at the meeting; instead he gave them the above range of $187,010 to $189,788. Further, he testified that he told the defendants that some invoices had not yet been recorded on the printout and some further work that had been discussed was to be completed. It follows from this that the total of $253,757.51 did not represent what the plaintiff said the defendants owed; the amount owed was, according to Mr. Garside, in the range of $187,010 - $189,788 plus any outstanding invoices (plus a management fee and taxes).

**30**  According to the evidence of Mr. Garside, Mr. Stirling said at the July 29, 2010, meeting he was hoping that the defendants would not have to spend that much money; i.e. $187,010 - $189,788. However, Mr. Garside testified that he was instructed to carry on with the work and if there were any ways to save money, the defendants would like to do that. Mr. Garside also testified that Mr. Stirling said that, when the West Saanich Road house was sold, there would be enough money to complete the project the way the defendants wanted it completed. This latter conversation may have taken place at a later date.

**31**  Work on the Birch Road property proceeded and the defendants moved into the Birch Road property on August 20, 2010.

**32**  There was another meeting in November 2010 between Mr. Garside and Mr. Stirling (the parties differ on the date, it may have been November 11 or 19, 2010). Mr. Garside presented a cost summary of numerous pages. This included some of the costs for the previous fixed-price contracts, and Mr. Garside testified that it would now take "considerable work" to calculate the amount owing by the defendants on November 19, 2010, under the cost-plus contract in dispute. He testified that the amount owed was approximately $180,000 at that time, and he told Mr. Stirling this and that there were more bills to come. According to Mr. Garside, Mr. Stirling said that the amount owing was too much and Mr. Garside would have to come and speak to both defendants to explain the costs. In discovery Mr. Garside said the amount discussed as owing was about $150,000. The actual cost printout from this meeting is not available.

**33**  Mr. Garside was asked in cross-examination whether Mr. Stirling said at this November 2010 that the amount claimed was not what was agreed. Mr. Garside answered that he did not know if Mr. Stirling used those exact words and then he said that Mr. Stirling may have said that the defendants did not agree on that amount. Mr. Garside was also asked whether Mr. Stirling was shocked by the amount claimed, and Mr. Garside replied that Mr. Stirling was unhappy and he said "something like we hoped it would come in less than that", in Mr. Garside's words.

**34**  A subsequent meeting took place on December 4, 2010. According to Mr. Garside, this was when "things fall apart." There is an entry in Mr. Garside's day timer that suggests that the meeting took place at 10 AM, and in his evidence he said he believed that the meeting took place in the morning. There is another cost summary sheet dated November 29, 2010, and it is likely that Mr. Garside took this to the meeting. This was a 10 page document with a total of $148,115.61. There is another handwritten document prepared by Ms. Ogilvie, the plaintiff's bookkeeper. This is a one-page document showing a total of $185,154.57 as owing by the defendants. A management fee was not included, and Mr. Garside testified that this was done to resolve the contract with the defendants.

**35**  Mr. Garside testified that the defendants were unhappy, rather than shocked, with this amount. The defendants said at the December 4, 2010, meeting that they would not pay the amounts presented by Mr. Garside. To this, according to Mr. Garside's evidence, he replied that this was the last thing he wanted to happen and he thought that a solution could be found. He asked the defendants what amount they thought was fair. According to him, they replied that they would pay $110,000 and he said he could not accept that.

**36**  The defendants then said, according to Mr. Garside, that he should take the $110,000 because in one week their offer would be reduced to $90,000 and the following week it would be reduced to $80,000. Mr. Garside refused. He agreed that the defendants wanted finality and he testified that he wanted finality as well. At the December 4, 2010, meeting the defendants raised an issue about the hardwood floors. Mr. Garside offered to take care of the repair cost because he wanted to resolve the situation and he was prepared to, as he testified, take "a bit of a loss." The meeting ended when Mr. Garside was told there would be no payment, Ms. Jones left the room and Mr. Garside was asked to leave.

**37**  Mr. Garside testified that he decided to leave the issue of costs for a while and look after completing a number of small things on the project. He apparently thought that with the passage of time the issue of cost would resolve. He agreed that the defendants may have called him on February 23, 2011, and offered $110,000 to settle his account.

**38**  On April 12, 2011, previous counsel for the plaintiff sent a letter to counsel for the defendants. It was signed by Kristen Collishaw, articled student. Among other things the letter says:

The figure of $91,000 that our client quoted in July, 2010 as the projected cost of completing the interior renovations was based on the work that Mr. Stirling and Ms. Jones requested at that point in time. . . .

**39**  At trial the plaintiff objected to the admissibility of this letter on the basis that it contained discussions between counsel about settlement. I denied the plaintiff's objection on the basis that, although it was in the context of settlement discussions and it did include information about settlement, it also contained a factual assertion that, on its face, appeared to contradict a fact asserted by the plaintiff in the trial. The plaintiff then called Ms. Collishaw as a witness; she is now a lawyer. Her evidence is discussed below.

**40**  On October 12, 2011, the plaintiff sent to the defendants an invoice in the amount of $238,627.55 for materials and subcontractors from June 30, 2010. Mr. Garside testified that a cost summary would have been sent with this invoice. It was sent some time after the commencement of this action.

**41**  At trial the plaintiff submitted 108 invoices for materials and labour, beginning February 26, 2010. Mr. Garside testified that these represented the materials and labour for the plaintiff's work at the defendants' Birch Road property. They total $206,627.32. The plaintiff's claim is for this amount, plus a management fee and plus taxes. The total of all costs claimed by the plaintiff at trial is $234,398.03.

**Defendant's evidence**

**42**  I next turn to the evidence of the defendants. Mr. Stirling provided the more lengthy evidence.

**43**  He and Ms. Jones began looking for property sometime in 2009. After looking at a number of properties they settled on the Birch Road house, the subject of the dispute in this case. However, it obviously needed repairs and they wanted some advice about the repairs, including costs, before they made an offer. They were also interested in making some changes to the house. Ms. Jones telephoned Mr. Garside to ask him if he could provide this advice because she had seen the signs for his company in the area.

**44**  Ms. Jones met Mr. Garside at the Birch Road property on November 21, 2009, late in the morning. Ms. Jones agreed that Mr. Garside's day timer correctly recorded the date although she said they met at 11:00 AM rather than the previously arranged 10:00 AM. There is an arrow in the day timer that is consistent with this.

**45**  They walked around and inside the house (it was empty) for about 1.5 hours. Ms. Jones testified there were a lot of repairs needed on the house and it was an odd design; "very chalet-ish", as she put it. There was water damage, all the windows needed to be replaced, the kitchen was old and narrow, all the cabinets needed to go, the upstairs fireplace was not working, the bathrooms were old and the fixtures were chipped, there was a hole in the ceiling of one of the bedrooms from water damage, the windows in the sunroom were fogged up and the concrete floor had sunken, all the patios needed to be replaced and there were other problems. She discussed these with Mr. Garside and she asked him for an estimate of the cost for the repairs they discussed. He said $200,000 - $250,000. They did not look at the garage but they agreed that it would require work as well.

**46**  The defendants testified that the working budget they had for the purchase was $850,000 (Ms. Jones thought it was $750,000 - $850,000) because this was an amount that they could service a mortgage on. Mr. Stirling explained that Ms. Jones liked Mr. Garside, she thought he could do the work that they wanted done and she arranged for a meeting with Mr. Stirling, Mr. Garside and her. In the meantime the defendants had made an offer on the Birch Road property and it had been accepted. The purchase price was $575,000 (the 2013 assessed value is $1,026,000).

**47**  Mr. Stirling could not remember the date of this meeting but he agreed it was in December 2009. His reference point was the possession date for the Birch Road property of December 16, 2009. The purpose of the meeting was for Mr. Stirling to meet Mr. Garside and to begin a discussion about the work. Mr. Stirling testified that his memory is that the work included new windows, flooring, changes to the kitchen, changes to the interior, patios, stucco (house and garage), and the roof. The defendants had in mind an open interior concept so that they were wondering about removing a wall between the dining room and kitchen and making more access to the family room. As well, the existing furnace was in a small room near the front door and they wondered about opening it up and relocating the furnace. As Mr. Stirling put it in his evidence, it was "basically a whole renovation of the house."

**48**  Further, Mr. Stirling testified that the discussion was "not so much about details, we were looking for the big picture." Later in his evidence, Mr. Stirling said that Mr. Garside did not break down the various parts of the project when he was discussing it with the defendants. Mr. Garside either offered or he was asked for a cost estimate for the work and he said it would be in the range of $200,000 - $250,000. Mr. Stirling could not remember any other meetings in December 2009; he agreed with Mr. Garside's evidence that there were about 10 to 20 meetings in all. At this same meeting, according to Ms. Jones, the idea of cost-plus contracts was discussed and she said she did not want to proceed on that basis.

**49**  The parties then agreed to the five fixed-price contracts described above as well as the one cost-plus contract, also discussed above. There were meetings in December 2009, January and into March 2010 about these contracts. The work under these contracts was completed and paid without any apparent difficulties. In his evidence Mr. Stirling said that, with respect to the cost-plus contract above that was a result of the defendants asking Mr. Garside to do some work to get the West Saanich Road house ready for sale. Mr. Stirling testified that the defendants did not know it was to be on a cost-plus basis or that there would be a management fee of 15%. Ms. Jones agreed with this but she was "happy" to pay the invoice because the work had been done quickly to help with the sale of the West Saanich Road property, she did not notice the management fee until later and the amount of the invoice was reasonable.

**50**  Mr. Stirling described the next discussion about cost with Mr. Garside as occurring on June 24, 2010. This was around the plaintiffs invoice of the same date with respect to the fixed-price contract $157,720.50. The defendants had paid $110,000 on account and they immediately paid the balance owing.

**51**  Mr. Stirling testified that there may have been some additional work done that was not included in the June 24, 2010, invoice. He could not say for certain and he was "not keeping any records about how the job was proceeding." Mr. Stirling could not "guess" if any work had been going on between June 24 and the next meeting on July 29, 2010. Sometimes he and Ms. Jones would go by the property and see progress was being made; other times nothing seemed to have changed.

**52**  Mr. Stirling described in his evidence what he called "direct contracts" for a number of things that the defendants contracted directly with suppliers or contractors, rather than paying the plaintiff. These included kitchen cabinets, countertops, lighting fixtures and appliances. The total cost for these items was approximately $60,000.

**53**  The defendants also testified about design issues and choices the defendants made during the project. These were times during the project when Mr. Garside would say that it was necessary to make a selection about something and the defendants would go to a supplier and make the selection. An example of this is electrical fixtures, and Mr. Stirling stated that he and Ms. Jones made this selection in one day. According to Mr. Stirling, virtually all of these selections were made before the invoice was submitted for the previous cost-plus contract on June 24, 2010. The defendants hired a design consultant and she produced a number of documents dated in May 2010. According to Mr. Stirling, the defendants did not use her after that date or make many changes to the project. Similarly, the defendants used a landscape consultant recommended by Mr. Garside and that work was done in January and February 2010. Other design issues and choices involved the outside patios and sunroom, the driveway and the garden beds. There were small things completed afterwards such as extending the length of the sidewalk because it had not been poured to the plans of the landscape consultant.

**54**  Early in the discussions between the parties there was the prospect of the defendants buying a boat owned by Mr. Garside, and he took the defendants on a cruise in it in February 2010. It was priced at around $100,000. They were thinking about Mr. Garside's estimate of $250,000 for the work on the Birch Road property, and, on that basis, the defendants thought they would have money available at the end of the work on the Birch Road house to buy the boat. When the defendants received the final fixed-price contract of $157,720.50 on March 10, 2010 (as above), the defendants realized that they could no longer consider buying the boat. Mr. Stirling also testified that at this point (March 2010) the defendants knew that their original budget price had nearly been met.

**55**  On July 29, 2010, the defendants and Mr. Garside met at a restaurant. Mr. Garside was not sure what time of day it was but he thought his day timer record of a morning meeting was the time. In contrast, Mr. Stirling had medical appointments in the morning, and he testified that the meeting could not have happened before noon.

**56**  At the July 29, 2010, meeting Mr. Garside presented a printout of the work and materials to that date. This was the 13 page document with a job total of $253,757.51. According to Mr. Stirling, no particular explanation was given for the costs or this amount or the fact that the defendants had already paid approximately $242,000 under the previous contracts. Mr. Garside did not request payment for the total of the worksheets or payment for any amount. Nor did he say how much was owed by the defendants.

**57**  However, according to Mr. Stirling's evidence, Mr. Garside advised the defendants at the meeting that he had just lost $3,000 on a previous fixed-price contract and he now wanted to change the arrangement he had with the defendants to a cost-plus contract. As above, Mr. Garside testified that the agreement on a cost-plus contract took place in June 2010, perhaps May 2010.

**58**  Mr. Stirling described Mr. Garside's costs as surprising and unexpected. He testified that most of the time at the meeting of July 29, 2010, was spent on the issue of a cost-plus contract rather than on the 13 page worksheet. The defendants were two weeks away from being able to move in to their Birch Road property and, according to Mr. Stirling, they did not feel they had any choice. Therefore they agreed to a cost-plus contract but they insisted on cost certainty. Mr. Stirling also testified that, with respect to any management fee, Mr. Garside said that it could be 10% or 5% or 0%; the defendants could decide at the end of the job what percentage to pay. This was done because, according to Mr. Stirling, of the defendants "obvious reluctance" to enter into a cost-plus arrangement, to use Mr. Stirling's words. They preferred a fixed-price contract.

**59**  Mr. Stirling testified that nobody was being very clear at the July 29, 2010, meeting about how to complete the work and he started to make specific suggestions. He described a list that he and Ms. Jones wrote on the last page of the July 29, 2010, cost sheet and on the back of that page. The list on the back of the last page was primarily written by Mr. Stirling and I reproduce it as follows:

Rock Chimney

Penn Plum Fixtures

|  |  |  |  |
| --- | --- | --- | --- |
|  | EST | ACTUAL |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Handrails | $2500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Floor | $25,000 |  |

Wood

Carpet

Tile

|  |  |  |  |
| --- | --- | --- | --- |
|  | Bath Towels, | $700 |  |
|  | holders Etc. |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Blinds | 10K |  |
|  | Bathroom Door Glass | ? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Lighting | $2200 |  |
|  | Mirrors | $1000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Countertops | $10,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Kitchen Cabinetry | $20,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Excavating | $4000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Drainage | $5000 |  |
|  | Concrete | $6000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Pagoda | $3000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Plumb Fixtures | $7200 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Door Hardware | $700 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | [ineligible] Doors | $2500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Vacuum | $900 |  |

$90,700

Monies

$360,000

-$254,000

$106,000

-$90,700

$15,300

**60**  In his evidence Mr. Stirling said that the items on the left-hand side of the list were the items that needed to be completed to finish the job. These were discussed with Mr. Garside. The cost for countertops ($10,000) and kitchen cabinetry ($20,000) were to be paid directly by the defendants to the contractors for those items and the pagoda ($3,000) was never built. Ms. Jones confirmed this in her evidence.

**61**  The numbers under the heading "EST" were provided by Mr. Garside. The total of $90,700 was calculated by Mr. Stirling. He testified that he asked Mr. Garside whether the amount of $90,700 was "the cost it would take to get us into the house." Mr. Garside agreed to this, according to Mr. Stirling. The calculation at the top right, "MONIES", was Mr. Stirling's. He used the amount of $360,000 as the amount available to the defendants, he deducted a rounded up amount of $254,000 (from the worksheets) and then deducted the amount of $90,700. The balance of $15,300 "showed" the defendants that they had enough money to do the job. On this basis, as explained by Mr. Stirling in his evidence, they instructed Mr. Garside to go ahead. Mr. Garside was not taking notes, nor did he have his day timer with him at this meeting, again according to Mr. Stirling.

**62**  As above, Mr. Garside's day timer for July 29, 2010, says that the amount of $187,010 to $189,788 was "Quoted to Andrew." Mr. Stirling denied in his evidence that Mr. Garside gave that quote on July 29, 2010. Further, according to Mr. Stirling, the first time he learned of that amount was a week before this trial commenced in May 2013 when he had the opportunity, through his counsel, to see a copy of Mr. Garside's day timer. As above, this document had been requested in discovery but, through an error of the court reporter, the request was not recorded in the transcript.

**63**  The next meeting of significance according to Mr. Stirling was one held in a restaurant in November 2010. He met with Mr. Garside without Ms. Jones. At this meeting Mr. Garside presented another worksheet showing the defendants owed about $152,000. According to Mr. Stirling he was "visibly shocked" with this number, and he asked Mr. Garside to take it back, to check his numbers and to prepare another worksheet that was consistent with their previous conversation on July 29, 2010. That new worksheet was to be presented to Mr. Stirling and Ms. Jones at another meeting. Mr. Stirling could not remember the reasons given by Mr. Garside for the cost of $152,000. He did recall that Mr. Garside was "blaming" Ms. Jones for all the changes she made. To this Mr. Stirling asked Mr. Garside not to speak badly of Ms. Jones.

**64**  The next meeting was held on December 4, 2010, with both defendants and Mr. Garside. Mr. Stirling testified that Mr. Garside presented a one-page handwritten document with the current costs on it. It showed that the defendants owed $185,154.57 for material, labour and taxes.

**65**  Mr. Stirling testified that there was "no mistaking" that he and Ms. Jones were "dumbfounded" because the amount was supposed to be less than $152,000 and now it was $30,000 more than what was discussed recently. The defendants asked how this could be possible. Mr. Stirling testified that Mr. Garside "talked a lot" but Mr. Stirling could not recall Mr. Garside's reasoning. Mr. Stirling also testified that Mr. Garside was not making any sense. In addition, Mr. Stirling said that the one-page document presented by Mr. Garside at the July 29, 2010, meeting did not include any management fee because Mr. Garside said he was forgoing that fee.

**66**  The defendants agreed that the meeting ended when Ms. Jones left the room. However, according to Mr. Stirling, there was still room for discussion and negotiation. They deny they told Mr. Garside that they would not pay him anything. Mr. Stirling also denied in his evidence that the defendants said at any meeting, or in any conversation, that Mr. Garside should accept the $110,000 because the following week the offer would be $90,000 and the week after that it would be $80,000. At the December 4, 2010, meeting Mr. Garside asked what amount could the defendants pay that day, and Ms. Jones testified that thought that she did not want to give him anything. She also testified that Mr. Garside suggested that the defendants "pay what we had and then go into personal debt with him" for the balance. She found this upsetting and left the meeting to go upstairs.

**67**  Mr. Stirling testified that, after the meeting on December 4, 2010, things remained amicable with Mr. Garside. For example, in December 2010 the defendants needed help installing a new fridge that was to be delivered. Mr. Stirling "felt comfortable", as he put it, calling Mr. Garside and asking him to help, which he did (and he was paid by the supplier).

**68**  On February 23, 2011, Mr. Stirling telephoned Mr. Garside to offer $110,000 to settle the defendants' account. Mr. Garside declined this offer. Mr. Stirling wrote a note about the conversation on the back of the worksheet described above (that has the cost at $90,700). Mr. Stirling also recorded that Mr. Garside told him in this conversation that he wanted to make sure that the Birch Road house was right for the defendants. Mr. Stirling presented this as a positive statement from Mr. Garside.

**69**  As above, the defendants have been in their Birch Road home since August 2010. Mr. Stirling testified about a number of deficiencies as a result of the work of the plaintiff. These are discussed in more detail below. In summary they include cupping of the wooden floors, damage to the exterior stucco, problems with the stain on the front door, nail pops and cracks in the drywall, gaps in the molding on the exterior of the windows, screen doors that do not open or do not open properly, problems with the in-floor heating in the bathroom, problems with flashing around skylights and coldness and drafts in the closet in the master bedroom. Photographs of some of these issues were entered in evidence. As well, the defendants hired another contractor to repair some deficiencies and record others that still need repairing. This contractor also testified.

**70**  There is also the issue of what type of contract was in place after June 24, 2010. Mr. Stirling emphasized that the defendants did not agree to a cost-plus contract until July 29, 2010. As above, Mr. Garside testified that the cost-plus arrangement began in June 2010. Mr. Stirling was also concerned that the defendants never received a written estimate of the cost of the work to be done and they were not told how frequently they would be billed. And he denied, as asserted by Mr. Garside, that the defendants agreed that any of the work or materials prior to July 29, 2010, were to be included in the cost-plus contract that commenced on that date. In her evidence, Ms. Jones was asked in cross-examination about the nature of the contract between the parties after the meeting on July 29, 2010, and she ultimately agreed it was a fixed-price contract.

**71**  Finally, according to Mr. Stirling the defendants expected to be in the Birch Road house in March or April 2010. However it was not until August 2010 that this happened. Mr. Stirling testified that Mr. Garside did not raise the issue of the late occupancy: he also could not specifically recall asking Mr. Garside about it. And, at times Mr. Garside was unavailable to the defendants because he was at his vacation property in the interior or he was working on other projects.

**Claim and counterclaim**

**72**  On May 13, 2011, the plaintiff filed its notice of civil claim.

**73**  The relief sought includes a declaration that the plaintiff is entitled to a lien against the Birch Road property in the amount of $228,197.93 (as above, at trial the plaintiff seeks $234,398.03, composed of materials, labour, a management fee of 12% and taxes). Other relief claimed includes an Order that the defendants pay the amount claimed and, in default, an Order that the property be sold to realize the amount of the claim.

**74**  A counterclaim was filed by the defendants on June 10, 2011.

**75**  The defendants' allege in their counterclaim that the plaintiff failed to properly manage the project and this resulted in damage and loss. Further, the work performed by the plaintiff resulted in damage and loss to the defendants, and the plaintiff owed the defendants a duty to complete the work in a professional and workmanlike manner. The plaintiff failed in this duty and did not meet the industry standards required for the performance of this duty. The relief sought by the defendants includes damages for breach of contract, a claim of set-off and other relief.

**76**  In a response to the counterclaim, filed June 10, 2011, the plaintiff stated, among other things:

1. The Plaintiff denies that the parties agreed that the cost of completing the project would not exceed $90,000. This figure was an estimate that the Plaintiff provided to the defendants as the cost of the project based on the scope of the work requested by the Defendants at that point in time. . .

**77**  The legal basis of the plaintiff's response on the counterclaim was the *BLA,* the law of contract and the law of *quantum meruit*.

**Expert evidence**

**78**  The defendants obtained an expert opinion from a document examiner with regards to the statement in the plaintiff's day timer on July 29, 2010, "Quoted to Andrew $187,010 - $189,788 flooring - flooring and tile . . ." This was described as "exhibit Q1" in the examiner's report.

**79**  The document examiner was J.M. Kovacs and his report is dated June 10, 2013. Mr. Kovacs worked for many years with the RCMP doing examination of documents, he has lectured on the subject and he has been an expert witness in this and other courts. Mr. Kovacs was not cross-examined.

**80**  The purpose of his examination was to "To conduct an examination of the question entry on exhibit Q1 with respect to the probability of the entry being made at the same time as the surrounding entries." The line quality of the entry in question was analyzed and Mr. Kovacs described "a freely and clearly written entry with a good overall line quality which means that the physical conditions would have been a stable surface for the book to rest on and ample arm support for the writing."

**81**  Mr. Kovacs conclusion was as follows:

I am not able to determine the sequence that the question entry was made on July 29, 2010... or the correctness of the indicated time of the entry. The question handwritten entry shows all the features normally associated with a carefully executed handwriting.

**Analysis**

**82**  The issues in this case are largely factual ones relating to the nature of the contract between the parties, the cost of the work under that contract, the cost of management fees and the cost of any deficiencies. There are also issues relating to the defendants' allegation of ***negligence*** against the plaintiff, the timeliness of the plaintiff's filing of a lien and issues about pre and post-judgment interest.

**83**  I begin by identifying some facts that are not in dispute and others where I have identified the different positions of the parties:

1. The defendants purchased a new home on Birch Road. The possession date was December 16, 2009, and they moved into the home on or about August 20, 2010. They had been living in another home on West Saanich Road before moving to Birch Road. The former home was sold in the summer of 2010.
2. The Birch Road home required extensive repairs and the defendants wished to make changes as well. These were reviewed generally with the plaintiff in November 2009, before the home was purchased, and the plaintiff estimated that the cost would be $200,000-$250,000.
3. The plaintiff contracted with the defendants to repair and renovate the Birch Road home by means of five fixed-price contracts. The defendants agreed to these contracts on the basis of detailed quotations of the work and prices. The total cost of these five contracts was $242,109.00
4. The plaintiff also contracted with the defendants to work on the West Saanich Road home to get it ready for sale. This was by means of a cost-plus contract that included a management fee of 15%. The invoice for this contract included a printout of the costs for materials and labour. The cost of this contract was $4,224.42.
5. There were no problems between the parties with regards to these contracts. Indeed, as Ms. Jones testified with regards to the cost-plus contract, the defendants were pleased with the work and "happy" to pay the plaintiff for the work. The total cost of the above six contracts was $246,333.42.
6. The parties agreed on a second contract with regards to further work on the Birch Road house. The plaintiff believes that this contract started in June 2010, possibly even May 2010 but the defendants say that it started on July 29, 2010 at a meeting that day.
7. The plaintiff is clear this was a cost-plus contract. In their opening and evidence the defendants agreed it was a cost-plus contract. However, during argument they changed their position and submitted that it was a fixed-price contract.
8. There were meetings between the parties on costs on July 29, 2010, in November 2010, and on December 4, 2010.
9. At no point did any of the parties say that the work was over budget until November 11, 2010, or that the work should stop for that reason.
10. Mr. Garside had a day timer that included some information about his dealings with the defendants. On July 29, 2010, it has the note "Quoted to Andrew $187,010 - $189,788", and Mr. Garside testified that he said that to the defendants on that date. The day timer was not available until after discovery and Mr. Garside did not explain the quote for $187,010 - $189,788 until after the day timer was disclosed, a week before trial. The defendants deny that the quote of $187,010 - $189,788 was given on July 29, 2010.
11. The defendants took notes at the meeting of July 29, 2010. These include a list of work items to be completed with cost figures beside them. The total is $90,700. They say Mr. Garside agreed to complete the work for that amount. Mr. Garside denies he said that at the meeting on July 29, 2010.
12. There is no other written record of the discussions or agreements between the parties after June 24, 2010, the date the last fixed-price contract was completed and paid.
13. On October 11, 2011, the plaintiff sent an invoice to the defendants in the amount of $238,627.55. This included management fees of $23,140.98 (at 12%), taxes and costs for materials and subcontractors.
14. The defendants allege deficiencies in the work of the plaintiff and that all of the contracted work was not completed by the plaintiff. They also allege ***negligence*** on the part of the plaintiff. The plaintiff denies there were deficiencies or that it was negligent.

**84**  I now turn to the issues in dispute between the parties: the nature of the contract between them; the cost and scope of the work; any management fee; any deficiencies; ***negligence***; the timeliness of the filing of the lien; and the issues of pre and post-judgment interest.

**The contract**

**85**  There are two issues with respect to the contract between the parties I will attempt to address here: when did the contract commence; and was it a fixed-price or cost-plus contract? I will deal with the issue of cost, including whether the contract included a management fee, separately below.

**86**  There is disagreement between the parties about when the contract in dispute commenced. Mr. Garside testified that it started about the end of June, when the last fixed-price contract was completed. That contract was invoiced and paid on June 24, 2010. In contrast the defendants submit that it started on July 29, 2010, when they met with Mr. Garside and, as they contend, agreed on the contract price of $90,700. Again, there is no written document to explain the date the contract started.

**87**  The difficulty with the July 29, 2010, date as the commencement of the contract is that there is no question that work on the Birch Road property continued after June 24, 2010. Mr. Garside testified that a cost-plus contract (as he described it) started about June 24, 2010, but it may have also started in May 2010. The defendants simply deny that there was any discussion about a contract until July 29, 2010. However, on June 24, 2010, the work that the defendants wanted done on the Birch Road property was not complete, and it carried on for at least one month prior to the July 29, 2010 meeting with the knowledge of the defendants. In his evidence Mr. Stirling agreed that the work on the Birch Road property carried over past the end of the last fixed-price contract in June 2010.

**88**  I conclude that there was some understanding or acquiescence around June 24, 2010, that the work would continue and would be paid for. It may have been that the previously successful contracts between the parties led them to simply carry on the work with the expectation that it would be paid for. That approach has obviously created difficulties for both parties; their lack of communication has contributed greatly to the problems in this case. It may also have been, as Mr. Stirling said in his evidence, that the defendants at least were just looking at the "big picture." In any event, I find that there was a contractual relationship between the parties on or about June 24, 2010.

**89**  What then was the contractual relationship on or about June 24, 2010?

**90**  In this litigation the parties initially agreed that the contract in dispute between them was a cost-plus one. Both parties presented their evidence on that basis. This would have been the second such contract after the cost-plus contract for the work on the West Saanich Road house in March 2010 to get that house ready for sale. That contract was completed and paid without any difficulties.

**91**  The dispute over the nature of the contract after June 2010 arose in evidence. The defendants had always asserted that, in their dealings with the plaintiff, they wanted cost certainty and, in fact, the plaintiff agreed that costs were always an issue. The problem arose because the evidence of the defendants was that the agreement was a cost-plus contract (as of July 29, 2010) but with a fixed-price of $90,700 and with a fixed list of work to be done. When pressed on this in cross-examination it was accepted that the contract they had in mind was really a fixed-price one. Then, in argument, the defendants submitted that the work done was pursuant to a fixed-price contract, contrary to their opening. The plaintiff says the contract was a cost-plus one.

**92**  There is no disagreement as to what a cost-plus contract is and what a fixed-price contract is. The former has been defined as "A contract to sell a product or perform work for the selling price or contractor's cost-plus a percentage or plus a fixed fee." A fixed-price contract is a "Contract in which the price is preset regardless of the actual cost" (Daphne Dukelow, *Pocket Dictionary of Canadian Law*, 3rd ed.(Toronto: Carswell, 2002). These definitions accord with the way the parties acted with the five fixed-price contracts and one cost-plus contract they previously completed with success.

**93**  Therefore, it is necessary to review what occurred between the parties between June 2010 and the end of 2010, in particular what happened on July 29, 2010.

**94**  First, on or about June 24, 2010, I find that there was an understanding or acquiescence that the work on the Birch Road property was not complete. Further, it would continue and it would be paid for. There was no preset price or quotation about cost that is in evidence. I conclude that the circumstances at this time support a conclusion that the work would be done on a cost-plus basis.

**95**  Another aspect of the contract between the parties beginning June 24, 2010, is that some work claimed by the plaintiff took place *before* that date, including work in February, March, April and May 2010. That is, work that might be expected to have been included in the five fixed-price contracts for the Birch Road property is being claimed by the plaintiff as part of the cost-plus contract that was in place from about June 24, 2010. The defendants oppose this claim and disagree they accepted or agreed to this. However, the work continued and, if there was not an express agreement, there was at least acquiescence that the work would be paid for by the defendants. I conclude that the cost for this work was part of the cost-plus contract between the parties.

**96**  There is then the meeting of July 29, 2010. The defendants now submit that the contract they had with the plaintiff was a fixed-price contract: it was for a fixed cost ($90,700) and for a fixed list of work items. In contrast, the plaintiff says the relationship continued as a cost-plus contract. I pause to note that there is no reason in law why parties cannot change their contract from a cost-plus one to a fixed-price one, or vice versa. The question is whether that happened on July 29, 2010.

**97**  It is clear that the defendants believed on July 29, 2010, that they had cost certainty by getting an agreement on the amount of $90,700. On the other hand the plaintiff's position is that, on July 29, 2010, a quote of $187,010 - $189,788 was given. Mr. Garside testified this quote was not a preset price but it was an amount that provided some cost certainty to the defendants.

**98**  The issue of whether the parties had a fixed-price or cost-plus contract is intricately related to what happened on July 29, 2010, and whether the plaintiff agreed to a fixed-price contract in the amount of $90,700 or whether the defendants agreed to a cost-plus contract with a quoted cost of $187,010 - $189,788.

**99**  I now turn to that issue.

**Cost**

**100**  As above, it is agreed that on November 20, 2009, at a first meeting between Mr. Garside and Ms. Jones at the Birch Road property, Mr. Garside was asked for an estimate of the cost of the work discussed and he replied with an estimate of $200,000 - $250,000.

**101**  The parties then entered into the five fixed-price contracts and one cost-plus contract, which totalled $246,333.42. The last of these contracts ended on or about June 24, 2010, when the defendants paid a total of $157,720.50 for the last fixed-price contract on the Birch Road property. If the cost of the work on the West Saanich Road property ($4,224.42) under the cost-plus contract is deducted from the total cost (because Mr. Garside's estimate in November 2009 related only to the Birch Road property), by June 24, 2010, the defendants had paid to the plaintiff an amount of $242,109.00 for work on the Birch Road property.

**102**  I therefore conclude that there can be little doubt that the defendants knew that the original estimate of $200,000 - $250,000 for the work on the Birch Road property was met in June 2010. A simple addition of the contracts to that date would have demonstrated that fact.

**103**  I also conclude that, after June 24, 2010, the defendants accepted that the work would continue and the cost would increase beyond the original estimate of $200,000 - 250,000. Clearly the scope of the work expanded from the original discussion in November 2009, it continued after June 24, 2010, and somehow it had to be paid for. The heart of the dispute between the parties on cost is how much more than the original estimate of $200,000 - $250,000 is to be paid by the defendants.

**104**  This came to a head on July 29, 2010, when, according to the defendants, the amount of $90,700 was agreed at a meeting in a local restaurant. On the other hand, Mr. Garside says he "quoted" the amount of $187,010 - $189,788. Both parties have documents that they say support their respective positions. The difficulty, of course, is how could the parties come away from the same meeting with very different understandings of what was agreed?

**105**  I therefore turn to the issue of what was discussed and agreed between the parties on July 29, 2010, with respect to cost.

**106**  The plaintiff relies on the day timer entry for July 29, 2010, that says "Quoted to Andrew $187,010 - $189,788." He testified that this is what he said at the meeting in the restaurant that day.

**107**  The day timer is not a complete list of all of Mr. Garside's appointments or all of his work. It is primarily notes that serve as reminders for things such as ordering supplies, telephone calls to make, measurements taken, list of work items at certain jobs and so on. Mr. Garside could not recall the significance of some notes at all and, in other cases, he could not recall details. Other things were not recorded in the day timer. For example, there is no note that the defendants moved into the Birch Road house on or about August 20, 2010. As well, there are no meetings noted in November 2010, and it is accepted that that is when Mr. Garside met with Mr. Stirling to present the cost figure of about $152,000. This figure was rejected by Mr. Stirling, and he asked for the meeting with Ms. Jones. The parties then met on December 4, 2010, and that is when, according to Mr. Garside, the contract ended. The only reference to this in the day timer is a note at 10 AM on December 4, 2010, "Carolyn [sic] Andrew."

**108**  Overall, while there are omissions, there are no apparent errors of any significance in the day timer, *unless* the note on July 29, 2010, "Quoted to Andrew $187,010 - $189,788" was an error, as submitted by the defendants.

**109**  The defendants take issue with the time listed for this entry on July 29, 2010. It is located on the page beside 7:30 or 7:45 AM but it does not appear to be noted at a specific time. The note "Quoted to Andrew $187,010 - $189,788" is followed by a list of work items such as "flooring" and "concrete". At the end of the list is "Bill at Slegg [Lumber]" and 10:00 AM is circled. Mr. Stirling testified that he attended medical appointments the morning of July 29, 2010, and the meeting could not have taken place before late morning or early afternoon. I accept this is a more specific memory of the meeting than that of Mr. Garside. Beyond that I am unable to conclude that any other differences between the parties about the time of the meeting on July 29, 2010, are of great significance.

**110**  The defendants' challenge to the note in the day timer on July 29, 2010, includes the use of an expert document examiner, and I have the benefit of his report. His opinion was inconclusive as to whether the statement in question was made at a different time than the "surrounding entries." It was written on a stable surface and I conclude that could have been a table, including one in the restaurant where the meeting took place. That, however, is not decisive. It is also apparent that there is no dispute that the note in question was written by Mr. Garside.

**111**  In summary, I can find nothing in the expert report that contradicts the evidence of Mr. Garside and his record in the day timer that he said "Quoted to Andrew $187,010 - $189,788" at the meeting on July 29, 2010.

**112**  There are then the circumstances of the day timer being disclosed. As above, as a result of an error by the court reporter at the discovery of Mr. Garside, counsel did not have the day timer until one week before trial. Further, Mr. Garside did not remember the reference to "Quoted to Andrew $187,010 - $189,788" until after he had reviewed the day timer; that is, until after discovery. This is noteworthy because one would expect that a person would recall, without the prompting of the day timer, an important matter such as a quote about cost while in litigation about that issue. Mr. Garside did not remember the entry in the day timer until it was disclosed and his memory on a number of areas in his evidence was similarly not good. On the other hand the evidence is that he wrote the entry.

**113**  Turning to another matter that may be relevant to the day timer entry on July 29, 2010, of a quote of $187,010 - $189,788, there are other numbers about the cost of the work attributed to Mr. Garside at other times. On April 12, 2011, his previous counsel wrote to counsel for the defendants to say, among other things, "The figure of $91,000 that our client quoted in July, 2010 as the projected cost of completing the interior renovations was based on work that Mr. Stirling and Ms. Jones requested at that point in time." The context of the letter was settlement discussions between counsel.

**114**  The author of this letter was Kristen Collishaw, an articling student in April 2011; she is now a barrister and solicitor. The plaintiff called her as a witness and she testified that her principal at the time was away on holiday for an extended period so she was handling the plaintiff's file. She talked to the plaintiff before writing the April 12, 2011 letter, and her notes say "Roger did not recall" the amount of $91,000. Ms. Collishaw said in her evidence that her letter had not been careful or drafted well. She said the letter should have said, "If in fact the $91,000 quoted . . ." In cross-examination she said that her notes did not indicate that the plaintiff gave any figure and she could not remember him doing so.

**115**  A related matter is that the plaintiff's previous counsel also filed a counterclaim on his behalf, dated June 27, 2011. Paragraph 3 of the counterclaim contained the following:

The Plaintiff denies that the parties agreed that the cost of completing the project would not exceed $90,000.00. This figure was an estimate that the Plaintiff provided to the Defendants as the cost of completing the project based on the scope of the work requested by the Defendants at that point in time. This estimate was at all times subject to change as the scope of the work changed.

**116**  I am urged by the defendants to find that the statements in the April 12, 2011, letter and the counterclaim prove that their estimate of $90,700 was the amount of money agreed to by the plaintiff on July 29, 2010, to complete the work on the Birch Road property. However, the evidence of Ms. Collishaw does not support that proposition and, indeed, it contradicts it. As well, I note that her letter of April 11, 2011, was not copied to Mr. Garside. His uncontradicted evidence is that he knew there were discussions going on between counsel but he did not know the details. Finally, taken on their own, the two statements describe an "estimate" or quotation by the plaintiff, subject to change. It is true that the estimate or quote was in an amount similar to the amount relied on by the defendants but it was not an agreed contract price.

**117**  I am not persuaded that the reference to $91,000 in the April 11, 2011, letter and the reference to a similar amount in the plaintiff's counterclaim support the conclusion that the plaintiff agreed with the defendants on July 29, 2010, that the cost of completing the work would be that amount.

**118**  In summary, the matter is not without difficulty, but I conclude that the evidence (including expert evidence) supports a conclusion that it is more likely than not that the entry "Quoted to Andrew $187,010 - $189,788" was made by Mr. Garside and it was made on July 29, 2010. His oral that he said this evidence corroborates the entry in the day timer. That evidence was prompted by the disclosure of the day timer but, again, despite a serious challenge by the defendants to the entry on July 29, 2010, it remains as credible evidence.

**119**  There is then the number of $90,700 relied on by the defendants as the cost agreed between the parties on July 29, 2010, to complete the work.

**120**  It may be recalled that this number was the total of costs recorded by Mr. Stirling on the back of the printout provided by Mr. Garside. The costs included specific items such as handrails, floors (wood, carpet, and tile), bath towel holders, lighting and so on. According to the defendants, they came away from the July 29, 2010, meeting with an agreement with Mr. Garside that the itemized work would be completed for $90,700 so that they could move into the Birch Road house. That move was imminent and, in fact, it took place on or about August 20, 2010. In his evidence Mr. Stirling agreed that the defendants asked Mr. Garside what amount of money it would take so that they could move in. However, the intent was to get a number that would complete the work.

**121**  As a starting point, I accept that the notes written on the back of the cost printout were made by Mr. Stirling. It is also probable that the numbers written beside each item came from Mr. Garside. And there is no disputing that the total is $90,700. Further, in cross-examination Mr. Garside agreed that the defendants "may have asked" whether the work could be completed for $90,700 but he never agreed with that number. What is in dispute is what this number represents.

**122**  One difficulty with the proposition that $90,700 was the agreed total to complete the work is that the list recorded by Mr. Stirling included two items that the defendants contracted for directly and paid directly to the suppliers. These were the countertop at a cost of $10,000 and the cabinets at a cost of $20,000. Logically, these costs were not the plaintiff's. Therefore, the total of $90,700 that includes these costs cannot represent the plaintiff's cost to complete the work.

**123**  As well, the defendants' figure of $90,700 left out some costs. There was the work done by the plaintiff between June 24, 2010, (and even before that date) and July 29, 2010, under what I have found above was a cost-plus contract. I also accept the evidence of Mr. Garside that not all of the invoices for completed work had been received by him and that he told the defendants this on July 29, 2010.

**124**  Some examples of the work not included in the $90,700 amount are evident on the printout presented by Mr. Garside at the July 29, 2010, meeting. There was a cost for stucco of $9,591.55, entered in the plaintiff's tracking system on July 22, 2010. There were also charges for recycling (drywall and garbage) totaling $3,710.66, beginning in January 2010 and the last one recorded was July 17, 2010. The cost for electrical wiring was entered in the tracking system on May 13, 2010, and the cost of an electrical furnace "system" was entered on April 28, 2010. These costs were $11,700 and $5,500, respectively.

**125**  The defendants respond to this by saying a number of things were done without their knowledge or authorization. For example, the furnace was removed and replaced in a different location, and Mr. Stirling testified that the first time he knew about this was when he asked about an empty cardboard box that had contained the new furnace. However, one of the original conversations the defendants had with the plaintiff was about the furnace. It had originally been in a small room beside the front door, and the defendants wanted it moved to open up the front area of the Birch Road house. Further, the evidence is that the defendants were obviously interested in the work on their new home. They attended from time to time and it is highly unlikely that they would not have noticed that the old furnace room had been removed and replaced as had been discussed from the beginning. I therefore conclude that the defendants knew about the new furnace.

**126**  Similarly, the defendants knew about the new wiring in new walls or to accommodate the removal of old walls, including media cables. It is not reasonable to suggest, as Mr. Stirling did in his evidence, that existing wiring from an older house could have been used again. Certainly, as described in the evidence of the cable wire installer, Michael Jennings, the defendants' request for satellite television service could not be met using wiring of that vintage.

**127**  I pause to note that separating out what work was done before or after June 24, 2010, is difficult because there is little evidence describing the sequence of the work and all of the parties had unreliable memories about the different stages of the work. There are the plaintiff's printouts of the cost of materials and labour. These set out the cost of specific subcontractors and specific material suppliers but the order is not necessarily the order that the work was done. I also take this opportunity to note that the printouts do not always represent the actual amount owed by the defendants. That is a separate calculation, and Mr. Garside testified that it would have taken "considerable time" to separate what was owed by the defendants on one of the printouts.

**128**  Apart from context, the significance of this is that the defendants may have, reasonably, taken the final amounts on the printouts as the amount they owed the plaintiff. In fact the final amount could be less than the total on the printout because there were invoices to come; the final amount could also be more than the total on the printout because some costs from the previous fixed-price contracts were included. For example, at the July 29, 2010, meeting Mr. Garside presented a printout that had total costs in excess of $250,000, but his evidence is that he said at the meeting that $187,010 - $189,788 would complete the project (subject to any invoices not yet recorded).

**129**  The defendants expressed some concern in their evidence that they had not been aware of the costs accruing on the project. In this regard, the evidence is that Mr. Garside presented the first printout of his costs on July 29, 2010, about one month after the last fixed-price contract was completed on June 24, 2010. His evidence is that he kept the defendants up to date on costs throughout the project, but the evidence is that the first printout of costs was provided on July 29, 2010. I do not agree with the defendants that the plaintiff should have presented information about costs earlier than about one month. On the other hand, the defendants concern that the plaintiff did not provide an actual invoice until October 2011 is well taken. In his evidence Mr. Garside said there was no real explanation for this. In any event, the defendants knew on July 29, 2010, that the printout of that date recorded costs in excess of $250,000.

**130**  The evidence includes two other documents related to the plaintiff's costs. The next one was at the meeting in November 2010 between Mr. Stirling and Mr. Garside; the latter presented a printout and Mr. Garside said (in discovery) an amount of $152,000 was owed by the defendants. Mr. Stirling rejected that out of hand, and the actual printout is not available. There is also a hand written sheet that Mr. Garside presented at the meeting on December 4, 2010. It recorded an amount of $185,154.57 owed by the defendants to the plaintiff, and it was prepared by the plaintiff's bookkeeper.

**131**  It is unfortunately the case that the defendants did not review the plaintiff's printouts in any detail or at all. Both defendants testified that, with regards to the printout from July 29, 2010, they did not read it at the meeting on that day or later. Ms. Jones could not recall if Mr. Garside explained at the meeting the costs in the printout; Mr. Stirling testified that Mr. Garside explained some parts of the printout. I find that Mr. Garside did review the printout of costs at the meeting (although it is unlikely he reviewed the entire 13 page document). At one point Mr. Stirling testified that Mr. Garside did not make any sense when he was explaining the printout, but Mr. Stirling also could not remember what he said. It was certainly open to the defendants to review the printout at the meeting or afterwards. As above this was not necessarily an accurate statement of what was owed, but it was a detailed statement of what work was done, what materials were used, when the invoices were received by the plaintiff and who did the work or supplied the materials.

**132**  The defendants did not review the printout given to them on July 29, 2010, and the reasons for this are not explained. However, there can be no real dispute that information to explain the costs that had been accruing up to July 29, 2010, was available to the defendants on that date. More significantly, those costs were more than $90,700 to complete the project if they were combined with the list prepared by Mr. Stirling at the meeting on July 29, 2010. Unfortunately, the defendants missed an opportunity to understand the actual costs for the work on their house.

**133**  A further concern of the defendants is that they say that their budget was exceeded on July 29, 2010, and the plaintiff knew it was exceeded. To the extent that this is a comment on the plaintiff's November 2009 estimate of $200,000 - $250,000 this is correct. However, the defendants knew this in June 2010 after the completion of the last fixed-price contract. They knew more work was required and they either authorized it or acquiesced in it proceeding.

**134**  Part of the defendants' submission on their budget involves their early interest in purchasing a boat owned by the Mr. Garside at a cost of about $100,000. The significance of this is that the defendants' budget was $750,000 - $850,000 to purchase the Birch Road property and do the renovations. The purchase price for the property was $575,000 and the balance was available for the renovations. On this basis the original estimate by Mr. Garside in November 2010 of $200,000 - $250,000 made sense for the defendants and left open the option to buy the boat. There is logic to these calculations.

**135**  However, the evidence is that Mr. Garside was not told by the defendants that he had a budget to work with until July 29, 2010. However, the evidence is not clear that Mr. Stirling's notes on that date about the defendants' budget were explained or disclosed to Mr. Garside. In addition, there was the cost of the work from June 24, 2010, to July 29, 2010, that was ongoing and substantial. With regards to the boat, there is no evidence that the defendants said to the plaintiff that they could not buy the boat because the cost of the project had surpassed a budget amount. I cannot interpret that decision to mean that the plaintiff had detailed knowledge of the defendants' budget and violated that budget. For these reasons I find that, until July 29, 2010, there was an open-ended budget, as would be consistent with the cost-plus contract for that period.

**136**  In summary, up to July 29, 2010, the contractual arrangement between the parties was a cost-plus one and the defendants knew or ought to have known this. It appears that the defendants prepared a list of costs on July 29, 2010, that reflected what they wanted done to complete the project. However, the list was not based on the plaintiff's printout of costs; it included costs that were not the plaintiff's and it did not include work that had actually been done and not yet been billed. I accept that Mr. Garside provided the numbers used by the defendants for their list but I am unable to find that he agreed that the project could be completed for the total of that list of $90,700. In short, it is probable that the defendants prepared and acted on an inaccurate and incomplete list of costs.

**137**  This is another matter that is not without difficulty, but I find it is probable that Mr. Garside provided a range of $187,010 - $189,788 as a quote to Mr. Stirling on July 29, 2010, to complete the work. The defendants did not need to agree to that quote but I find it was available for them to consider, as was the detailed but not necessarily complete printout of costs to date. It follows that there was no agreement that the project would be completed for $90,700.

**138**  I return to the issue of the nature of the contract between the parties. As discussed above, the parties were certainly not clear about their contractual relations and no specific legal definition is a perfect fit. I have found above that the contract between the parties from June 2010 to July 29, 2010, was a cost-plus one. To the extent there is a need to define the contract after July 29, 2010, I conclude that it continued as a cost-plus arrangement but with the proviso that the cost would be $187,010 - $189,788. To be clear that amount was a quote rather than an agreed contract price. It represented the plaintiff's commitment to complete the items listed by Mr. Stirling, but it also included other costs. And the nature of a quote is that it may change.

**139**  There are other matters that relate to the discussions between the parties. First, there is the plaintiff's allegation that the defendants told him on December 4, 2010, that he should accept their offer of $110,000 or the next week it would be $90,000 and the following week it would be $80,000. There is also the defendants' statement that the plaintiff proposed a cost-plus contract on July 29, 2010, because he had just lost $3,000 on a fixed-price contract on another project. I find that neither of these incidents has been proved on the required standard of proof.

***Management fee***

**140**  As a final cost matter, there is an issue of whether a 12% management fee was agreed on. The defendants say it was left open-ended, to be determined by them at the end; the plaintiff says it was always agreed that the management fee would be 12%.

**141**  As background Mr. Garside testified that his fee for cost-plus contracts ranges from 10 to 15%, depending on the size of the contract. At times 100% of his work is done on this basis. As well, there is the previous cost-plus contract between the parties in March 2010 for work on the West Saanich Road property of the defendants. The invoice for that contract included a management fee of 15% and it was immediately paid. The defendants say that there was no discussion of a management fee for the contract after June 24, 2010; it simply appeared on the final invoice.

**142**  From the previous cost-plus contract I conclude that the defendants were familiar with the concept of a management fee in the context of a cost-plus contract. As well, Mr. Garside testified that he proposed waiving his management fee at the later meeting on December 4, 2010, as a way to resolve the issue of costs. However, that offer (which included a cost in excess of $165,000) was rejected by the defendants. Finally, there is nothing in Mr. Garside's day timer about any management fee. However, that is not determinative because some things of significance are not recorded there.

**143**  As in many issues in this litigation, it is one person's word against another.

**144**  I find that it is implausible that the plaintiff would forgo a management fee on a substantial project such as this. He has managed many cost-plus contracts in the past with success. He was clear in his evidence that he said a management fee would be applied. As well, the plaintiff charged and was paid a management fee on the first cost-plus contract in March 2010 for a contract amount substantially smaller than the amount at stake here. Assuming the defendants are correct that this fee was not discussed and simply turned up on the bill, it must have still been the expectation that another fee would be charged for a second cost-plus contract. It is similarly difficult on its face to accept that the plaintiff would simply leave it to the defendants to decide if there would be any management fee at all or, if so, the percentage.

**145**  It may have been that Mr. Garside said something to the effect that a management fee could be discussed later, but that is speculation and I am unable to find that he said or agreed that it could be waived. He did testify that he offered to forgo a fee on December 4, 2010, and this evidence is supported by the handwritten document of that date prepared by his bookkeeper. But this was rejected by the defendants because it was part of a proposal that they pay in excess of $185,000.

**146**  In light of these factors and the previous history of the parties with regards to a cost-plus contract and a management fee, I find that one was agreed on here. I find that a management fee of 12% is applicable.

**Deficiencies**

**147**  The defendants allege that the plaintiff's work was deficient with regards to quality of work and because some work was not completed at all. They go as far as to say that the cost of the deficiencies of the plaintiff's work cancel out any money they owe. I presume this submission includes unspecified damages they seek in ***negligence*** because the cost of all deficiencies claimed by the defendants does not offset the plaintiff's entire claim, even assuming the starting point for calculating that claim is $90,700.

**148**  It is generally accepted that there are always problems to fix after a project of this scale is completed, perhaps after any project. The plaintiff testified that he has always stood behind his work and his many years of running a successful construction business building and renovating custom homes generally supports that statement. His practice is to, for example, be available to customers for a period of time, sometimes up to ten years after the end of the project, to make good on any repairs. One of his subcontractors testified about this practice as well as Mr. Garside's firm expectation that a subcontractor address any problem within a day of being requested to do so.

**149**  Mr. Garside also testified that he generally takes responsibility for the damage done by subcontractors he has hired. An example of this was that he paid for refinishing the hardwood floor when it had been damaged by subcontractors. He went further and replaced boards that had been gouged by the defendants' use of unprotected chair legs. He was intending to repair a part of the exterior stucco that had been damaged by a subcontractor but the defendants asked him to leave their property before he could do so. He testified about other repairs he made at his cost.

**150**  In general Mr. Garside relies on more than 40 years' work doing custom homes and renovations, usually on a cost-plus basis, and he points out that he has never previously had to come to court to resolve a problem with a client.

**151**  There is written evidence of at least three trips by Mr. Garside to the Birch Road property to deal with deficiencies. His day timer for August 20, 2010, lists seven tasks such as grout around the fireplace and laundry, filler at the kitchen window and wood trim on the front door. Similarly, on August 30, 2010, there is a list of 22 items including new front door, skylights, towel bar, checking the fridge water, stair nosing and mirrors. And on November 10, 2010, a list of 13 items is recorded including window screens, countertop, dust at the top of the stairwell, repaint door sliders at pantry, replace a four way switch in the hallway and "sunscreen costs." I pause to note that a complaint such as dust in the stairway is very much in the *de minimis* category of deficiencies.

**152**  With respect to the list on November 20, 2010, Mr. Stirling testified that he gave Mr. Garside a list of deficiencies about that time. He believed Mr. Garside wrote them down and he may have written them in his day timer. Later in his evidence he was asked if the November 20, 2010, date recorded by Mr. Garside for a meeting to discuss deficiencies was accurate. Mr. Stirling replied that he was not sure the time recorded by Mr. Garside was correct but he did not dispute the date. I find that the day timer entry on November 20, 2010 is accurate.

**153**  From this evidence I conclude that there were discussions about deficiencies between the parties and deficiencies were addressed by the plaintiff up to at least November 20, 2010.

**154**  A further contextual matter relates to the meeting between the parties on December 4, 2010. This was not a pleasant event for anyone. The plaintiff presented a written note that said the defendants owed him in excess of $185,000, and the defendants were surprised and unhappy about this. Ms. Jones was offended by Mr. Garside's suggestion that the defendants pay what they could and then pay the balance in instalments although it is not clear she said that at the time. She testified that she thought she did not want to pay anything and I find that she said that to Mr. Garside. She abruptly left the meeting and went upstairs.

**155**  Mr. Stirling agreed that Ms. Jones asked Mr. Garside to leave the house and he showed him to the door. Mr. Stirling testified that the meeting was not "heated." I accept that no one was yelling but I also find it was very tense. He also testified that Mr. Garside said he thought the defendants would be good for the figure he presented and Mr. Garside also thought something could be negotiated. In his evidence Mr. Garside confirmed that the defendants refused to pay the invoice and that he was asked to leave.

**156**  Following the meeting of December 4, 2010, the parties had very little to do with each other. Mr. Garside testified that he attended at the Birch Road property to do some small jobs with the hope that the defendants would come around to pay their bill. Mr. Stirling testified that things remained amicable after the meeting, including Mr. Garside sending a small crew on or about December 17, 2010 to help install a new fridge that had been replaced on warranty after being requested to do so. The plaintiff was paid for this work by the supplier of the fridge.

**157**  In my view a fair reading of the December 4, 2010, meeting is that it was the end of any contractual relationship between the parties. Mr. Garside presented the plaintiff's account, the defendants refused to pay it, or any amount, and they asked Mr. Garside to leave. At that point all parties were left with the unpleasant options of changing their positions substantially or pursuing legal action. There was an attempt in February 2011 by Mr. Stirling to resolve the impasse for an amount of $110,000, but Mr. Garside declined to accept what he described in his evidence as about one half of what was owed.

**158**  The plaintiff urges me to find that he had no further contractual obligations with respect to work on the Birch Road property after December 4, 2010. Specifically, it is submitted that the defendants ended the contractual relationship with the plaintiff and he had no obligation to redress any deficiencies. I accept that the contract between the parties ended on December 4, 2010, and this was primarily as a result of the defendants refusing to pay anything to the plaintiff. I can see no other conclusion to be drawn from that situation other than that he defendants ended the contract.

**159**  However, I do not agree with the plaintiff that this finding ends any obligation he has to address legitimate deficiencies in his work. I therefore turn to consideration of the issue of specific deficiencies. As above, the context for these deficiencies is the cost-plus contracts from June 2010 to July 29, 2010, and then the one in dispute I have found above to be a cost-price contract with the quotation of a cost of $187,010 - $189,788.

**160**  The defendants have provided three letters from other contractors with respect to deficiencies and oral evidence from one of those contractors. In addition, Mr. Stirling testified about deficiencies and provided some photographs.

**161**  There is a letter dated September 20, 2012, from a supplier of furnaces and fireplaces to Mr. Stirling. It quotes a price of $2,150.40 (including HST) to supply and install sealing for a gas fireplace and a wood burning fireplace including fire stops. These fireplaces had been installed by subcontractors hired by the plaintiff. Among other things, the letter of September 20, 2012, describes the installation of an aftermarket fan in one of the fireplaces. According to the defendants this work and cost are a result of deficiencies in the work of the plaintiff.

**162**  The evidence is that the defendants picked out the fireplaces that were originally installed, but after installation they were not happy with the amount of heat from at least one of them. The fan installation referred to in the September 20, 2012, letter apparently addresses that concern. Colin Loganhume, the plaintiff's installer, testified that there was nothing in the September 20, 2012, letter that was part of his work or part of his discussions with the defendants. Further there were no complaints from the defendants until they asked Mr. Loganhume about in-line fans after the installation was done. With regards to fire stops, Mr. Stirling presented photographs of the fireplace chimneys, and there are no fire stops. However, the chimneys are contained in wooden towers framed on the outside of exterior walls. They were inspected and there is no requirement for fire stops in this situation; fire stops would be required if the chimneys were inside actual walls.

**163**  A further consideration is that the allegation that the plaintiff's subcontractor did not install fire stops for the fireplace chimneys was not put to that subcontractor when he gave evidence. I am entitled to consider this as a factor in assessing the credibility of the defendants' evidence (*Gill Tech Framing Ltd. v. Gill,* [*2012 BCSC 1913*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X334-00000-00&context=) at para. 29; citing *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd*, [*2008 BCSC 848*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35H-00000-00&context=) at para. 9; and relying on the so-called rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L)).

**164**  I conclude that the work described in the letter of September 20, 2012, did not result from deficient work by the plaintiff or his subcontractors. The defendants decided the addition of fans was necessary because the fireplaces they chose were not doing what they thought they should do. Fire stops were not required in this application.

**165**  A second letter provided by the defendants with regards to their allegation of deficiencies is dated May 7, 2012. It is from Dave Meade who operates KLAD Custom Building. Mr. Meade has been operating his own company doing custom home renovations for two years, and prior to that he was the general manager of a company that did similar work. He testified on behalf of the defendants.

**166**  The letter of May 7, 2012, refers to a quote for a, drywall, painting, exterior finishing and clean up. The total cost is $8,979.04 (including HST) and individual items are not costed. Mr. Meade testified that the work described in the letter was completed about this time and the defendants paid him this amount.

**167**  The letter of May 7, 2012 also included construction of a "pergola." However, as above, the notes taken by the defendants on July 29, 2010 refer to a "pagoda." I have not done an exhaustive review of the evidence but a review of my notes indicates that the parties referred to pagoda in their evidence. Counsel, after the trial and in response to a question from me, advised that pagoda and pergola were one and the same. Mr. Meade was not asked about this in his evidence because the use of pergola rather than pagoda did not come up then. It is not totally satisfactory but I presume that he meant pagoda when he said pergola. I will use the former word, pagoda.

**168**  With regards to the pagoda it was something talked about early on between the parties, the plaintiff gave an estimate for its construction and it was still being discussed in May 2010. There is reference to a pagoda on the handwritten list Mr. Stirling prepared at the meeting on July 29, 2010, with a cost of $3,000. Mr. Garside agreed in his evidence that the pagoda was something that was part of the original plan. It was not however built by the plaintiff, although anchor bolts for the structure were installed when concrete was poured. Mr. Garside testified that the defendants cancelled the pagoda; his "guess" was that they could not afford it. However, when he was asked in cross-examination whether he said to the defendants that he should get going on building the pagoda, he replied that he may have said that.

**169**  The cost of the pagoda is listed in the defendants' notes of July 29, 2010 as $3,000. However, since the context for the construction of the pagoda is a cost-plus contract, it is not open to the defendants to have it built at the cost of the plaintiff. That would mean they would get a pagoda at no cost. Therefore, the pagoda is not a deficiency and the cost must be deducted from the costs in the letter of May 7, 2012.

**170**  With regards to drywall and painting in the May 7, 2012, letter, much of this work was required because the defendants changed the skylights. But the work remained incomplete, and there was an obligation to complete the work as part of the quote given on July 29, 2010. It is a deficiency. Mr. Meade, the defendants' current contractor, testified that the ensuite bathroom paint was peeling and needed primer and new paint. I also accept that as a deficiency. The defendants would like painting under the stairs but that is a design choice; I deduct $200 for that item.

**171**  With regards to the reference to exterior caulking around patio doors in the letter of May 7, 2012, this strikes me as something that the plaintiff would have done as part of his regular and established practice of looking after the work he did. I conclude it was a deficiency in the work. Clean-up costs are not separated but they are, in general, reasonable.

**172**  The next record of deficiencies presented by the defendants is another letter From Mr. Meade, dated February 21, 2013. The specific work proposed in this quotation has not been done and it is (with costs before taxes in brackets): windows ($705), painting ($6,600), heated floor in bathroom ($5,000), exterior cantilever in master bedroom ($2,100), front door ($350), sealed unit above staircase ($1,520), exterior sliding doors ($3,840), skylight flashing ($720), flooring and vinyl decks ($2,820).

**173**  As a general comment on this list I note that it was made in February 2013, some two years after the plaintiff last worked on the defendants' Birch Road property. Undoubtedly, after this time routine maintenance and repairs are now required.

**174**  With regards to the specific items in Mr. Meade's letter of February 21, 2013:

***Windows ($705)***

**175**  Mr. Garside testified that he had done caulking around the windows in November or December 2010. Apparently this was not finished and I fix $500 for that task.

***Painting ($6,600)***

**176**  As Mr. Meade and Mr. Garside testified, nail pops are a common occurrence after construction is completed and the building settles. They are, therefore, a deficiency although not always one a builder has any control over. They are not in the lists recorded by Mr. Garside in his day timer in August and November 2010 but they may not have been apparent at that time. Some painting will be required after the nail pops are repaired. I see no basis for painting the entire interior of the house at the cost of the plaintiff two years after its work was completed. Painting for baseboards is dealt with in the discussion on floors. I fix the cost for repairing the nail pops, including paint, at $1,200.

***Heated floor in en suite bathroom ($5,000)***

**177**  The plaintiff installed in floor heating in the en suite bathroom with the standard spaces of 5" between the heat tubes. This leaves some areas between the tubes unheated, and Mr. Garside explained this to the defendants. There were no complaints from them after they moved into the Birch Road house, and this item is not on the August and November lists of deficiencies in the day timer of Mr. Garside.

**178**  Mr. Meade explained in his evidence that the defendants now want to replace the existing heated floor to install tubing 2-3" apart because there are unheated parts. This is a change of design and/or specifications. It is not a deficiency in the plaintiff's work.

***Exterior cantilever in Master Bedroom ($2,100)***

**179**  Mr. Meade testified that the master bedroom closet is cool and its floor is cantilevered over an outside area. He testified that his quotation is to remove the stucco "to try and discover where the draft is coming from." He did not know if there was insulation under the closet. The closet is not heated, Mr. Meade agreed that a closet should not be heated and he agreed that the insulation of the house was inspected.

**180**  I conclude that coolness in a closet that cannot be heated is not a deficiency. Further, the expense of $2,100 is not warranted to investigate a situation where insulation is the only remedy and it is at least probable that the floor is insulated.

***Front door ($350)***

**181**  There is some history to the front door, primarily of the defendants complaining about its finish. The plaintiff replaced it once to placate them. Mr. Meade testified that the finish remains "not to the satisfaction" of the defendants. He could not recall the exact condition of it. This is not a deficiency.

***Sealed unit above staircase ($1,520)***

**182**  The defendants seek the removal and installation of sealed units to access "compromised interior framing members" and to replace framing members as required. The framing was inspected, along with windows and insulation, and I conclude that any problem with the framing now, two years after the plaintiff left the job, is not a deficiency it is responsible for.

***Exterior sliding doors ($3,840)***

**183**  The defendants seek the replacement of 8 sliding doors and repair of the stucco around them based on the letter of February 21, 2013 from Mr. Meade. He testified that they do not open or close properly. Mr. Stirling testified about this as well. Mr. Garside testified that he has never had to replace a sliding door he has installed.

**184**  In his evidence Mr. Meade was not sure whether there were 8 or 4 sliding doors. He also acknowledged that he did not know what the problem was and that there could be a number of things wrong including not being installed correctly. The estimated cost for what are, frankly, vague complaints is high. I cannot agree that, if there is a deficiency, that the amount claimed is justified.

***Sky light flashing ($720)***

**185**  According to the letter of February 21, 2013, the sky lights need to be removed in order to "replace compromised framing members as required." Flashing is also to be supplied and installed. As above the framing was inspected more than two years previously.

**186**  Mr. Meade agreed the lack of flashing was a result of the defendants changing their mind about what kind of skylights, from closed to ones that open. This is an extra rather than a deficiency and not something the plaintiff should pay for.

***Flooring ($25,880)***

**187**  When the defendants purchased the Birch Road property it had hardwood floors that were water damaged. One of the first conversations between the parties was what to do with the flooring in the house and the original idea was to refinish the floors and replace any boards that required replacing. However at some point, Mr. Garside advised the defendants that the cost of a new floor was not much different than the cost of refinishing and repairing the old floor. As Mr. Stirling put it in his evidence, the decision to go with a new floor was an easy one to make.

**188**  The old floor was removed, stored and ultimately sold by the plaintiff for $1,000. This was given to the defendants, who in turn gave Mr. Garside's son and his wife $500 for helping with the sale.

**189**  When it came time to install the new floor the installer, Andrew Hill, tested the moisture level of the subfloor, as is normally done. The first level was higher than the accepted level and a decision was made to install dehumidifiers and put off the installation of the floors. A second moisture test had better results but the level was still not at the acceptable level. The problem with having high moisture levels in the subfloor is that there is a very good chance of the flooring that is installed over the subfloor will expand and then there will be cupping of each board. Everyone understood the problem and the risk.

**190**  At this point the versions of what happened differ substantially. Mr. Stirling testified that Mr. Hill said Mr. Garside told him to go ahead with the installation of the new floor and Mr. Garside would take the risk. On the other hand, Mr. Garside and Mr. Hill testified that Mr. Stirling said that he did not want to wait any longer and that the wood flooring should be installed even with the high levels of moisture in the subfloor. The floor was installed with the high moisture levels in the subfloor.

**191**  Mr. Hill testified that he was contacted by Mr. Stirling about a year after the floors were installed and he was told that they had started cupping. Mr. Stirling said he was not "mad or coming at me for it" (as Mr. Hill stated in his evidence), he was just looking for advice about what to do. Mr. Hill suggested further use of dehumidifiers, and he did not hear anything else until this litigation. In cross-examination Mr. Stirling confirmed this conversation with Mr. Hill.

**192**  There does not seem to be much doubt that the new flooring was installed over subflooring that had an unacceptable level of moisture. As everyone knew, the risk was that the floors would start cupping and that, in fact, happened. The question is who authorized the installation?

**193**  While this is primarily a conflict in evidence as between Mr. Garside and Mr. Stirling, there is also the evidence of Mr. Hill. He confirms that it was Mr. Stirling that authorized the installation of the new floors. It is true that Mr. Hill has a past and current working relationship with Mr. Garside. However there is also the telephone call from Mr. Stirling to Mr. Hill after the floors were installed and after the cupping was discovered. During that conversation Mr. Stirling did not suggest to Mr. Hill that there was a problem with who authorized the installation. It is possible that Mr. Stirling was looking for some free advice without engaging Mr. Hill in how the problem arose. Another explanation is that Mr. Stirling accepted that it was his problem.

**194**  Finally, the defendants' assertion that Mr. Hill told Mr. Stirling that Mr. Garside authorized the installation and took the risk was not put to Mr. Hill in cross-examination. I am entitled to consider this as a factor in assessing the credibility of the defendants' evidence (*Gill Tech Framing Ltd. v. Gill,* [*2012 BCSC 1913*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X334-00000-00&context=) at para. 29; citing *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd*, [*2008 BCSC 848*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35H-00000-00&context=) at para. 9; and relying on the so-called rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L)).

**195**  I find that it is probable that it was Mr. Stirling who authorized the installation of the wood floors over a subfloor that had higher than acceptable moisture levels. This is not a deficiency in the plaintiff's work, or the work of his subcontractor.

***Vinyl Decks ($2,820)***

**196**  The defendants seek the cost of removing and replacing the existing vinyl decking (and railings) from two decks at the Birch Road house. Mr. Meade testified that the decks do not drain and puddles gather in the wet weather. Further, puddles in the low spots remain for some time; they dry out after a period of time. There is no allegation the vinyl is leaking. Mr. Garside testified that it was installed with the seams overlapped as required by the manufacturer.

**197**  Mr. Garside testified that he frequently gets comments from customers such as the defendants in this case after vinyl decks are installed because of puddling. Drains are installed and some slope is put into the deck to prevent this. The slope can be increased but, if the slope is significant, then customers complain about that.

**198**  I accept the evidence of Mr. Garside that it is not possible to have a deck with a reasonable slope that is entirely free of puddling. Further, I interpret the defendants concern with the vinyl decks to be unrealistic given the construction of decks and the climate in which they live. And this matter was not raised by Mr. Stirling when deficiencies were discussed with Mr. Garside in August or November 2010. Perhaps it was dry in August but that cannot be said about November. I conclude that whatever problems the defendants perceive with the vinyl decks are not deficiencies.

***Other issues***

**199**  In his evidence Mr. Stirling reviewed a number of other matters he considered to be deficiencies in the work at the Birch Road house. For example, there was an issue of the placing of the stovetop and the placing of an island as part of the kitchen cabinets. There was considerable discussion about these matters and the cabinetmaker testified that he abandoned a bill of $4,000 rather than deal with the defendants any further. The kitchen cabinets were ordered and paid for directly by the defendants, rather than through the plaintiff, but the cabinetmaker's experience dealing with the defendants is consistent with the plaintiff's.

**200**  Another problem Mr. Stirling described was trying to move a high voltage wire in a wall that the plaintiff built. Apparently he attempted to do this himself and then sought the assistance of an electrician friend from work. They could not find the source of the wire. Drywall had to be cut and a new wire installed. The electrician did not testify. If there is a problem with this wire it has not been adequately explained. It is not a deficiency.

**201**  Mr. Stirling did raise an issue about the molding around some doors and some windows. He produced photographs to demonstrate that in some corners the molding was short, thus leaving a gap where weather could get to the window. I accept that these are deficiencies in the work managed by the plaintiff and I assess an amount of $500 to correct those deficiencies.

**The plaintiff's claim**

**202**  It follows from the above that the plaintiff is entitled to a claim for the cost of his materials and subcontractors, plus a management fee and taxes on that fee for the work at the Birch Road property. This follows from the cost-plus contract that was in place from June 24, 2010, to about December 4, 2010. Further, some of the costs of the plaintiff from before June 24, 2010, are legitimate to claim.

**203**  The plaintiff's claim at trial is in the amount of $206,627.32. This is the total of 108 invoices for materials and labour, from February 26, 2010, to December 30, 2010. There is no serious dispute that all of these costs were for the work on the Birch Road property. As Ms. Jones put it in her evidence, she did not think that Mr. Garside would bill anything that was not appropriate. The total claim includes a management fee of 12% which I have found applicable ($24,795.28) and taxes on that fee ($2,975.43). The overall total is $234,398.03.

**204**  The plaintiff's claim of $206,627.32 is more than the quote of $187,010 -$189,788 that Mr. Garside gave on July 29, 2010. The difference is about $19,000 or about 10%. A previous decision has concluded that leeway of 15% between an estimate and final payment price is acceptable (*Mt. Cheam Developments Ltd. v. Clark et al*, [*[1988] B.C.J. No. 3114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1PP-00000-00&context=), 1988 CarswellBC 715 at paras. 11-12 (S.C.)).

**205**  None of these costs have been paid. As above, the defendants submit they owe nothing to the plaintiff. This is based on the defendants' view of the contract price of $90,700 minus the amount of deficiencies and work that should have been done. I have found against the defendants on that issue.

**206**  I have found the following deficiencies that are the responsibility of the plaintiff:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Letter of May 7, 2012: | $5,797.04 |  |
|  | (drywall, painting, |  |  |
|  | exterior finish, clean |  |  |
|  | up; less pagoda and |  |  |
|  | paint under stairs) |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Caulking around windows: | $500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Repair of nail pops: | $1,200.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Repair of molding on windows: | $500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Subtotal: | $8,170.04 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | HST: | $981.48 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $9,160.52 |  |

**207**  I conclude that the evidence supports a net claim by the plaintiff in the amount of $225,237.48 ($234,398.03 less $9,160.52).

***Negligence***

**208**  In their counterclaim the defendants plead ***negligence*** on the part of the plaintiff. It is alleged that the plaintiff failed to properly manage the work at the defendants' Birch Road property and this failure resulted in damage and loss. It is also alleged that the work of the plaintiff was not completed in a professional and workmanlike manner.

**209**  There is not much doubt that the plaintiff owed the defendants a duty of care. The question is whether this duty was breached.

**210**  A significant part of the defendants' allegation of ***negligence*** relates to their assertion that the plaintiff did not keep proper accounts and did not submit a proper invoice until October 2011. The defendants rely on a 1947 decision from Ontario that a contractor in a cost-plus contract has an obligation to keep proper accounts (*G.T. Parameter Construction Ltd. v. Sanders*, [*[1947] O.J. No. 568*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDY1-F30T-B0GK-00000-00&context=) (H.C.J.); also *Taylor v. Taylor*, [1954] O.W.N. 575 (H.C.J.)). I am not persuaded that, as said in *G.T. Parameter Construction Ltd.* (para. 10), that a contractor under a cost-plus contract is in a favourable position because he has "no risk of any loss." The subject case is an example of just such a risk.

**211**  In any event, I accept that the plaintiff's records as they were presented to the defendants were not to a high standard. I say this by comparing the contract in dispute with the previous fixed-price contracts and the previous cost-plus contract which were characterized by very complete quotations and invoices. However, as discussed above, it cannot be said that the defendants were left in the dark for an extended period about the cost of the work that is now disputed. They knew from simple observation that the work was ongoing from the end of the last fixed-price contract in June 2010 and they knew, or should have known, that there would be costs for that work. They also knew at that time that Mr. Garside's estimate of $200,000 - $250,000 had been met and more was required to pay for the work.

**212**  More significantly, they knew on July 29, 2010, when Mr. Garside gave them a printout of the costs to date that they were in the order of $240,000. This was not what they owed because the print-out did not, for example, include invoices for work not yet received by the plaintiff. That number was not what they wanted to hear and, indeed, the evidence is that they did not read the print-out then or after the July 29, 2010, meeting. In the end the plaintiff submitted an invoice in October 2011 in an amount significantly higher than its previous numbers but that was the result of the discussions between the parties breaking down rather than poor record keeping.

**213**  There is no legal requirement for a contractor to provide record keeping to a high standard. I conclude that the plaintiff's records in this case were adequate (assuming that poor record keeping by a builder under a cost-plus contract amounts to ***negligence***).

**214**  It is also alleged by the defendants that the plaintiff was negligent by failing to advise them of the impact of changes to designs of the work. To a large extent I conclude that the changes made in the work were at the direction of the defendants. They had in mind one project within one budget amount and, from a cost point of view, it was essentially complete by the end of the last fixed-price contract in June 2010 when the original estimate of $200,000 - $250,000 was met. The work carried on with their knowledge and they were never clear about what the budget was to be; on July 29, 2010, there was some clarity, but I have found above there was not the clarity the defendants wanted. By July 29, 2010, on the basis of their own incomplete numbers, the project had expanded substantially. I have addressed above the issue of the furnace which was moved and replaced as discussed with the defendants. Further, the defendants had unrealistic expectations that, for example, somehow the wiring of an older house could be reused in the newly renovated house.

**215**  The defendants also allege that the plaintiff did not obtain the best prices for the trades work for the project. The evidence for this allegation is thin and it is not particularized in argument. One aspect of it, perhaps, is that Mr. Garside's son was one of the labour contractors for the Birch Road property. Mr. Garside was questioned in cross-examination about whether this was good value and whether, in fact, his son was running the project rather than Mr. Garside. He denied this was the case, and there are only the defendant's suspicions that are contrary to this denial. In fact, the defendants rewarded Mr. Garside's son by paying he and his wife half of the money received from selling the old wood flooring.

**216**  As for damage to the project by other trades the evidence is that this was no more than would be expected and, in any case, the plaintiff took responsibility for it. Any issue with regards to deficiencies is addressed above. It is true that the plaintiff did not construct the pagoda but I have found above that was a deficiency rather than an issue of ***negligence***. Finally, the complaints by Mr. Stirling in his evidence that Mr. Garside was sometimes not available because he was on holidays or working at other jobs does not by any means amount to ***negligence*** on his part.

**217**  I summary, I deny the defendant's counterclaim that the plaintiff was negligent when it managed the work on the Birch Road project.

***Builders Lien***

**218**  The defendants raise a timeliness issue with respect to the plaintiff's claim under the *BLA*. In summary, the defendants submit that the final day for filing a lien in this case was January 9, 2011, but the lien was filed on January 12, 2011. The plaintiff disagrees that his lien was filed late. As general context, the time limits for filing a lien under the *BLA* start when the project is substantially complete and they are strict. I note that Mr. Garside said in his evidence that the project was substantially complete on November 10, 2010, but he qualified that statement to say that on that date some things that were "not minor" were uncompleted.

**219**  I reproduce the applicable parts of the *BLA* as follows:

**Definitions and interpretation**

**1** (1) In this Act:

. . .

1. For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
2. 3% of the first $500 000 of the contract price,
3. 2% of the next $500 000 of the contract price, and
4. 1% of the balance of the contract price.
5. For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

. . .

**Time for filing claim of lien**

**20** (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of

(a) the contractor or subcontractor, and

1. any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the certificate of completion was issued.

1. A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
2. the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
3. the improvement has been completed or abandoned, if paragraph (a) does not apply.
4. Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
5. that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
6. time had started to run under subsection (2).
7. On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

**220**  According to the defendants, $480,736.55 is the total contract price. This figure is taken from the plaintiff's invoice of October 12, 2011, with the addition of the five previous fixed-price contracts. Applying section 1(2) of the *BLA,* the defendants point out that the contract was substantially performed when 3% of the total contract price was capable of completion. This 3% amount is $14,422.09, using the defendants' estimate of the contract price.

**221**  According to the defendants, the billing of invoices from suppliers and subcontractors to the plaintiff is indicative of completion and more than 97% of the contract price was billed on or before November 23, 2010. That is, on or about November 23, 2010, there was substantial completion of the contract and the 45 day period for filing a lien commenced on that day. It expired on January 9, 2011, and, therefore, filing the lien on January 12, 2011, was late.

**222**  In my view, there are two errors in the defendant's calculation. The first relates to their setting the contract price at $480,736.55. That figure represents all of the previous fixed-price contracts as well as the plaintiff's invoice of October 12, 2011, in the amount of $238,627.55. It is relevant but not decisive that the plaintiff's claim in this litigation is for a lower amount, $234,398.03. Of more significance in my view is that the previous five fixed-price contracts are not appropriately included in the price of the contract at issue. The fixed-price contracts were complete to everyone's satisfaction and paid and the plaintiff does not seek a lien under those contracts and nor is one available.

**223**  I find that the appropriate contract price for the calculation of the time limit for filing the lien in this case is $234,398.03. The 3% amount is $7,031.94.

**224**  I also disagree with the defendant's use of the list of invoices submitted by the plaintiff as the best indication of the substantial completion. In my view, there is an alternate approach that more accurately reflects the completion of the improvement. The letter submitted by the defendants from KLAD Custom Building, dated May 7, 2012, lists deficiencies that were completed at or about that time. I have found above that, with some exceptions, the letter reflects legitimate deficiencies and the amount is $5,979.04. There are other amounts as described in the letter of February 13, 2013, from Mr. Meade that reflect work not yet done, totalling $9,160.52 for all deficiencies.

**225**  The result is that, as of February 13, 2013, more than 3% of the contract price was unpaid and under the *BLA,* the improvement was not substantially complete.

**226**  It follows that the filing of the lien on January 12, 2011 was not late.

***Interest***

**227**  The plaintiff seeks pre and post judgment interest pursuant to sections 1 and 8 of the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, at a rate of 6%. This is opposed by the defendants.

**228**  The plaintiff points out that the defendants have paid no money for the work done on their property since the last fixed-price contract in June 2010. Since that time, as is evident above, there have been costs in excess of $200,000 for the work. There is no evidence of any agreement between the parties as to the interest to be charged on overdue accounts and that is consistent with the informal nature of their contractual relations since June 2010.

**229**  Mr. Garside testified that he had to delay payments to his subcontractors using funds from other work. This was necessary in order to maintain the plaintiff's relationship with reliable subcontractors. Mr. Garside also testified that his working capital was reduced and he was forced to seek financing to keep his business going. His evidence is that the interest he paid for this financing was 6%. It is not clear that he had to finance the entire amount owing by the defendants.

**230**  As of July 1, 2013, the Registrar's rate under the *Court Order Interest Act* for pre-judgment interest is 1% and the post-judgment rate is 3%.

**231**  The plaintiff relies on two previous authorities for its submission that a higher rate than the Registrar's rates is appropriate in this case. In one judgment (*Hardwoods Specialty Products LP v. Rite Style Manufacturing Ltd.,* [*2006 BCCA 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23V2-00000-00&context=)) the Court of Appeal said that the Registrar's rates of interest are only "rates of convenience to trial judges" and those rates should not be seen as the default rate (para. 17). In that case the court awarded interest at 5% per annum (having set aside the trial judge's decision to set interest at 24%). In the other case (*Domtar Inc. v. Univar Canada Ltd.,* [*2012 BCSC 510*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62K2-00000-00&context=)) Madam Justice Fisher reviewed the *Hardwoods* decision and concluded that it is not necessary for a party to adduce specific evidence about the use to which a party would have put the money that is owed (para. 11). In the end she awarded the prime rate of interest.

**232**  A distinguishing feature of both of these judgments is that that they involved so-called commercial parties. In the subject case the plaintiff is a commercial party but the defendants are not. A factor that is at least as significant, and perhaps related, is that the judgments looked at the history of the parties relationships. In the case of *Hardwoods* there were previous contracts with express interest rates for overdue accounts. In *Domtar* there were past dealings to consider.

**233**  In the subject case there is no such history. Further, there is no documentary or any evidence of the plaintiff's practise with regards to overdue accounts with the defendants (or with anyone). For example, there is no reference on any of the previous contracts between these parties to an interest rate for overdue accounts. And another aspect of the lack of any written form of the contract in dispute between the parties is that there is no record of any interest rate for overdue accounts. I accept that this is likely a result of the informal nature of the way the plaintiff has conducted his successful business over the years. The practise has apparently served him well, but it is a problem when there is a dispute over a contract.

**234**  In these circumstances pre-judgment interest is payable in this case at the Registrar's rate. I also order post-judgment interest in this case at the Registrar's rate.

**Summary**

**235**  I make the following Orders and directions:

1. An Order that the plaintiff is forthwith entitled to a builders lien (the Lien) pursuant to the *Builders Lien Act* in the amount of $223,178.99 against the lands and premises owned by the defendants, legally described as:

PID 000-147-338

Block 39, Section 19, Range 2 West

North Saanich District Plan 1211

1. An Order that the Lien has priority as against the lands and premises and all rights, titles and interests of the defendants;
2. An Order that the defendants pay to the plaintiff the amount of $223,178.99;
3. An Order that the defendants pay to the plaintiff pre-judgment and post-judgment interest pursuant to the Registrar's rates and the *Court Order Interest Act*;
4. The plaintiff's application for an Order for sale of the subject property in default of payment is adjourned and will be heard at 9:00 AM on August 23, 2013, by telephone hearing, unless adjourned generally or otherwise by agreement; and
5. The plaintiff is entitled to regular costs, subject to any application made within 45 days of this judgment (or appeal decision).

J. STEEVES J.

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**CORRECTION**

Released: August 16, 2013

[1] Please be advised that the attached Reasons for Judgment of Mr. Justice Steeves dated August 13, 2013 have been amended as follows:

1. In subparagraph (e) of paragraph [235], the date for the hearing the plaintiff's application for an Order for sale has been changed to 9:00 AM on August 23, 2013.

**End of Document**

[***Rutter v. Allen, [2012] B.C.J. No. 170***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1P9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.M. Joyce J.

Heard: September 6-9 and 12, 2011.

Judgment: January 27, 2012.

Docket: M085351

Registry: Vancouver

**[2012] B.C.J. No. 170** | 2012 BCSC 135

Between Texas Rutter, Plaintiff, and George William Allen and Jeremy Brian Boileau, Defendants

(141 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Action by Rutter for damages for personal injuries sustained in a motor vehicle accident allowed — Rutter's vehicle was struck from behind by two vehicles — The impacts caused Rutter's wrist and back injuries and resulted from the *negligence* of the two defendants — Rutter had been able to maintain his full-time employment and was therefore not awarded damages for loss of future earning capacity — However, his activity level had been reduced due to chronic pain — Rutter was awarded $78,414 in damages, including $65,000 in non-pecuniary damages, $12,839 for future care and $575 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action by Rutter for damages for personal injuries sustained in a motor vehicle accident allowed — Rutter's vehicle was struck from behind by two vehicles — The impacts caused Rutter's wrist and back injuries and resulted from the *negligence* of the two defendants — Rutter had been able to maintain his full-time employment and was therefore not awarded damages for loss of future earning capacity — However, his activity level had been reduced due to chronic pain — Rutter was awarded $78,414 in damages, including $65,000 in non-pecuniary damages, $12,839 for future care and $575 in special damages.**

|  |
| --- |
| Action by Rutter for damages for personal injuries sustained in a motor vehicle accident. Rutter was traveling on a highway in heavy traffic when the vehicle in front of him came to a sudden stop. Although Rutter was able to stop behind the vehicle, the two vehicles behind him did not stop, causing Rutter's vehicle to be struck from behind. Rutter alleged that he suffered a wrist injury in the accident that required surgery. He also alleged that he suffered from ongoing back pain caused by the accident. He was seeking non-pecuniary damages, special damages and damages for loss of future earning capacity and the cost of future care. The two defendants submitted that Rutter's injuries were caused at least in part by Rutter's contributory ***negligence***.  HELD: Action allowed.  The impacts to Rutter's vehicle were caused by the ***negligence*** of the two defendants. Furthermore, the impacts caused Rutter's wrist and back injuries. Rutter had been able to maintain his full-time employment and continued to perform well at his job. Therefore, he was not awarded any damages for loss of future earning capacity. Rutter was previously very active but, due to his chronic back pain, was unlikely to return to his pre-accident level of activity. He would require the services of a kinesiologist and a physiotherapist. Rutter was awarded a total of $78,414 in damages, including $65,000 in non-pecuniary damages, $12,839 for the cost of future care and $575 in special damages. |

**Counsel**

Counsel for the Plaintiff: K.C. Blair.

Counsel for the Defendants: C.J. Hope.

**Reasons for Judgment**

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| **B.M. JOYCE J.** |

**I. INTRODUCTION**

**1**  Mr. Rutter sues for damages arising from a four-vehicle accident that occurred on December 15, 2006. At approximately 11:45 a.m., Mr. Rutter was returning to his home in Coquitlam from work in Langley. He was travelling westbound on the Trans-Canada Highway on the Johnston Hill, approaching the Port Mann Bridge. The traffic was quite heavy.

**2**  The vehicle immediately ahead of Mr. Rutter, which was being driven by a Mr. Beckley, came to a sudden stop when traffic ahead of him slowed or came to a stop. There is an issue whether Mr. Rutter's vehicle, came to a stop or struck Mr. Beckley's vehicle. The third vehicle, driven by the defendant, Mr. Allen, struck the rear of Mr. Rutter's vehicle and the fourth vehicle, driven by the defendant, Mr. Boileau, struck the rear of Mr. Allen's vehicle.

**3**  Mr. Rutter alleges that he suffered a number of injuries as a result of the accident, including injury to his low back, hips, neck and left wrist. He suffered headaches, loss of sleep and reduced concentration for a time after the accident. Mr. Rutter says that most of the injuries resolved fairly quickly, but that the injury to his back and wrist persisted for a considerable period of time. Eventually, Mr. Rutter had an operation on his wrist that was successful in resolving his complaints regarding his wrist. He complains that his back pain persists.

**4**  Mr. Rutter claims damages, including non-pecuniary damages, loss of future earning capacity, cost of future care and special damages. His claim for special damages includes a claim for extra costs incurred by him in connection with the construction of a house in Houston, Texas, that Mr. Rutter was building at the time of the accident.

**5**  The defendants submit that the plaintiff's injuries or some of them were caused at least in part by Mr. Rutter's contributory ***negligence*** in failing to stop in time and colliding with the rear of Mr. Beckley's vehicle. The defendants also deny that Mr. Rutter's back and wrist injuries were caused by their ***negligence***. They submit as well that Mr. Rutter had pre-existing back problems. They dispute Mr. Rutter's entitlement to any special costs related to the construction of his house in Texas. The defendants also submit that Mr. Rutter failed to mitigate his loss.

**II. ISSUES**

**6**  The following issues have to be determined in this action:

1. Liability for the injury and loss suffered by Mr. Rutter;
2. Causation of injury to Mr. Rutter's wrist and low back;
3. Quantum of the non-pecuniary damages;
4. Whether Mr. Rutter is entitled to damages for loss of future earning capacity, and, if so, the quantum of those damages;
5. Whether Mr. Rutter is entitled to damages for the cost of future medical care, and, if so, the quantum of those damages;
6. Whether Mr. Rutter is entitled to special damages for any increased costs incurred by him in the construction of the house in Texas; and
7. Whether Mr. Rutter failed to mitigate his loss, and, if so, the amount by which his damages should be reduced.

**III. DISCUSSION AND FINDINGS OF FACT**

**1. Circumstances of the accident**

**7**  Mr. Rutter's evidence of the circumstances of the accident was as follows. He was driving in his Chevy Blazer automobile heading home after having been at work. He was wearing his lap and shoulder belt. He said the traffic was quite heavy. He was picking up speed going down Johnston Hill towards the Port Mann Bridge when he saw some police lights in the eastbound lanes. He saw the brake lights on a small white car that was ahead of a large Ford F350 truck that was immediately ahead of him. The white car came to a stop, as did the Ford F350. Mr. Rutter braked, geared down and came to a stop with the front of his vehicle just touching the trailer hitch of the Ford F350, which he thought stuck out about 14 inches from the bumper of the truck. Mr. Rutter looked in his rear-view mirror and saw a pick-up truck coming towards him. The pick-up truck struck the rear of the vehicle and pushed him into the Ford F350 causing the front of his vehicle to get caught up in the rear of the Ford F350. He was then propelled forward again by another collision behind him.

**8**  Mr. Rutter said that the estimate of the damage to his vehicle was $18,000.00 and it was written off.

**9**  Mr. Beckley, the driver of the Ford F350, testified as follows. He was driving in the centre lane and had reached a speed of about 80 kilometres per hour when he was forced to stop suddenly because traffic in front of him came to a sudden stop. Mr. Beckley's vehicle was then struck from behind. He felt what he thought were two impacts from behind a matter of seconds apart. He heard the sound of a third impact as he was moving to get out of his truck. Mr. Beckley said the first impact moved his truck a bit and the second was just a bump that did not move his truck forward. He did not feel a third impact.

**10**  Mr. Beckley testified that the trailer hitch on the rear of his truck stuck out about six inches from the bumper. He agreed that after the collisions, Mr. Rutter's vehicle was impaled on his.

**11**  Neither Mr. Allen nor Mr. Boileau testified at trial, but the plaintiff read in evidence from their examinations for discovery as part of his case.

**12**  Mr. Allen's testimony on discovery was as follows. He was driving his Toyota Tundra pick-up truck westbound on the Trans-Canada Highway, approaching the Port Mann Bridge, when the vehicle in front of him came to an abrupt stop. He said he was stopped for between 30 seconds and one minute before his vehicle was struck by a Honda car behind him and pushed into the Chevy Blazer.

**13**  Mr. Boileau's testimony on discovery was as follows. He was driving a 1995 Honda Civic. The truck in front of him, which I understand to be the Toyota Tundra, stopped suddenly. Mr. Boileau tried to stop but slid into the back of the truck, with a single impact. He was going 50 to 60 kilometres per hour before he applied his brakes. Mr. Boileau's car was written off.

**14**  The photographs taken of the four vehicles do not assist in determining the mechanics of the collisions. They show the Chevy Blazer impaled onto the back of the Ford F350, damage to the front and rear of the Toyota Tundra and severe damage to the front of the Honda Civic.

**15**  Whatever the exact sequence of collisions, I am satisfied that they all occurred within a very short time span. Traffic was heavy and was moving at between 60 and 80 kilometres per hour before the lead vehicle came to a very sudden stop. It is unlikely that there were any lengthy gaps between the vehicles before the drivers were forced to brake suddenly.

**16**  There are three possible scenarios for the mechanics of the collisions that may arise from this evidence. The first scenario would involve the Chevy Blazer coming to a stop just touching the trailer hitch of the Ford F350, without any significant impact; followed by the Toyota Tundra striking the back of the Chevy Blazer and driving it into the Ford F350 at significant force to impale it on the trailer hitch (impact #1); followed by the Honda Civic striking the rear of the Toyota Tundra, which in turn struck for a second time the Chevy Blazer, which by that time was stuck to the Ford F350 (impact #2). This scenario involves only two impacts of any significance upon the Ford F350, which accords with Mr. Beckley's recollection. It also accords with his recollection that the first impact he felt was greater than the second impact. It does not, however, explain the third impact that Mr. Beckley said he heard but did not feel.

**17**  The second scenario would involve the Chevy Blazer striking the rear of the Ford F350 with enough force to impale it onto the trailer hitch of the Ford F350 (impact #1); followed by the Toyota Tundra striking the rear of the Chevy Blazer, causing it to strike the Ford F350 a second time (impact #2); followed by the Honda Civic striking the Toyota Tundra without the Toyota Tundra transferring any significant energy to the Ford F350. This scenario accords with Mr. Beckley hearing three impacts but feeling only two impacts. However, in my view, considering the extent of the damage to the front of the Honda Civic and the rear of the Toyota Tundra and the likely proximity of the four vehicles to one another, it is unlikely that the impact of the Honda Civic with the Toyota Tundra did not transfer energy to the Chevy Blazer and Ford F350, which, by that time, would have been stuck together.

**18**  The third scenario would involve the Chevy Blazer striking the rear of the Ford F350 with sufficient force to impale it on the trailer hitch (impact #1); followed by the Toyota Tundra coming to a stop without striking the Chevy Blazer; followed by the Honda Civic striking the rear of the Toyota Tundra and driving it into to the Chevy Blazer, which was stuck to the Ford F350 (impact #2). This scenario also accords with Mr. Beckley's evidence that he felt two impacts, the first of which was greater than the second. However, it depends on a finding that the Toyota Tundra came to a stop without striking the Chevy Blazer. No one testified to that effect at trial and such a finding is contrary to the evidence of Mr. Rutter, who was in the best position to observe, feel and hear a collision between the Toyota Tundra and his vehicle.

**19**  I find, on the balance of probabilities that the first scenario I described is what, in fact happened. In my view, it is likely that Mr. Beckley's recollection of feeling two impacts is accurate, but that he is mistaken in thinking that he heard a third impact that he did not feel as he was getting out of his truck.

**20**  I am satisfied that the impacts to Mr. Rutter's vehicle were caused by the ***negligence*** of both Mr. Allen and Mr. Boileau. Mr. Rutter was able to come to a stop when traffic slowed suddenly in front of him. Mr. Allen and Mr. Boileau were not able to stop because they were travelling too close to the vehicles directly ahead of them given their speed to permit them to stop safely in an emergency situation or failed to stop because they were not paying proper attention.

**21**  It is also my view that the impact to Mr. Rutter's vehicle caused by Mr. Allen and the impact caused by Mr. Boileau both caused the injuries suffered by Mr. Rutter as a result of the collisions. They are concurrent, several tortfeasors and are jointly and severally liable for the loss and damage caused by their ***negligence***.

**2. Nature of Mr. Rutter's Injuries and Causation**

**22**  Mr. Rutter declined an invitation from the emergency personnel who attended the scene of the accident to go to the hospital. He first sought medical treatment on December 18, 2006, from Dr. Jacobs, his family doctor. Since then, Mr. Rutter has seen Dr. Jacobs and other medical practitioners for a number of complaints that he attributes to the accident. Dr. Jacobs prepared two medical-legal reports that were tendered in evidence, one dated November 5, 2009 and the other dated March 8, 2011. I will discuss Mr. Rutter's complaints below.

1. ***Headaches***

**23**  Mr. Rutter testified that he developed a headache soon after the collision. He complained of headaches when he saw Dr. Jacobs on December 18, 2006, but reported to him on January 16, 2007, that the headaches had decreased. On March 7, 2007, Mr. Rutter reported to Dr. Jacobs that he no longer had headaches.

1. ***Neck pain***

**24**  Mr. Rutter testified that he had a sore neck, but that it resolved within about three weeks. This is corroborated by his reporting to Dr. Jacobs on January 16, 2007, that he no longer had neck pain.

1. ***Injury to right knee***

**25**  Mr. Rutter testified that for quite a long period of time he had a sore right knee when he bent down. He noticed it most when he was in the shower and bent down to clean the shower with a "squeegee". He said that the knee pain has subsided within the last year.

1. ***Injury to left wrist***

**26**  Mr. Rutter alleges that he sustained an injury to his wrist as a result of the accident, specifically an "ulnar carpal impaction with a tear of the triangular fibrocartilage". In January 2010, Dr. Perey, an orthopaedic surgeon, operated on Mr. Rutter's wrist to shorten the ulnar bone, which largely resolved the problem with the wrist, although Mr. Rutter testified that he still had occasional sharp pains in his wrist.

**27**  The plaintiff did not provide any expert opinion evidence from Dr. Perey.

**28**  The defendants submit that Mr. Rutter's wrist problem is unrelated to the accident. They point to the fact that there is no mention in Dr. Jacobs' clinical records of any complaint with regard to the wrist until June 15, 2009, nearly two and one-half years after the accident. Mr. Rutter saw Dr. Jacobs on 22 occasions during that time span for matters concerned with the accident. The defendants also refer to the fact that Mr. Rutter could not recall mentioning any problem with his wrist to the physiotherapist when he attended for physiotherapy for his back on 18 occasions between January 2007 and April 2007, and three times in August and September 2007.

**29**  Not surprisingly, when he testified at trial, Dr. Jacobs had no independent recollection of the office visits. He testified that he tries to make a note of all subjective complaints and believes that if he saw any bruising he would have made note of it. However, he also said that sometimes it is difficult to make note of every complaint and that he focuses on the most significant complaint.

**30**  In his medical legal report, Dr. Jacobs expressed the opinion that Mr. Rutter suffered the tear of the triangular fibrocartilage in his left wrist as a result of the accident, but conceded that his opinion is based solely on Mr. Rutter's self-report. He testified that this sort of injury is usually caused by some sort of compression or impact or sudden force. Jacobs testified that he would expect pain to develop soon after the trauma. He said that it would be very unlikely that the tear to the cartilage would remain dormant for two years before becoming painful, although it is possible that there could be soreness soon after the trauma, then subsidence of pain for a time and reoccurrence of pain as a result of some event.

**31**  Mr. Rutter testified that he felt pain in his left wrist immediately after the accident. He said that he mentioned it to Dr. Jacobs on December 18, 2006, and on other occasions in 2007. He said that the pain in his wrist got worse and worse from the time of the accident until he had the operation.

**32**  On January 22, 2007, Mr. Rutter gave a statement to an adjuster with the Insurance Corporation of British Columbia ("ICBC"), in which he described his injuries. In that statement he said:

My left hand must have hit something because my baby finger and ring finger were badly bruised for about 5 days and were stiff and sore. They are fine now.

**33**  Mr. Rutter said that bruising to his hand had gone away by the time he gave the statement to the ICBC adjuster.

**34**  Mr. Rutter's wife testified that she saw bruising to her husband's left hand or fingers within a few days of the accident. She also testified that she accompanied her husband on many occasions when he went to see his doctor and confirmed that he told Dr. Jacobs about the problem with his wrist.

**35**  Mr. Rutter testified, in particular, that on the weekend of April 28-29, 2007, he was helping his wife with some yard work and experienced pain in his wrist. He testified that on July 24, 2007, there was a discussion with Dr. Jacobs, when his wife was present, about the wrist. He also testified that on January 15, 2008, when he was doing back exercises that were prescribed by his physiotherapist, he found that the exercises put pressure on his wrist and made it sore. He testified that on May 30, 2008, while playing in a golf tournament he felt unbearable pain. He said it felt like it was broken.

**36**  The plaintiff tendered a report from Dr. le Nobel, a specialist in physical medicine and rehabilitation. Dr. le Nobel expressed the opinion that the accident is the cause of the wrist injury, assuming Mr. Rutter suffered pain and bruising of his left wrist within a few days of the accident. In his report he elaborated, saying:

Tex Rutter's account of his left hand being on the steering wheel at the time of impact and of left wrist bruising and swelling within days of the motor vehicle collision, is consistent with the December 15, 2006 motor vehicle collision being a factor in terms of his left wrist condition.

**37**  Dr. le Nobel agreed that the fact that Mr. Rutter was an avid golfer and, at least before the accident, played 100 rounds or so of golf per year, could be a potential cause of the wrist problem.

**38**  In cross-examination, Dr. le Nobel agreed that if Mr. Rutter had not experienced any pain in his wrist during the two years after the accident, that fact would certainly affect his opinion with regard to the cause of the wrist injury.

**39**  I accept the evidence of Mr. Rutter that his left hand sustained some sort of impact trauma as a result of the accident. I accept his evidence that his left pinkie and ring finger were sore and bruised for a time after the accident. I think it is also probable that the initial pain subsided after several days and that Mr. Rutter was being honest when he told the insurance adjuster on January 22, 2007, that his hand was fine. I also accept Mr. Rutter's evidence that he experienced wrist pain on occasion in 2007 and 2008, when he put pressure on his wrist through certain activities, such as yard work, exercise and golfing, although I am not satisfied that it was a constant, debilitating pain.

**40**  In my view, there is a body of evidence, which I accept that supports the opinions of the medical experts. The evidence as a whole supports a finding, on balance, that the accident was the underlying cause of the problem and that but for this accident, Mr. Rutter would not have developed the wrist problem that was eventually corrected by surgery. The defence has not suggested any other cause for what they admit was a tear in the cartilage, other than frequent golfing, nor have they put forward any contradictory expert opinion evidence. Mr. Rutter had been an avid golfer for many years before the accident and had not experienced any problems with his wrist.

**41**  I find, on a balance of probabilities, that the accident was the cause of Mr. Rutter's wrist injury.

1. ***Injury to low back***

**42**  Mr. Rutter's primary complaint concerns low back pain and the effect that it has had on his overall functioning. He submits that apart from some episodes of back pain in the past which were relieved by chiropractic treatment, before the accident he was a healthy and very active man in his forties. Mr. Rutter submits that because of the accident he suffers chronic low back pain that is not improving with time; if anything, it is getting worse. He submits that it affects his ability to work, to engage in recreational pursuits, particularly running and golfing, which he frequently enjoyed before the accident, and has affected his ability to sleep, to concentrate and generally enjoy life.

**43**  The defendants do not dispute that Mr. Rutter sustained a soft tissue injury to his low back but submit that he exaggerates the injury and its effect on his functioning.

**44**  Mr. Rutter has attended the clinic where Dr. Jacobs practises since November 1991 and Dr. Jacobs has been his family doctor since January 1999. Prior to the accident, the only time that Mr. Rutter sought medical attention from Dr. Jacobs or other physicians at the clinic was in August 2003, when he saw Dr. Jacobs once because of low back pain as a result of stepping in a pot hole when golfing.

**45**  Mr. Rutter testified that after this incident in 2003, he experienced episodes of back spasm every three months or so. He admitted that he had episodes of low back pain in 2003, 2004 and 2005. He did not see his doctor on those occasions, but did have some chiropractic treatments.

**46**  Following the accident, Mr. Rutter saw Dr. Jacobs frequently because of low back pain. The following excerpts relating to low back pain are taken from Dr. Jacobs' reports:

*January 16, 2007*

... He also stated that his low back pain was improving on the right side. There was no radiation to his legs. ... Assessment at that time was soft tissue injury to his neck which had resolved but persistent low back pain. He was referred to a physiotherapist.

*March 7, 2007*

... he stated that his neck was okay with no headaches. He still had low back pain.

*April 11, 2007*

... still complaining about low back pain, which seemed to be less painful. He found that the pain was worse when he went golfing and also with running.

*June 1, 2007*

... still complaining about low back pain. He wanted an MRI. On examination he had tenderness of the LI area and bilateral sacroiliac joints, right greater than left. Assessment at that time was persistent soft tissue injury to his low back. An x-ray was ordered.

*June 7, 2007*

... x-ray ... showed lumbar degenerative disc disease. He was sent for a CT scan.

*July 19, 2007*

... CT scan ... showed a grade I anterolisthesis.

*August 20, 2007*

... still complaining of a sore low back.

*December 3, 2007*

... complained of right sacroiliac pain. ... Assessment at that time was soft tissue injury to his low back.

*March 27, 2008*

... still complaining about a sore back. ... Assessment at that time was soft tissue injury of his low back. He was referred to Dr. Dommisse.

*May 26, 2008*

... stat[ed] that his chronic low back pain was actually getting worse. ... Assessment at that time was soft tissue injury to his low back with grade I anterolisthesis of L5/S1. He was to have repeat x-rays and CT scan and sent to Dr. Dommisse.

*September 19, 2008*

... CT scan ... showed L4/5 spondylolisthesis unchanged from the previous CT scan.

*December 4, 2008*

... stat[ed] that he still had intermittent low-back pain.

*January 12, 2009*

... Assessment was that of flare up of his low back pain. ...

*April 6, 2009*

... still complaining about variable low back pain.

*April 14, 2009*

... he stated that his back was improving slowly ....

*April 20, 2009*

... stated his back was getting worse.

*August 6, 2009*

... he saw Dr. Dommisse who suggested a steroid injection and deferred surgery.

*September 28, 2009*

... he returned to the clinic stating that he still had back pain.

*October 20, 2009*

... he returned to the clinic stating that he still had intermittent low back pain when he lifts weights or runs. Therefore, he avoids these activities.

*March 8, 2011*

... His main problem is persistent low back pain, which has not responded to steroid injections or physiotherapy.

**47**  Mr. Rutter received a course of physiotherapy treatments for his low back during the period January to April 2007 and some further physiotherapy treatments in August and September 2007, but they were largely ineffective.

**48**  Dr. Jacobs referred Mr. Rutter to a specialist, Dr. Dommisse. I did not hear from Dr. Dommisse and no report authored by him was filed. According to Dr. Jacobs, Dr. Dommisse contemplated surgery at one time, but ultimately recommended against surgery. Dr. Dommisse used steroid injections to try to reduce the pain, but they were largely ineffective, according to Mr. Rutter.

**49**  In his most current report of March 8, 2011, Dr. Jacobs summarized as follows:

In summary, Texas Rutter was involved in a motor vehicle accident on December 15, 2006. He suffered from soft tissue injuries to his neck, low back and his left wrist. The neck pain has completely resolved. The left wrist injury has been partially relieved with an ulnar osteotomy by Dr. Perey. However, he still gets occasional sharp pain in his left wrist with certain movements. His main problem is persistent low back pain, which has not responded to steroid injections or physiotherapy. It has curtailed many of his activities including running, golf, and home maintenance renovation and has had an impact on his sexual relationship with his wife. He has also had to change his career within the same company as a result of this injury. He has learned to cope with the pain without medication. His prognosis is guarded. He has had this pain now for four years and it is very unlikely that his pain is going to improve over time. However, he has learned to tolerate the pain with changes in his personal and professional endeavors.

**50**  Dr. le Nobel's report contains the following opinions regarding Mr. Rutter's back pain and its cause:

It is now over four years and five months since the December 15. 2006 motor vehicle collision in which Texas Rutter was injured. Based on the time elapsed since the motor vehicle collision and based on his symptoms ongoing, I diagnose his pain as chronic. (Chronic pain is pain which persists for longer than tissue healing is felt to require. Tissue healing is generally felt to occur within 10 to 12 months of injury).

I diagnose his low back pain as mechanical spinal pain. (Mechanical spinal pain is pain felt primarily in the spinal column, at times referred from the spinal column to adjacent areas of the trunk and limbs, made worse by changes in posture and changes in position. The understanding is that mechanical spinal pain is generated in injured structures in and near the spinal column).

...

Texas Rutter's account of being able to play golf, as much as 100 times a year and being able to run between 6 and 13 miles a day several times a week, indicates he made a symptomatic and functional recovery from the low back pain earlier in his life.

...

Absent the December 15, 2006 motor vehicle collision, Texas Rutter would not have been anticipated to develop the chronic limiting low back pain, which he has felt over the past four years and five months and more.

...

Texas Rutter has not recovered from the December 15, 2006 motor vehicle collision. He is deconditioned with weight gain and reduced physical capabilities based on his account today. His examination today shows restriction of ranges of motion in his cervical spine and in his hips. He reports as well pain at his right and left hips. His deconditioning is multifactorial and contributed to by injuries from the motor vehicle collision.

**51**  Dr. le Nobel recommended that Mr. Rutter engage in a program of physiotherapy and exercise, including core muscle strengthening, overseen by a kinesiologist and exercise-based physiotherapist. He was of the opinion that some improvement is reasonably anticipated, but that a full return to all of his pre-accident capabilities is not likely.

**52**  Mr. Rutter has an underlying spondylolisthesis, which is a condition in which the vertebrae are out of proper position, but this was largely asymptomatic prior to the motor vehicle accident.

**53**  I find that Mr. Rutter's suffers chronic back pain that was caused by the accident of December 15, 2006. I find further that it is unlikely that he will return to his pre-accident level of activity, although it is likely that he can achieve some improvement with regular exercise, including core muscle strength training.

**3. Impact of Mr. Rutter's injuries on his employment, recreational pursuits and daily life**

**54**  Mr. Rutter was 49 years old at the time of the accident and is now 54 years old. He was employed by a large, multi-national food company as a Chain Development Manager. His job involved selling food products that his company manufactured to large restaurant chains. Mr. Rutter spent part of his time working in his office, but he also spent time attending trade shows, giving presentations and meeting with clients away from his office. He spent a significant amount of his time travelling throughout Canada and the United States. In October 2010, Mr. Rutter accepted a new position as a Sales Training Manager with the same employer. He now works from an office in his home as well as attending training sessions for salesmen. While this change resulted in much less travel, I can see nothing in the evidence to suggest that Mr. Rutter's employer made the change to accommodate him for a loss of his capacity to perform his job. In my view, the change of position had nothing to do with the accident.

**55**  Mr. Rutter has not missed any time from work since the accident and he does not advance a claim for past loss of income. Mr. Rutter testified that he was able to do his job, although it took him longer to perform certain tasks. Sometimes he had to cancel business trips because his back could not tolerate long flights, but he was able to rearrange appointments to get his work done. Mr. Rutter's employment performance reviews since the accident suggest that he was able to maintain a high level of performance at his job. His 2007 performance rating was "fully meets expectations". In 2008, his performance rating was "often exceeds expectations". For the review period 2009-2010, his performance rating was "often exceeds expectations". His most recent review indicated that his supervisor felt that Mr. Rutter's interpersonal skills were somewhat lacking, but there is no indication that physically he is impaired from performing his job.

**56**  Mr. Rutter described an incident during a business trip in May 2008, when his legs gave way and he collapsed while checking into a hotel in Chicago for a trade show. He said that after a few minutes he was able to move around, but his back was very sore and he walked hunched over. He also described a couple incidents when he was bending over and found that he could not stand up again for several minutes. On one of these occasions he spent about three days in bed.

**57**  A significant part of Mr. Rutter's employment involved golfing with his customers' representatives to promote and market his company's products. Mr. Rutter estimated that he played somewhere between 75 and 125 rounds of golf a year, much of it in connection with his employment.

**58**  Mr. Rutter continued to golf after the accident but on a much reduced frequency. When he changed jobs in 2010, Mr. Rutter was no longer required to play golf as part of his employment. Mr. Rutter has continued to play golf occasionally on a recreational basis. He testified that, in 2010, he played golf in connection with his employment on about twelve occasions. He had played about eight rounds of golf in 2011, up to the time of the trial. Mr. Rutter's handicap has dropped from 9 to 18 since the accident.

**59**  In addition to being an avid golfer, before the accident, Mr. Rutter ran on average six to 13 miles per day. He ran in the annual Vancouver Sun Run and in other charity runs. Mr. Rutter said that he tried running after the accident, but found it very difficult. In January 2007, Mr. Rutter participated in a charity 5 kilometre run, walking part of the time. Mr. Rutter also participated in the Vancouver Sun Run in April 2007, although he had to walk parts of the course. He was able to complete the race in 58 minutes compared to times of 55 minutes in 2005 and 2006. He said that immediately after completing the run he literally collapsed and had to be helped to his wife's car to be driven home. He said he was exhausted, his back was extremely sore and he spent the rest of the day in bed. Mr. Rutter said that he now walks and sometimes jogs on a treadmill.

**60**  Mr. Rutter was also on a curling team prior to the accident. After the accident he was unable to tolerate the sweeping, so he became a skip, where he did not have to sweep.

**61**  Mr. Rutter testified that his back pain prevents him from doing yard work that he used to engage in, including cutting the lawn, edging, trimming the trees in his yard twice a year, trimming shrubs, working in the flower beds and pressure washing. He has also not been able to assist in the physical labour when he and his wife re-insulated their house and had new windows installed.

**62**  Mr. Rutter testified that, in addition to the other physical effects of his injuries, he experienced some erectile dysfunction after the accident that affected his sexual relations with his wife. Mrs. Rutter confirmed that their sexual intimacy was negatively impacted as a result of Mr. Rutter's discomfort. It appears that Mr. Rutter raised this issue with his doctor on only one occasion, on July 24, 2007, when Dr. Jacobs suggested that he use Viagra to improve his sexual performance. It appears that Mr. Rutter was never referred to a urologist to further investigate this issue.

**63**  Mr. Rutter's injuries, particularly his chronic low back pain, have affected his ability to sleep soundly and have, at times, caused him to be grumpy at times. He also complains that he is less able to concentrate, although his difficulty in this regard seems to have been associated with his use of certain pain medication, particularly Ralivia, which is an opioid analgesic. Mr. Rutter testified that taking that medication clouded his judgment, so he stopped using that medication. He now uses Tylenol for pain relief.

**64**  Mr. Rutter's wife, his daughter and his friend, Ms. Renee Kinnear, all confirmed the significant change in Mr. Rutter's level of activity since the accident.

**4. Non-pecuniary damages**

**65**  Mr. Rutter led a very active life before the accident and was involved in a number of sports, particularly golf and running. His injuries, particularly the back injury, have led to a significant change in lifestyle for Mr. Rutter. Since the accident, Mr. Rutter has had to reduce his sporting activities substantially. He is also curtailed somewhat in his day-to-day activities, including assisting with housework and household maintenance. He has difficulty sleeping and, at times, is more irritable than he was before the accident. Fortunately, Mr. Rutter has been able to maintain his full-time employment despite his symptoms. I am satisfied that Mr. Rutter finds his life today more frustrating and less enjoyable than previously. Mr. Rutter suffers chronic back pain that is likely to continue well into the future, although Dr. le Nobel is of the opinion that if Mr. Rutter engages in an exercise regime that is developed and maintained with the assistance of a physiotherapist and kinesiologist some improvement in his symptoms is probable.

**66**  The plaintiff submits that an appropriate award of general damages for pain, suffering and loss of amenities would be in the range of $65,000.00. He refers to three cases in support of his submission on quantum: *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=); *Kerr v. Macklin*, [*2004 BCSC 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3SK-00000-00&context=); and *Lo v. Thompson*, [*2007 BCSC 1330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X45H-00000-00&context=).

**67**  Ms. Kuskis was a 38-year-old operations manager at a large travel agency. She was involved in a car accident, which exacerbated a pre-accident condition involving migraine headaches, neck and shoulder pain. The court found that with treatment the plaintiffs would probably improve over the next five years, but that the neck and shoulder pain would probably persist indefinitely. The court summarized the affects of the plaintiff's injuries at paras. 141 - 143:

**141** Ms. Kuskis has suffered a significant worsening of her painful pre-existing migraine disorder and a new form of headache due to her soft tissue injuries. She has also suffered a new form of low grade, but persistent, neck and shoulder pain. As a result of her increased headaches and pain, she is sometimes exhausted, irritable and unhappy. She is also less able to produce large volumes of computer-based work in short periods of time. Given her changed employment circumstances this compromised work capacity, though minimal, is a source of potential frustration and stress.

**142** Ms. Kuskis is a stoic and determined person. Despite her increased headaches and neck pain she remains physically active, upbeat and productive most of the time. She requires painful steroid injections, however, to control her increased neck and shoulder pain and associated symptoms. She also occasionally requires strong medication such as Oxycodone to manage her pain.

**143** Although Ms. Kuskis can work, travel and socialise most of the time without significant impairment, her personal life has been diminished by her increased headaches and pain. In particular, Ms. Kuskis' ability to form and maintain intimate relationships has been compromised by her increased irritability and fatigue. This, too, is a source of frustration and stress.

**68**  The court awarded $65,000.00 in non-pecuniary damages.

**69**  Mr. Kerr was a 51-year-old man who suffered a soft tissue injury to his neck and back as a result of a car accident that resulted in persistent pain descending from the left of his neck down his back in a reverse-L pattern, as well as discomfort and numbness in left pinkie and ring fingers. The court found that these symptoms would be with the plaintiff for the rest of his life. The plaintiff also suffered frayed nerves, sleep disturbance, tiredness and irritability. The injury resulted in the plaintiff having to stop playing rugby, a sport that he loved playing, and mountain biking. The injury also reduced his ability to control his Type 2 diabetes through exercise. The court assessed non-pecuniary damages at $65,000.00.

**70**  Ms. Lo was a 27-year-old woman at the time of the accident. She was physically fit and enjoyed excellent health. She worked out regularly and enjoyed mountain biking and snowboarding. As a result of the accident, Ms. Lo suffered soft-tissue injuries resulting in neck and back pain, and headaches which were likely to persist indefinitely. Her symptoms forced her to greatly reduce her former active lifestyle. Non-pecuniary damages were assessed at $65,000.00.

**71**  The defendants' submission with regard to non-pecuniary damages put forward three scenarios:

1. Short-lived soft tissue injuries to the plaintiff's neck and back caused by the accident, but the wrist injury not caused by the accident. The defendants submitted that if the court found that this scenario was accurate, non-pecuniary damages in the range of $7,500.00 to $12,000.00 would be appropriate.
2. Soft-tissue injuries with chronic low back pain caused by the accident, but the wrist injury not cause by the accident. The defendants submitted that if the court found that this scenario was accurate, non-pecuniary damages in the range of $35,000.00 to $40,000.00. The defendants relied on *Elgood v. Ellison*, [*2010 BCSC 442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62MJ-00000-00&context=); *Sharpe v. Tidey*, [*2009 BCSC 948*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0G0-00000-00&context=); and *Sandher v. Hogg*, [*2010 BCSC 1152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-212D-00000-00&context=).
3. Soft-tissue injuries, chronic low back pain and wrist injury, all caused by the accident. In this scenario, the defendants submitted that the appropriate range of non-pecuniary damages would be $45,000.00 to $50,000.00. The defendants rely on the decisions in *Mawji v. Hendry*, [*2007 BCSC 1880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FBFS-S2M4-00000-00&context=) [*Mawji*]; and *Perez v. Vancouver (City)*, [*2002 BCSC 1773*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3RB-00000-00&context=) [*Perez*] as illustrative of this range of damages.

**72**  I have found that it is the third scenario referred to by the defendants that actually occurred.

**73**  In *Mawji*, the plaintiff suffered soft-tissue injuries to her neck, back and left knee and right wrist. The injury to the wrist was the most serious of the injuries. At the time of trial, some four years after the accident, the plaintiff had only flare-ups in her neck back and knee, but complained of persistent the problem with her wrist, which restricted her ability to participate in sports to the same degree that she enjoyed before the accident. The medical evidence concerning the prognosis with regard to the wrist was "inexact", but the court found that there was no evidence that the plaintiff's problems with her wrist would persist in the long term. Non-pecuniary damages were assessed at $45,000.00.

**74**  In *Perez*, the plaintiff fell on uneven pavement and fractured her wrist, requiring surgery to repair the damage. The plaintiff claimed a permanent disability in her left hand and wrist that forced her to give up certain sports that she used to enjoy, namely tennis and volleyball, and affected her ability to perform many day-to-day activities. The plaintiff also claimed that the injury also impaired her ability to type, which affected her employment. The court had serious reservations about the reliability of the plaintiff's evidence concerning the impact of the injury on her ability to work and her life. The court also found that the plaintiff was intending to undergo further surgery for which there was a 75% chance that the plaintiff's pain would be improved or significantly eliminated.

**75**  At paras. 86-89, the trial judge summarized the impact of the accident on the plaintiff:

**86** The plaintiff nevertheless has since the accident suffered pain and the loss of mobility of her wrist which has had a significant impact on her lifestyle.

**87** She was an active person before the fall, and, even though the injury was not to her dominant hand, it has affected her ability to play and enjoy tennis, volleyball and to do gardening and housework. I think the injury has also affected the plaintiff's ability to enjoy work to the extent that she did prior to the accident.

**88** Ms. Gillespie has developed reactive stiffness in her left neck, shoulder and elbow. She also has developed osteoarthritis. The further surgery requires a bone graft from her hip and there will further pain and discomfort and a period of convalescence.

**89** Although I have noted in my comments on credibility that her evidence must be treated with caution, the accident has clearly had a significant effect on her enjoyment of life and will continue to have an impact in the future.

**76**  Non-pecuniary damages were assessed at $50,000.00.

**77**  In my view, the chronic low back pain which Mr. Rutter experiences has a more significant impact on his life and the prognosis for significant improvement is not as good as was the case in *Mawji* and *Perez*. In my view, the authorities cited by Mr. Rutter are more representative of an appropriate range of non-pecuniary damages considering the nature and effect of his injuries. I assess non-pecuniary damages at $65,000.00.

**5. Claim for loss of future earning capacity**

**78**  The plaintiff advances a claim for loss of earning capacity, which he says should be valued at $75,000.00. He advances two bases for his claim of loss of earning capacity. The first basis is that he was reassigned from a position as a Chain Development Manager to one as a Sales Training Manager. Mr. Rutter says that while his base salary remained the same, the position he is now in does not offer him as great a potential to earn bonuses as did his former position, having been reduced from 0 to 37.5% to 0 to 15% of his base salary. Thus far, however, he has not suffered any reduction in salary. Mr. Rutter also says that he does not feel that his performance in the new position is as good as it was in his former position and he is concerned about job security. He says that if he loses his current job he will be less marketable and that he has therefore suffered a loss of capacity.

**79**  The second basis upon which Mr. Rutter advances his claim for loss of earning capacity is that he has lost the opportunity to start his own renovation business. His evidence was that before the accident he had thoughts of retiring at age 55 and starting a renovation business with a friend of his. He says that he is no longer able to carry out the physical work that would be required to operate such a business.

**80**  The defendants submit that the plaintiff has failed to establish an evidentiary basis for a claim for loss of earning capacity. They say that Mr. Rutter has not established that the accident has caused a real and substantial possibility of a future event that might lead to an income loss.

**81**  The question of what is required to establish claim based on loss of earning capacity was considered by the Court of Appeal recently in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) [*Perren*]. In that case, the plaintiff was involved in a motor vehicle accident and suffered neck and back injuries. She developed chronic pain which rendered her unable to participate to the same extent in normal physical family life, housekeeping and recreational activities. These symptoms were likely to continue indefinitely. After the accident the plaintiff continued to be employed by the same employer as before the accident. The trial judge found that the impact of the accident on the plaintiffs' future earnings was minimal because of her chosen career path, but awarded her $10,000.00 for future income loss on the basis that she was less marketable as an employee.

**82**  On appeal, Garson J.A., giving the judgment of the Court, stated the question for determination at para. 4, as follows:

**4** [T]he question is whether a plaintiff who demonstrates a diminishment in her earning capacity no matter how slight, is entitled to some award of damages, even where she cannot demonstrate any substantial possibility that that lost capacity will result in a pecuniary loss.

**83**  Garson, J.A. then reviewed a number of prior judgments in this area and discussed the two approaches that emerge from the authorities. One approach, which she termed the "real possibility" approach is illustrated by *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (C.A.) [*Steenblok*], where a demonstrated pecuniary loss is quantifiable in a measurable way.

**84**  In *Steenblok*, the plaintiff had been employed as a raker on a paving crew before he was injured. He returned to that employment for a time, but found the work too strenuous. He found work as a security guard but gave up that job because he did not like it. The trial judge dismissed the plaintiff's claim for loss of future earning capacity on the ground that he had failed to show that his chronic pain was irreversible. Hutcheon J.A., at. p. 136, stated what he considered to be the governing principle:

[I]n dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring and the balance of probabilities is confined to determining whether it did in fact happen in the past.

**85**  Hutcheon J.A. further said:

The question then is what is the chance that "the affliction of chronic debilitating pain is indeed irreversible" to use the words of the trial judge. That chance is certainly a substantial possibility if Steenblok attempts to work full time in his job as a raker on an asphalt paving crew.

**86**  The appeal was allowed by increasing the damages awarded by the trial judge by $150,000.00 for loss of future earning capacity based on the difference between the plaintiff's rate of pay from his former employment and that of a security guard for a period of time up to age 60.

**87**  The other approach, which Garson J.A. referred to as the "capital asset" approach is illustrated by the decision in *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), [*53 B.C.A.C. 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) [*Pallos*]. In that case, the plaintiff suffered a fracture of his leg when he was struck by a car. He had permanent pain that would limit his capacity to perform certain activities in the future. However, the plaintiff remained employed by his pre-accident employer. The trial judge declined to make any award for loss of earning capacity on the ground that the plaintiff failed to establish, as required by *Steenblok*, that there was a "real possibility" of his being unable to work at his present job at some future date.

**88**  Finch J.A. held this to be an error, saying at para. 29:

**29** In my respectful view, a consideration of this issue should not have been limited to the test established in *Steenblok v. Funk* (*supra*). The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

**89**  Finch J.A. assessed damages for loss of earning capacity at $40,000.00.

**90**  Madam Justice Garson also referred to *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=) [*Steward*]. In *Steward*, the trial judge, [*[2005] B.C.J. No. 2838*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S313-00000-00&context=), awarded the plaintiff $50,000.00 as compensation for the impairment of his earning capacity, even though the plaintiff remained employed in the same occupation and there was no suggestion that he had any intention to go into a career in which his injuries would be an impediment. At paras. 17-18, Donald J.A. observed:

**17** ... 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* [[*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=)] 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.

**91**  Based on her review of the case law, including *Steenblok*, *Pallos* and *Steward*, Garson J.A. concluded, in *Perren*, as follows at paras. 30-33:

**30** Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), and *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=). These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

**31** Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

**32** A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, [*[2008] B.C.J. No. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

**33** On the facts of this case, the trial judge found that there was no substantial possibility of a future event leading to an income loss. That should have been the end of the enquiry. That was a reasonable conclusion on the evidence because there was no evidence that she was limited in performing any realistic alternative occupation.

[Emphasis in original.]

**92**  It appears to me, based on *Perren*, that the question that I must first answer is this: has the plaintiff proven that there is a real and substantial possibility of a future event leading to an income loss? He says, first, that there is a real and substantial possibility that he will lose his job, and that if he does there is a real and substantial possibility that he will not be able to find employment with comparable remuneration that he can undertake given his chronic back pain.

**93**  I am satisfied that if the plaintiff were to lose his job, it would not be because of the accident. He has proven himself capable of working, without missing any time, since the accident. He has performed his job well, according to his periodic assessments. If he requires improvement with regard to his current position, it is with regard to interpersonal skills and communication. In my view, Mr. Rutter is an intelligent man with a good work ethic and is very capable of improving in these areas. In my view, his fears regarding the security of his employment with his current employer are not well-founded.

**94**  Mr. Rutter submits, however, that circumstances other than his performance might result in the loss of his job and, if that were to occur, he would be less marketable as an employee. That would certainly be the case with respect to jobs requiring significant physical capacity, but Mr. Rutter's experience is in the field of sales and management, where he has proven himself capable, both before and after the accident. In my view, there is no realistic possibility of his pursuing or attempting to pursue a career that would require a physical capacity beyond that which his present job requires, which he has been able to handle.

**95**  With regard to the lost opportunity to start up a renovation business, I am not satisfied that there was a real and substantial possibility that he would have pursued such an undertaking. Mr. Rutter said he had thought of starting such a business when he turned 55. He said he talked to his friend about going into business, but the friend did not testify. No plan was put forward concerning the proposed business. Mr. Rutter has done some home renovations and did some work on the house that he built in Houston, which I will deal with more fully later in these Reasons, but he is not a qualified tradesperson. Further, I do not believe it is reasonable to suppose that Mr. Rutter could have established and run a renovation business that could provide remuneration greater than that which he has enjoyed and can continue to enjoy from his current occupation.

**96**  I am not satisfied that there is any basis upon which Mr. Rutter is entitled to compensation for loss of opportunity or capacity to earn income in the future.

**6. Cost of future care**

**97**  The plaintiff advances a claim for cost of future care supported, in part, by the report of Ms. Linda Waithman, an occupational therapist, who conducted a work capacity evaluation for Mr. Rutter. Ms. Waithman provided an opinion with regard to Mr. Rutter's future care needs based upon her interview and evaluation of Mr. Rutter and her review of Dr. Jacobs' medical reports. Ms. Waithman identified a number of future care items and provided her estimate of the cost of the items and frequency of replacement. They are set out in Appendix C of Ms. Waithman's report, which is reproduced below:



**98**  According to a report prepared by an economist, the forgoing services would have a present value of between $77,068.00 and $113,707.00. Counsel for Mr. Rutter suggests an award of $50,000.00 would be reasonable compensation for the cost of future care.

**99**  The defendants submit that Mr. Rutter does not require physiotherapy or kinesiology services. They point out that Mr. Rutter has not attended physiotherapy in the past four years. He had been trained how to do home exercises. They say that if it is a matter of motivation, Mr. Rutter has a duty to apply himself. The defendants submit that Mr. Rutter does not need a gym pass, since he has a gym in his home that is equipped with two treadmills, a recumbent bicycle, a stair climber, a set of weights and a Bowflex machine.

**100**  Dr. le Nobel recommended that Mr. Rutter work with a kinesiologist and an exercise based physiotherapist to help develop an exercise program. It seems to me that once the program is developed and Mr. Rutter is monitored over a reasonable period of time, there should be no need for ongoing physiotherapy as suggested by Ms. Waithman. Dr. le Nobel recommended access to a physiotherapist and kinesiologist several times a month for ten to twelve months.

**101**  I accept that Mr. Rutter needs the services of a kinesiologist and physiotherapist to work with him to develop an effective exercise program. I accept that this will involve more than simply showing Mr. Rutter what exercises to do; it will require follow-up for some period of time to ensure that Mr. Rutter stays on track. On the other hand, Mr. Rutter does have a duty to mitigate his loss and to find the self-motivation to maintain the program. I would think that if Mr. Rutter works in tandem with a physiotherapist and kinesiologist, once a week over a period of six months, he should have developed a program and a routine that will maximize his potential recovery. Such a program would have a cost of between $2,400.00 and $3,240.00, based on the cost estimates provided by Ms. Waithman.

**102**  I will allow $2,820.00 for the future cost of physiotherapy and kinesiology services.

**103**  I agree with the submission of the defendants that Mr. Rutter does not need a gym pass considering the equipment that he already has.

**104**  With regard to the costs associated with an ergonomic assessment and special furniture and equipment for his work, Mr. Rutter is not stuck at a desk or computer station for lengthy periods of time without the ability to move around. He works from a home office. He is able to sit, stand and walk around to relieve tensions as he desires. It is of some considerable significance, in my view, that Mr. Rutter has demonstrated the ability to perform his work without losing any time from work. I am not satisfied that the need for most of these items of future care has been proven. I do agree that an Obus Forme Back Support is reasonable. The present value of the cost of two back supports every five years is approximately $750.00.

**105**  With regard to housecleaning, Ms. Waithman is of the opinion that Mr. Rutter is capable of performing the majority of the basic household tasks between waist and shoulder height, but would have difficulty with lower and higher level tasks. This would primarily involve vacuuming/mopping floors and washing windows. Mr. and Mrs. Rutter share the household chores. Thus far, they have not engaged any outside services to do the housecleaning. I am not satisfied that Mr. Rutter is entitled to compensation in respect of regular household chores.

**106**  I agree, however, that Mr. Rutter is no longer able to perform some of the more physical home maintenance that he used to and that he is entitled to be compensated so that he can hire others to perform these services. These maintenance items include washing the outsides of windows, pressure washing decks and walks, cleaning gutters, touch-up painting and major pruning. I think a reasonable allowance for these tasks would be ten hours, twice per year at a rate of $40.00 per hour or $800.00 per year. I think it would be reasonable to suppose that without the accident, Mr. Rutter would have ceased doing these heavier tasks by the time he reached age 70. Using the multiplier table provided by the economist, I calculate that this claim has a present value of $9,269.00.

**107**  With regard to regular lawn mowing, the Rutters have a lawn in front of their house that is about 60 by 40 feet in size and some grass along one side of the house that is about 12 by 60 feet in size. Mr. Rutter testified that it takes about an hour to mow the grass. Ms. Waithman agreed that Mr. Rutter is capable of general yard clean up and is capable of pushing a lawn mower over flat ground. I am not persuaded that Mr. Rutter requires assistance with mowing his grass every ten days or so from spring until fall.

**108**  In summary with respect to this head of damage, I award the sum of $12,839.00 for the cost of future care.

**7. Extra costs associated with house in Houston**

***Background***

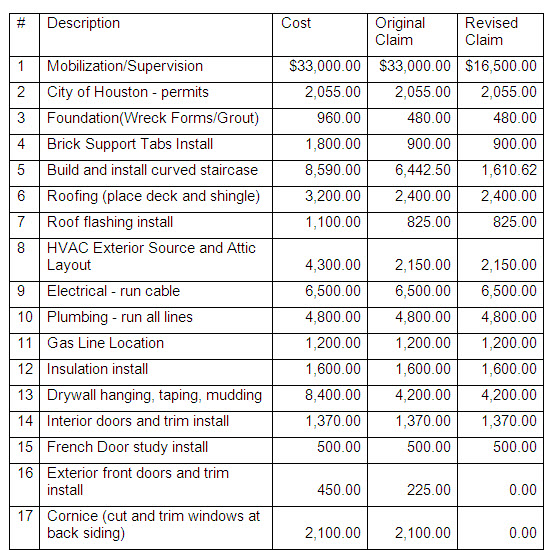
**109**  In 2003, Mr. Rutter's daughter, Amanda, received a swimming scholarship at a university in Houston, Texas. For a time, Ms. Rutter lived in a dormitory at the university but was dissatisfied with that arrangement and wanted a place of her own. In 2005, Mr. Rutter and his wife decided to build a house in Houston where their daughter could live while attending university. They purchased a lot in or around June 2005, and construction on the house began in the summer of 2006. By December 15, 2006, construction had reached the stage where the house had been largely framed. Mr. Rutter testified that before the accident he went to Houston once or twice a month, usually extending a business trip for a day or two over a weekend. He hired casual labourers from time to time. He supervised the labourers as well as doing physical labour himself. The house was completed by December 2007.

***Nature of the claim***

**110**  Mr. Rutter testified that after the accident he realized he could not carry on with the construction on his own and that, in or around March 2007, he hired a general contractor, Mr. Pratt, to supervise the balance of construction and provide skilled labour. Mr. Pratt remained on the job until late 2007, when the majority of the work had been completed. Mr. Rutter testified that there was only some finishing work left to do, which he was able to complete with the help of his daughter and son-in-law. Mr. Rutter asserts that if he had not been injured in the accident he would have completed the construction of the house himself, hiring skilled labourers only when he did not have the necessary skills to do the work. He claims that he is entitled to compensation for the cost of hiring Mr. Pratt and other persons to do work that, but for the accident, he would have done himself.

**111**  At trial, the plaintiff put in evidence a document that summarized the value of the services paid by him for work that he said he would have done if he had not been injured. That summary amounted to $98,384.75. During closing submissions, counsel for Mr. Rutter revised the summary, reducing the claim to a total of $74,567.87.

**112**  The table below sets out the particulars of Mr. Rutter's original and revised claim:



***Documentary evidence***

**113**  Mr. Rutter was unable to provide any receipts or other documents to substantiate many of the payments to third persons regarding this claim. He provided invoices in support of items 15-16, 19-20, 22-25 and 30, which was work that was done by persons other than Mr. Pratt.

**114**  Mr. Rutter's explanation for his inability to provide documentary evidence is as follows. Mr. Rutter testified that in the early summer of 2008 his adjuster at ICBC, Ms. Levy, requested receipts in support of his claim for the extra construction costs. He said that he and his wife compiled the receipts and showed them to Ms. Levy, but she told him that she did not require the receipts at that time. He said that subsequently Ms. Levy called him asking for the receipts and he asked his wife to deliver them to Ms. Levy's office. Ms. Rutter testified that as requested by her husband, she took a large envelope full of receipts to ICBC in the summer of 2008, and left the envelope, addressed to Ms. Levy, with a woman at the counter in Ms. Levy's office. She said she did not make copies of the receipts because she thought they would be returned.

**115**  Ms. Levy testified that she met with Mr. Rutter on March 19, 2008, told her about the house he was building in Houston and said that he would be spending an extra $50,000 to $60,000 in costs for the construction because of his injuries and would be making a claim in that amount. She said that she advised Mr. Rutter that he would have to produce documents to support the claim and that he did not have any documents with him at the meeting. On July 2, 2008, Ms. Levy spoke to Mr. Rutter asking for the documents and he told her that his wife had dropped off the receipts. Ms. Levy made enquiries of the receptionist and mail clerk in her office, but no documents were located.

**116**  Mr. Rutter testified that he was unable to locate Mr. Pratt and a number of other workers whom he paid in order to obtain confirmation of the amounts paid to them.

**117**  Mr. Rutter said that he paid Mr. Pratt and the other workers whom he retained in cash, using a US bank account into which he periodically transferred money from his Canadian bank account. Mr. Rutter was unable to provide any records from the US bank and testified that he was told by the bank that they did not keep records past two years. Mr. Rutter was able to produce only a few documents relating to his Canadian bank account. He acknowledged that he received electronic statements from his Canadian bank, but said that he had been unable to obtain copies of the statements from the bank. The documents that Mr. Rutter did produce indicate the following payments into the US bank account (all amounts in US dollars):

|  |  |  |  |
| --- | --- | --- | --- |
|  | June 21, 2005 | $50,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | September 1, 2005 | $50,000.00 |  |
|  | November 28, 2005 | $50,000.00 |  |
|  | February 14, 2006 | $17,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | August 3, 2006 | $32,000.00 |  |
|  | June 22, 2007 | $9,500.00 |  |

***Discussion re items of claim***

**118**  The evidence with regard Item 1 was confusing at best. As I indicated previously, Mr. Rutter testified that he hired Mr. Pratt to both supervise the construction and to provide skilled labour, which Mr. Rutter would have undertaken had he not been injured. The implication is that whatever Mr. Rutter could have done, Mr. Pratt would do. According to Mr. Rutter, Mr. Pratt was to hire other skilled workers only where the job was outside of Mr. Pratt's expertise. Mr. Rutter testified that he and Mr. Pratt agreed on a price to complete the work.

**119**  Mr. Rutter testified that Item #1, as initially put forward, was for payments made to Mr. Pratt for his skilled labour and for managing the project. He did not say what portion of the claim represented labour and what portion represented management of the project. During his examination in chief, Mr. Rutter testified that Item #1 should be reduced by one-half because he conceded that he could have performed the supervisory part of what Mr. Pratt did, but he would still have had to hire skilled labourers to do the work that Mr. Pratt did. He said that he estimated the value of Mr. Pratt's skilled labour was about one-half of what Mr. Pratt charged, but provided no basis for the estimate. Mr. Rutter did not identify what types of skilled labour Mr. Pratt provided or how he valued that labour.

**120**  Item #5 is a claim for the cost of having Mr. Pratt design and build a curved staircase. Mr. Rutter testified he would have been able to do one-quarter of that work, but would have needed someone with more expertise to design it and take the lead role in its construction. Hence, he reduced the claim to 25% of the total charged by Mr. Pratt. However, if Item #1 was to cover the work that Mr. Rutter would otherwise have done, 25% of the cost of constructing the staircase ought to be included in item #1 and rather than being a separate item.

**121**  There are a number of other items which Mr. Rutter testified he would have done, even though they involved special skills and that Mr. Pratt had to do in his place and would, therefore, fall under Item #1. It appears to me that these items would include at least part of Items 6, 8, 10, 11, 16 and 26. It also appears to me that these items would have included Items 14, 15, 18, 19, 20, 22, 23, 24, 25, 28, 29 and 30. Some of these items, namely Items 15, 16, 19, 20, 22 - 25, and 30, were apparently completed by someone other than Mr. Pratt because Mr. Rutter provided invoices from other persons. Mr. Rutter gave no explanation why Mr. Pratt did not do this part of the work. With regard to the other items, Mr. Rutter did not testify whether Mr. Pratt or someone else did the work. If Mr. Pratt did the work, it should come within Item #1. If Mr. Pratt did not do the work, there is no explanation for why he did not do it.

**122**  Mr. Rutter testified that Item #2 represents the cost of transferring permits from Mr. Pratt's name into his own name before obtaining the final occupancy permit. He maintained that he could not obtain any documentary evidence to confirm this claim because the City of Houston did not retain any records relating to them for more than two years. I find that to be simply incredible.

**123**  There are other circumstances in addition to the forgoing that cause me to doubt the validity of Mr. Rutter's claim for extra costs of building as presented. Mr. Rutter makes a claim under Item #8 for one-half of the cost of $4,300.00 relating to the heating and air conditioning system for work that he says he would have done, yet he produced an invoice from a contractor in the amount of $3,451.00 purportedly for installing HVAC ducting and water lines and installing a Heat/AC exchanger in the attic for which he makes no claim, on the basis that the work covered by the invoice was beyond his expertise. There appears to me to be an overlap in that both Item #8 and the invoice refer to installing ducting and water lines.

**124**  Mr. Rutter asserts that he and his son-in-law would have installed all of the drywall in the house, including that placed on the ceilings; although he concedes he would have hired someone to do the mudding, taping and sanding. He therefore claims one-half of the total cost for the drywall. I do not believe that Mr. Rutter would have done that work. It involves very heavy sheets, requiring special tools and experience. Further, I do not believe that Mr. Rutter would have had the time to do the work. He testified that it would have taken him ten days just to install the drywall. He was working full-time in 2007 and had only four weeks of holiday that year, plus whatever weekends he might have been able to arrange around a business trip that took him to the US.

**125**  Mr. Rutter testified that he was able to drill all of the holes in the studs where electrical cable was to pass through, but was unable to pull the cables from where the electrical panel would be located to their destinations. If he was drilling holes, I cannot see why his daughter, a very athletic woman and his son-in-law could not have worked with him to pull the cables. I do not believe it was necessary to hire anyone to do this work if Mr. Rutter did not want to. Further, there is no evidence as to who he paid to do this work. It is not skilled labour and even at $25.00 per hour, the claim represents 260 hours or over one month of labour. I cannot believe it took that long. If it did, Mr. Rutter could not have spent that much time pulling cable.

**126**  Mr. Rutter agreed that texturing the walls was an art, that he would have had to rent special equipment and that he had never done that type of texturing before. He said he would have tried to do it and that if he was not able to do the job he would have contracted it out. I do not believe that he would have taken that chance when he was building a custom home.

**127**  Mr. Rutter was living in British Columbia and working full-time when the house was under construction. As I have already noted, he had only four weeks of vacation in 2007. In the six month before the accident he made some trips to Houston on weekends but his business did not take him to Houston so he made the trips by extending business trips to other locations, particularly Chicago. Mr. Rutter could not have afforded to travel to Houston every weekend to work on the house, nor would it have made any sense economically.

**128**  Mr. Rutter's revised claim for labour that he says he would have done but for the accident totals $74,567.87. At a labour rate of $50.00 per hour, that represents 1,491 hours or 186 eight hour days or 26 weeks. At $100.00 per hour, the claim still represents 93 eight-hour days or over three months of full-time labour, seven days per week, eight hours per day. Mr. Rutter could not possibly have done all of this work by the end of 2007. It would likely have taken at least an additional year to complete construction. Mr. Rutter testified that he was in no rush to complete the house, but the purpose of the house was to provide a home for his daughter so they must have wanted to complete the construction sooner rather than later.

**129**  In the end, having considered all of the evidence, I simply am not satisfied, on the balance of probabilities, that Mr. Rutter would have done the work for which he has claimed extra costs and that has incurred the extra costs as he has alleged. This part of the claim is dismissed.

**8. Special damages**

**130**  Mr. Rutter claims special damages of $2,675.10, including a claim of $2,100.00 for obtaining bank statements and other financial documents to substantiate his claim regarding the extra costs associate with the house in Houston. As I have dismissed that aspect of the claim, this portion of the special damages claim cannot succeed. I therefore award special damages in the amount of $575.10.

**90. Failure to mitigate**

**131**  The defendants allege that the plaintiff has failed to mitigate his loss in that he failed to follow Dr. Jacobs' advice in December 2007 to continue with physiotherapy and that, if he had done so, some of his low back symptoms might have been relieved. They also submit that he failed to mitigate with regard to any erectile dysfunction that he may have suffered by not using medications to deal with the issue.

**132**  A plaintiff cannot recover for losses which arose through the defendant's wrong but which could have been avoided had the plaintiff taken reasonable steps to minimize the loss.

**133**  The onus is on the defendant to prove that the plaintiff acted unreasonably in not taking mitigative steps.

**134**  Mr. Rutter testified that the course of physiotherapy he had during the period from January to March 2007 did not relieve his symptoms of back pain. In August 2007, Mr. Rutter returned to a physiotherapist, who recommended an exercise regime. Mr. Rutter said that he did the exercises for four or five months. He said that he stopped doing the exercises after consulting with Dr. Jacobs. He told Dr. Jacobs that he had difficulty doing the exercises because of the amount that he travelled in connection with his work.

**135**  In December 2007, Dr. Jacobs recommended that Mr. Rutter continue with physiotherapy. In cross-examination, Dr. Jacobs testified that if Mr. Rutter had continued with physiotherapy and home exercises it is possible that they would have relieved some of his symptoms.

**136**  I am not satisfied that Mr. Rutter acted unreasonably in not continuing with physiotherapy and exercises recommended by the physiotherapist when he honestly believed that he was not deriving any relief of symptoms from them. Further, even if Mr. Rutter had continued with the physiotherapy, I am satisfied that he would have continued to experience pain and discomfort and significant interference with his pre-accident lifestyle. At most, Dr. Jacobs offered the opinion that it is possible that if Mr. Rutter had continued with the physiotherapy and exercise his symptoms would have been relieved somewhat. While Dr. le Nobel opines that some improvement in symptomology can be expected if Mr. Rutter maintains an exercise program designed and supervised by a kinesiologist and physiotherapist, it is clear on the evidence that Mr. Rutter cannot expect to return to his pre-accident condition.

**137**  While Mr. Rutter and his wife both testified about some decrease in Mr. Rutter's level of sexual performance, it appeared to me that this was a relatively minor issue compared to his continuing back problem and it is only a minor component of his non-pecuniary damages.

**138**  I have assessed Mr. Rutter's damages for the cost of future care on the basis that Mr. Rutter follows Dr. le Nobel's advice.

**139**  I am not persuaded that Mr. Rutter's damages should be decreased on account of a failure to mitigate.

**V. SUMMARY**

**140**  The plaintiff is entitled to judgment in the following amounts:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (a) | Non-pecuniary damages: | $65,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | Damages for loss of capacity: | nil |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (c) | Cost of future care: | $12,839.00 |  |

1. Extra costs of construction nil re house:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (e) | Special damages: | $575.10 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $78,414.10 |  |

**141**  Unless there are relevant circumstances of which I am not aware, the plaintiff is entitled to his costs at Scale B.

B.M. JOYCE J.

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[***R. v. Parent, [2012] B.C.J. No. 704***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G398-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.A. Schultes J.

Heard: September 12-16, 19, November 9 and 29, 2011.

Oral judgment: January 19, 2012.

Docket: X73835-2

Registry: New Westminster

**[2012] B.C.J. No. 704** | 2012 BCSC 533 | 31 M.V.R. (6th) 230 | 100 W.C.B. (2d) 545 | 2012 CarswellBC 1022

Between Regina, and Brent Donald Parent

(181 paras.)

**Case Summary**

**Criminal law — Criminal Code offences — Offences against person and reputation — Motor vehicles — Criminal *negligence* — Causing death — Dangerous operation of motor vehicle — Failing to stop or remain at accident scene — Trial of Parent, charged with criminal *negligence* causing death, dangerous driving and failing to remain at an accident scene — Parent allegedly caused a pickup truck to drive off the road — Parent then allegedly returned to the scene, striking and killing O'Brien, who had been an occupant of the pickup truck — Parent deliberately initiated physical contact with the pickup truck — He then failed to remain at the accident scene — When returning, Parent aggressively swerved, striking O'Brien — That result was well within the reasonable foreseeable risk of engaging in such negligent conduct — Parent found guilty.**

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| Trial of Parent, charged with criminal ***negligence*** causing death, dangerous driving and failing to remain at the scene of an accident. The charges arose from two incidents. First of all, Parent allegedly caused a pickup truck operated by Dooley to drive off the road while it was attempting to pass his vehicle. Parent then allegedly returned to the scene of the accident a short time later and allegedly struck and killed O'Brien, who had been an occupant of Dooley's vehicle and was standing at the side of the road when he was struck. With respect to the first incident, Parent admitted that he attempted to prevent Dooley's vehicle from passing him. However, he submitted that he never had any intention to make contact with Dooley's vehicle. With respect to the second incident, Parent took the position that he was advancing slowly toward the accident scene when he was distracted by the aggressive approach of Dooley and one of his companions. While he was momentarily distracted, he struck O'Brien, although he was not aware that he had done so until he heard about the death the following day.  HELD: Parent found guilty.  Parent's evidence was unsatisfactory in many respects and was inconsistent with common sense. Parent was driving his vehicle aggressively and deliberately initiated physical contact with Dooley's vehicle. Such conduct was objectively dangerous and represented a marked departure from the standard of care of a prudent driver. Parent then failed to remain at the scene of the accident with the Dooley vehicle. When returning to the accident scene, Parent aggressively swerved toward Dooley and his companions. While correcting the swerve, he inadvertently struck O'Brien. The swerve was the cause of O'Brien's death. Furthermore, striking someone who was not visible to Parent in the course of using his vehicle in such a manner was well within the reasonable foreseeable risk of engaging in such negligent conduct. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, R.S.C. 1985, c. C-46, s. 249, s. 252

**Counsel**

Counsel for the Crown: D. Ballyk and C. Yamashiro.

Counsel for the Accused: V. Michaels.

[Editor's note: An amended judgment was released by the Court May 26, 2012. The changes were not indicated. This documents contains the amended text.]

**Oral Reasons for Judgment**

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| **T.A. SCHULTES J. (orally)** |

**I.** **INTRODUCTION**

**1**  Brent Parent is charged with criminal ***negligence*** causing death, dangerous driving causing death, dangerous driving, and two counts of failing to remain at the scene of an accident. These charges arise from two motor vehicle incidents, as I will call them, in which Mr. Parent was involved while operating his pickup truck in the early morning hours of March 13, 2008.

**2**  In the first he is alleged to have caused another pickup truck, operated by Sam Dooley, to drive off the road while it was attempting to pass his vehicle.

**3**  In the second he is alleged to have returned to the scene of that accident shortly afterwards and, in the course of operating his vehicle, to have struck and killed Silas O'Brien, who had been an occupant of Mr. Dooley's vehicle. Mr. O'Brien, along with the other occupants, had emerged from the Dooley vehicle after it went off the road.

**4**  For reasons that I will discuss later, the Crown has conceded, correctly in my view, that there should not be a conviction for the second count of failing to remain at the scene, which is in connection with the collision with Mr. O'Brien. That is Count 3 in the indictment.

**II.** **EVIDENCE**

**A.** **The Road Configuration**

**5**  Both these incidents occurred on 16th Avenue in Langley, between 264th and 260th Street. In this area 16th is a two-lane roadway running east and west, divided by a double solid line. The eastbound and westbound lanes are 3.75 and 3.78 metres wide respectively. There is a white fog line defining the outer margins of the travelling portion of each lane. Specifically, in the case of the south side of 16th Avenue, which contains the eastbound lane and where the events most relevant to this case occurred, there is a narrow paved portion outside the fog line, after which it turns to dirt and then to the grassy beginnings of a fairly shallow ditch.

**6**  16th Avenue is a main connector route in Langley and it is heavily travelled during the day, including by commercial vehicles. It is only lightly travelled at the time of night during which these matters arose. The posted speed limit is 60 kilometres per hour in this part of 16th, but it is common for vehicles to exceed that posted speed at night.

**7**  Perhaps most significantly in terms of the configuration of this roadway, there is no artificial lighting. Visibility for drivers at night is provided mainly by their own vehicle headlights.

**8**  Weather was not a factor in these incidents.

**B.** **The First Incident**

*1.* *The Dooley Vehicle*

**9**  Sam Dooley, Silas O'Brien and Luke Stephen were travelling westbound on 16th. They were headed for a vacation in Hawaii that was to involve them flying from Seattle later that day.

**10**  Mr. Dooley was operating his Chevrolet Silverado pickup truck. Mr. O'Brien was the front seat passenger and Mr. Stephen was riding in the rear, on the passenger side.

*2.* *The Parent Vehicle*

**11**  Mr. Parent was operating a Ford F-350 diesel pickup truck. His brother, Lloyd Teneycke, was his front seat passenger. They were returning to Mr. Parent's home after a social evening that had been spent with Mr. Teneycke's friends. Mr. Teneycke had journeyed down from his home in Castlegar with these friends to attend an auction later that day.

**12**  On all the evidence it is clear that Mr. Parent had consumed only a small amount of alcohol much earlier in the evening and that alcohol played no role in the events that followed.

**13**  An unusual feature of Mr. Parent's truck was that it carried a sled deck, a large aluminium structure anchored in the bed of the truck that was used primarily for transporting snowmobiles or other types of recreational vehicles. It could also be used as a flat deck for transporting large loads. The significance of the sled deck in this case is that it extended outwards from the sides of the truck for approximately 20 centimetres on either side. There was evidence, which I will discuss, of contact between one side of this deck and parts of the Dooley vehicle.

*3.* *Sam Dooley*

**14**  Mr. Dooley recalled that he was driving westbound on 16th Avenue shortly after 2:00 a.m. He was travelling between 70 and 80 kilometres per hour. After turning on to 16th from 264th Street, he noticed the tail lights of a vehicle ahead of him on 16th, headed in the same direction. When he got within 100 yards of this vehicle, it started to brake. He assumed that it was slowing down to turn. It slowed down even more when he was about 50 yards back. By this time he had begun to apply light pressure on his brakes. As he got closer, within about 30 yards, the vehicle ahead jammed on its own brakes, to an extent that he saw the whole back end of it lift up, as it came to a dead stop. Mr. Dooley said he brought his vehicle to a near standstill. The brake lights of the vehicle ahead had been on throughout this process.

**15**  He concluded that the driver of this vehicle was intending to aggravate him or had some other reason for slowing down, so he pulled out into the oncoming eastbound lane to pass it, initially at a speed of about 20 kilometres an hour.

**16**  As soon as he accelerated to pass, the other vehicle also accelerated, so that he was unable to get ahead of it. He estimated his speed as being about 40 to 50 kilometres per hour in this passing attempt. The farthest he advanced was when his truck was level with the other vehicle.

**17**  Mr. Dooley said that as they moved forward, the other vehicle began to merge towards him, that is, to move sideways into the oncoming lane that he occupied, so as to crowd him to the left. Mr. Dooley in turn moved his own vehicle to the left, to avoid contact between the vehicles. The other vehicle merged toward him again, so that he was forced to drive over the fog line and near the ditch to avoid contact. Given this precarious position, Mr. Dooley applied his brakes to attempt to slow down and get behind this other vehicle. It came over towards him a third time and made contact, causing a loud crunching noise and pushing his truck right into the ditch, where it flipped over. The two vehicles were essentially even with each other when all of this occurred.

*4.* *Luke Stephen*

**18**  Mr. Stephen's recollection of this portion of the incident differed in some respects. He recalled that they were behind a pickup truck that was going slower than they were. They were travelling 70 to 80 kilometres per hour and the truck in front of them was travelling between 40 and 60 kilometres an hour. Mr. Stephen said the driver of the truck in front tapped, that is he lightly applied, his brakes when they were 20 to 25 yards behind it. Mr. Dooley did not slow down. Then as they gained on it a little more, with it 10 to 15 yards ahead of them, that other driver slammed his brakes on, requiring Mr. Dooley to swerve to miss the truck in front of him and go into the oncoming lane. Mr. Dooley slowed down only slightly in the course of this evasive manoeuvre, according to Mr. Stephen. As a result the Dooley vehicle was almost immediately beside the other vehicle.

**19**  Mr. Stephen's view was that, according to the brake lights of the other truck, it only applied its brakes twice -- when the driver tapped them and when he slammed them on. The other driver did not have them on continuously.

**20**  Mr. Stephen said that the other truck then sped up and rammed into them. The contact was made when the Dooley vehicle was travelling in the middle of the eastbound lane. The other truck kept engaging in this behaviour and Mr. Dooley slowed his vehicle down, trying to control it to avoid going into the ditch. However, the other truck kept ramming them until Mr. Dooley had no choice but to go into the ditch or lose control. Their truck did end up in the ditch and flipped over.

**21**  There is no issue that this other truck, which on all the evidence was clearly the truck operated by Mr. Parent, did not stop after the Dooley vehicle ran off the road.

*5.* *Brent Parent*

**22**  Mr. Parent's evidence about this first collision was that he had been driving west on 16th at about 60 to 70 kilometres per hour, when he saw the lights of a vehicle about half a kilometre behind him. That vehicle was gaining on him at a high rate of speed. When it was about five car lengths behind him, it put on its high beams. He was concerned about this fast and erratic driving behaviour, so he tapped his brakes in an attempt to send a message to the other driver -- slow down and back off. This had no effect and so he applied his brakes harder, slowing down to about 30 kilometres per hour. He agreed that his truck's rear end would have elevated, as Mr. Dooley described, in response to this harder braking.

**23**  The other vehicle moved into the other lane and began to pass him. Mr. Parent accelerated his vehicle to prevent himself from being passed. He saw the front end of the other vehicle, which he recognized as a pickup truck, out of his driver's side window. He heard a rubbing noise, which was continuous for a second. It was obvious to him from this noise that the vehicles had come into contact. The noise was from the area behind him, the rear passenger of his truck cab on the driver's side. Both vehicles were making a lot of noise at this point and the rubbing was loud enough so that he could hear it above that. It was a split second later that the Dooley vehicle went into the ditch. He heard no other sounds of contact between the vehicles after the rubbing sound.

**24**  Mr. Parent testified that he was in his own lane as this was going on, close to the yellow line. He conceded, however, that as he was looking at the other vehicle, he could have strayed into that other lane, but he would not have been very far into it. There was never any intention on his part to move his vehicle left to make contact with the Dooley vehicle. In particular, he denied bumping it or ramming it off the road. He did acknowledge that his actions in hitting the brakes hard and then not letting the Dooley vehicle pass him had been "stupid and childish".

**25**  Mr. Parent acknowledged in cross-examination that the greater height of the Dooley vehicle could have caused its regular headlights to mimic the effects of high beams, but he did not think that had occurred in this case because he actually saw the high beams come on. He was annoyed by the Dooley vehicle flashing its high beams at him, which in effect was telling him to speed up. He agreed with the suggestion that tapping his brakes was to tell the driver of the other vehicle to slow down and, when that was not heeded, that he had slammed on his brakes to get the other vehicle off the rear of his vehicle.

**26**  He agreed that when the Dooley vehicle attempted to pass him, the safe thing would have been to slow down, move over a bit, and allow that to happen. He also agreed that he speeded up because he wanted the other vehicle to stay in the back of the line where it belonged -- to prevent the other vehicle from being able to pass him.

**27**  He maintained that the Dooley vehicle's presence next to him, while it was attempting to pass, was distracting to him and may have caused him to move over slightly into the other lane. This was despite his many years of experience as a qualified driver, including of large commercial vehicles, and his resulting ability to keep a vehicle within its lane while various distracting things are occurring. He also acknowledged that he was aware that the vehicle was attempting to pass him, so that its presence would not have been a surprise, and that much larger vehicles than his and Mr. Dooley's, such as semi-trailer units, pass by each other in opposite directions on 16th Avenue daily, without ever coming into this kind of contact.

*6.* *Lloyd Teneycke*

**28**  Mr. Teneycke was called by the Crown as a witness. His observations of the first collision are of limited use, because by his own admission he consumed eight or nine alcoholic beverages over the course of the evening socializing, became intoxicated as a result and had fallen asleep on the way home. His recollection of this first incident was that he was awakened by "a rubbing or something, or the vehicle veering". In cross-examination he agreed he could not say exactly what the sound or experience had been that had woken him. When he came to consciousness, Mr. Parent's truck was in its own lane of travel.

*7.* *Expert Evidence*

**29**  Jonathan Gough, an accident reconstruction engineer, was called as an expert witness by the Crown. He conducted examinations of the two vehicles and offered opinions that bear on the dynamics of the collision between them, as well as on the subsequent incident involving Mr. O'Brien.

**30**  With respect to the contact between the vehicles in the first incident, Mr. Gough's examination identified three areas of contact. They all involved the Dooley vehicle being to the left of the Parent vehicle when they occurred.

**31**  First, there was contact between the right front tire of the Dooley vehicle and the left rear door area of the Parent vehicle. The front of the Parent vehicle would have been about 3.3 metres ahead of the Dooley vehicle at this point.

**32**  Second, there was contact between the forward edge of the sled deck on the left side of the Parent vehicle and the right outside mirror of the Dooley vehicle. The Parent vehicle would have been about two metres ahead at the time of this contact.

**33**  Third, there was contact between the left rear corner of the sled deck of the Parent vehicle and the right rear box of the Dooley vehicle. The Parent vehicle would have been two-and-a-half to three metres ahead at the time that the markings in that area were made.

**34**  Mr. Gough offered the opinion that the Parent vehicle was travelling faster than the Dooley vehicle at the time that these contacts occurred, but not by a large differential.

**35**  There is no way for him to tell in what sequence these three contacts occurred, but they would have occurred separately from each other. There was also no physical evidence of where on the road the two vehicles were when they came into contact with each other.

**36**  Mr. Gough found that the tracks conforming to the tires of the Dooley vehicle, which lead to its resting place in the ditch, show that the tires were sliding sideways, but still rotating. In his view this demonstrates that the Dooley vehicle swerved before leaving the roadway.

**37**  The other significant observations made by Mr. Gough about the first collision came from a device in the Dooley vehicle called an event data recorder ("EDR") module. This is a kind of memory device found in many newer vehicles. It records certain relevant information about the operation of a vehicle prior to any event that the vehicle's sensors have been programmed to regard as significant. Usually this would be an accident or a serious loss of control. The Dooley vehicle's EDR tracked speed, engine revolution (rpms) and application of the throttle, in the five seconds before an event. It recorded braking data for the preceding eight seconds.

**38**  This particular event was recorded by the EDR as a "non-deployment event", which means that it was seen by the system as being of low severity, for which it was not necessary to deploy the truck's airbags or its seatbelt pre-tensioners (devices which decrease the slack on the seatbelts).

**39**  Because the Dooley vehicle had oversized tires, Mr. Gough had to adjust the speed recordings from the EDR to produce an accurate measurement.

**40**  The important information extracted from the EDR was five and four seconds prior to what the module saw as the impact. The throttle of the vehicle was being applied between 99 and 91%, which followed an aggressive acceleration, and its speed was climbing. In those two seconds it climbed from 74 kilometres an hour to a maximum speed of 83 kilometres an hour. At the minus three to minus one-second interval, the throttle was no longer being applied, the driver was braking aggressively and the speed of the vehicle was declining rapidly to below ten kilometres an hour, leading up to the actual rollover.

**41**  Mr. Gough's interpretation of this data is that it had been recorded when the vehicle rolled into the ditch, rather than in any earlier contact between the two vehicles that he found.

**C.** **The Second Incident**

*1.* *Mr. Parent's Immediate Actions*

**42**  Mr. Parent did not stop his vehicle after the Dooley vehicle went into the ditch. He testified that he needed a minute to compose himself, because he was taken aback by what had occurred. Someone was in the ditch and he knew that he had to go back, he said.

**43**  He drove in a large loop, travelling on 256th Street, 24th Avenue and 248th Street, so that he was returning to the scene of the earlier incident eastbound, in the eastbound lane. He believed it took him only a few minutes to execute this manoeuvre and return.

*2.* *Sam Dooley*

**44**  Mr. Dooley testified that he and the other occupants got out of the truck, which was on its driver's side in the ditch. The truck that had been involved with them was no longer there. Mr. Dooley obtained Mr. O'Brien's cell phone, which was the first one he could locate because of the disturbed contents inside the truck. He called Danielle, a female friend, whose cousin they had been going to pick up and drive to the airport.

**45**  With some reluctance he eventually accepted the suggestion during cross-examination that he was both upset and angry at what had happened to his vehicle and potentially to their holiday plans. He said that he was in an agitated and frustrated state of mind.

**46**  At this point an eastbound car pulled up to them and its occupants asked if they were all right. Other evidence establishes that this vehicle was driven by Jennifer Lowe, with her husband Bradley as the front seat passenger. Mr. Dooley testified that he was on the cell phone during this time and that it was Mr. Stephen and Mr. O'Brien who spoke to the Lowes. He just heard the gist of what they were saying. This couple stayed only long enough to see if they were okay or not and then went on their way.

**47**  Mr. Dooley agreed with the suggestion that it was possible that he was swearing while on the cell phone and that he expressed anger towards the driver of the other vehicle, while the Lowes were present.

**48**  While Mr. Dooley was still on the phone, Mr. Stephen said something to indicate that the truck that they had interacted with earlier was now returning. Once Mr. Dooley saw that the truck was returning, he stepped onto the road and began waving his arms and yelling at it to stop. His companions were doing the same thing. He still had the cell phone in his hand, and agreed with the suggestion that he was thinking of throwing it at the truck. He also agreed with the suggestion, which was based on his evidence at the preliminary inquiry, that if the truck had been going more slowly, he would have stepped in front of it to halt its progress.

**49**  When the truck returned, Mr. Dooley was 10 to 15 metres west of the front of his overturned truck. Mr. Stephen and Mr. O'Brien were behind, that is east, of him and he believed Mr. Stephen was closer to him. From the sound of their voices, he would have put them on a diagonal line back from him.

**50**  The approaching truck was in the centre of the road with its tires just about on the centreline, or just over. Its driver's side would have been slightly over, or right on the yellow line, Mr. Dooley recalled. He said it was going at a pretty good rate of speed, about 60 to 70 kilometres an hour. As it got closer, he realized that its speed was not changing, so he moved back towards the shoulder.

**51**  The truck began to swerve or jerk sharply towards him. It was about ten feet from him. He had to jump out of its way onto the shoulder. He had been a foot or a foot and a half onto the road from the fog line before he jumped. The sled deck, which enabled him to recognize the truck as the original one with which he had interacted, passed close by his head.

**52**  He then saw the truck make a sharper "jerking" movement and it was travelling onto the shoulder. At that point the front right of the truck struck Mr. O'Brien. The truck was across the fog line. He described its position as its front end pointing south, towards the ditch, in effect perpendicular to the roadway.

**53**  Mr. Dooley saw something that turned out to be Mr. O'Brien coming out from underneath the wheel, as the truck veered back onto the road from the shoulder. Mr. O'Brien was two feet to the shoulder side of the fog line, on the asphalt, when he was hit. He was at the tail end, or just a few metres east of Mr. Dooley's overturned truck.

**54**  Mr. O'Brien was standing up and making a move towards the ditch. He was therefore lower in stature as a result of this body position. In Mr. Dooley's view, Mr. O'Brien was not struck or carried very far from where the truck originally struck him to the final resting spot where his body was located.

**55**  The truck veered back onto the road and continued eastbound. It did not stop.

*3.* *Luke Stephen*

**56**  Mr. Stephen testified that after they got out of the overturned truck they were upset about what had happened. Mr. Dooley was on the phone to Danielle when the Lowes pulled up. Mr. Stephen denied the suggestion that he or his friends were swearing in the presence of the Lowes, or that they had made remarks indicating what they would do to the driver of the other truck if they got hold of him.

**57**  He also denied the suggestion that Mr. Dooley was talking on the cell phone when the Lowes arrived. It was brought to his attention by Mr. Parent's counsel that at the preliminary inquiry he had answered twice that he did not remember whether Mr. Dooley was on his cell phone, before positively asserting that he was not. He clarified in his evidence on the trial that, since Mr. Dooley talked to the occupants of the car that stopped, he must not have been on the phone.

**58**  Mr. Stephen said that after that he could see headlights approaching, about a half a kilometre away. He had a funny feeling it was the same truck. He recognized it, and he and his companions were waving their arms and yelling, "Stop" to catch the attention of the driver.

**59**  As this truck moved closer, they moved off of the road, where they had been standing. Mr. Stephen moved to a position that was over the fog line and off the road, between the fog line and the grassy ditch. This was about even with the middle of the chassis of their overturned truck. Mr. Dooley was two feet to the left, or west, of him and Mr. O'Brien was six feet to his right, or east. He disagreed with the suggestion that the three of them formed any sort of diagonal line with Mr. Dooley nearest to the road.

**60**  The truck slowed down as it moved closer, about 50 feet away, down to 40 to 50 kilometres per hour. When it was approaching them, the area around him was lit up by its headlights. He said that when it was five or ten feet away it then swerved towards them, coming within inches of him. In cross-examination he modified his evidence on this point, to adopt his evidence at the preliminary inquiry that it was about two feet away from him when it swerved. The truck was on the shoulder when it did this. He had to jump in the ditch to escape. The speed of the vehicle still gave him time to react.

**61**  Mr. O'Brien was on the ditch side of the fog line at this point, he said, about a metre behind him, near the end of the truck or a little beyond it. He looked up after jumping into the ditch in time to see the truck hit Mr. O'Brien and then keep going. The front right bumper and front wheel were the parts of the truck that struck him. He said the truck was angled in a southeast direction when it did so, that is partially oriented towards the ditch, off of the axis of the roadway. It had been driving parallel to the fog line, and then re-swerved before striking Mr. O'Brien. He also said that the truck's headlights had illuminated their area before it began to swerve.

**62**  Mr. Stephen struggled somewhat in cross-examination to explain his answer to the question of why Mr. O'Brien was not able to evade the truck, when he and Mr. Dooley were able to. He said that when the truck swerved, he and Mr. Dooley had the greater point of the acute angle and Mr. O'Brien was at the centre point. I understood this to be a roundabout way of saying that once the truck swerved it was pointed more directly at Mr. O'Brien, so that when it reached him it was closer to the ditch, thus leaving him less of an opportunity to escape than there had been when it passed the other two.

*4.* *Brent Parent*

**63**  Mr. Parent's description of the events leading up to the striking of Mr. O'Brien was that he was travelling about 50 kilometres an hour when he crossed 256th on 16th, as he returned to the location where the other truck had left the road. He slowed to 30 kilometres an hour once he crossed 256th. He straddled the centreline with his truck, meaning that it was equally on each side of the line. He did this because although he knew that the truck had gone off the road on the south side, he did not know which side of the road the occupants would now be on.

**64**  When he was about 50 yards away, he saw a vehicle and some people standing on the side of the road on his right hand, or south side. He could just see the front end of the truck.

**65**  At this point he angled his truck towards the position where these people were standing. His stated purpose in doing this was to illuminate the area that they were standing in. By then he had slowed down to 25 kilometres an hour.

**66**  He could see three people on the shoulder with their arms waving around. He could not hear what they were saying. He continued to approach them at the same angle and speed.

**67**  As he got closer, he noticed that they were angry. He could see the looks on their faces, they were swinging their arms and he could hear some yelling and swearing. He believed their state of mind to be "pissed off". These figures were standing in a row east-west, that is, in the same direction as the travel of the road.

**68**  At this point he could see that "somebody had something in their hand" and the guy that was out front was coming at the side of his vehicle. He described one guy approaching the side of his truck about five feet away with something in his hands. He then described a second person approaching, also with something in his hand. One of them had something that could fit in the palm of the hand. It looked like a rock or something they could throw. It seemed to him that the lead individual was going to throw something at his truck. Both were approaching the right side. He did not know where the third person was at this point. As these two approached the vehicle, he took his eyes off the road to look to the side, while his truck was still moving forward at the same direction and speed.

**69**  At this point he heard a bang. He thought someone had just kicked his truck or thrown something at it.

**70**  He decided to get out of there because he did not want to have a confrontation with a bunch of guys. He turned his vehicle to carry on his way and accelerated away.

**71**  He never saw the third person after he turned his attention to the other two. He said that he had no idea that his truck had struck anyone.

**72**  He drove home at a normal rate of speed, pausing at the intersection of 16th and 264th to check for oncoming traffic before making a right turn.

**73**  In cross-examination, Mr. Parent acknowledged that he is a very good driver, as demonstrated in part by his ability to operate large semi-trailer units in the course of his employment as a heavy duty mechanic. His F-350 is a very wide vehicle when it contains the sled deck, he agreed, and it also requires care to be driven safely.

**74**  He agreed that if he had just stopped after the Dooley vehicle left the road he would not have had to go back to find anyone and that, if he had needed to collect his composure as he claimed, he could have just stopped a short distance down the road. He could also have called 9-1-1 and reported the truck in the ditch.

**75**  In response to the suggestion that, if he had intended to stop and render assistance, it would have made sense to stop before he got to these individuals and put on his four-way flashers, he answered, "I guess." He gave the same response to the suggestion that this was also true at the point when he saw that the people were waving at him to stop.

**76**  He agreed that if he had stopped on the shoulder, ahead of the area, there would have been lots of light from his headlights to illuminate the overturned truck.

**77**  He conceded that he had returned to satisfy his conscience that no one was hurt following the first incident, but he did not agree with the suggestion that he had not come there to render any assistance.

**78**  He said that he could see the truck and three people from 50 yards away and started angling his vehicle towards them from 40 yards out. He needed to see them in more detail to see how they were reacting first. He agreed that, because of the slow speed at which he was proceeding, he could have stopped at any point within that 40 yards and they would have been illuminated.

**79**  He did not accept the suggestion that these people would be angry because he had forced them into the ditch, but rather maintained that they would be angry because they had gone into the ditch.

**80**  He assumed that everyone was out of the vehicle because there were three guys, and that is "usually what there is".

**81**  He accepted that it would have been safer to call the RCMP. He never did call the RCMP, he testified, because he thought he had 24 hours to phone in an accident.

**82**  Despite the apparent anger of these individuals, he agreed that he and Mr. Teneycke were safe inside his truck as long as he kept the doors locked.

**83**  He agreed that it was not the right place to take the focus off the front of his vehicle, when it was proceeding towards a dark shoulder and there were people present.

**84**  He struggled somewhat to explain why two individuals would need to come closer to his truck than four or five feet in order to throw a rock at it. He also agreed that if anyone were attempting to kick his truck, that would be "a really dumb idea".

**85**  He accepted the suggestion that when he decided to leave he turned his vehicle back into an eastward direction, from how it had been angled. Even when it was angled, he maintained that he was never on or over the fog line.

**86**  While he thought that he felt the kick before he straightened out his vehicle, he agreed that it was completely possible that they could have occurred at the same instant. However, he later returned to the position in cross-examination that the kicking sound had happened before he changed his direction to straighten out.

**87**  He agreed that it makes sense that if Mr. O'Brien was hit on the south side of the fog line then a portion of the truck would have been on that side of the line as well. As to the impact, he agreed with the suggestion that it was "a heck of a thud", but he was not prepared to acknowledge that this sound must have been made by his vehicle hitting Mr. O'Brien.

*5.* *Lloyd Teneycke*

**88**  Mr. Teneycke testified that after the first incident with the Dooley truck his brother told him that the vehicle may have left the road, but was uncertain. They drove down 16th and then made a decision to return, to make sure the occupants of the other vehicle were all right.

**89**  When they returned in that direction, they were driving 40 to 45 kilometres per hour. Mr. Teneycke saw the truck, then a line of people, possibly four of them, behind either the fog line or what he called the "ditch" line. Their truck slowed down even more after that.

**90**  His brother's vehicle was straddling the centre line, but he thought that they might have tried to shine a light towards the vehicle that was in the ditch. He agreed with the suggestion on cross-examination that his brother may have angled the vehicle towards the truck that was in the ditch.

**91**  He said it happened pretty quickly, but when they were only a couple of car lengths away, two of the people that were standing in the ditch rushed towards the vehicle. They looked like they were agitated and had their hands in the air. He could hear yelling. One of them looked like he was going to throw something and the other looked like he was going to grab the door or kick the vehicle. Mr. Teneycke was surprised and startled. He said, "Let's get the hell out of here." They sped up to normal highway speeds and continued down the road. Only about three seconds elapsed from seeing the vehicle to telling his brother to leave.

*6.* *Expert Evidence*

**92**  Mr. Gough's opinions about the dynamics of the collision between the Parent truck and Mr. O'Brien were not as definitive as in the case of the collision between the two trucks, because of the absence of an identifiable point at which the collision between the Parent truck and Mr. O'Brien had occurred.

**93**  Blood was identified on the road by Corporal Davies, the RCMP traffic accident analyst. Mr. Gough concluded that since this blood was likely deposited when Mr. O'Brien hit the roadway (rather than from the initial impact) and because his body would have been thrown to the east, the point of impact was likely somewhere west of where the first blood evidence is seen. This would be even with or just east of the rear tire of the Dooley truck.

**94**  If Mr. O'Brien was struck there, then the distance that his body was thrown to his final resting place would correlate with an impact speed of 24 kilometres an hour. The lack of damage to the front grille areas of the truck is also indicative of a relatively low speed collision.

**95**  Without a point of impact, Mr. Gough also could not say whether the truck would have been travelling parallel to the road's direction or at some angle to it when it struck Mr. O'Brien. However, if the Parent vehicle had been angled south, Mr. Gough would expect Mr. O'Brien to have been thrown south of the fog line, instead of coming to rest on it. He agreed therefore with the suggestion that there was no evidence that the Parent vehicle had been angled sharply south at the point of impact. He also agreed that if Mr. O'Brien had been struck while in the eastbound lane and the Parent vehicle had been angled sharply there, then that could also have cast Mr. O'Brien so that he ended up at the same resting place.

**96**  Mr. Gough said that if Mr. O'Brien had been standing on the fog line when he was hit, the right side wheels of the Parent vehicle would have been on the shoulder of the road. If the left side wheels had been on or north of the centre line instead, then that would mean that Mr. O'Brien was somewhere in the vicinity of the eastbound lane when he was struck.

**97**  Taking into account the autopsy evidence, his own observations and those of Corporal Davies, Mr. Gough offered the opinion that Mr. O'Brien's injuries were consistent with being struck while in a generally erect position and that the truck had passed over him. Some diagonal abrasions on his right thigh could be consistent with the tire of the truck passing over him. All of these injuries, however, could be consistent with other scenarios. If Mr. O'Brien had been crouched down or turned sideways in a north or south direction when struck, Mr. Gough would have expected to see different patterns of injuries.

**98**  The cleaning of certain surfaces on the underside of the Parent truck, which are otherwise covered in road grime, indicated to Mr. Gough that contact with Mr. O'Brien would have been to the right, or passenger side of that truck's centre, more towards the right wheel. This assumes, of course, that Mr. O'Brien's body made those marks.

**99**  Mr. Gough was doubtful that a gouge found on the road by Corporal Davies would be related to this point of impact, because such a gouge could only be caused by a metal object, and not the truck. He saw no evidence of abrasions to Mr. O'Brien's belt, the only other plausible metal object to contact the roadway, in the photographs.

*7.* *Jennifer and Bradley Lowe*

**100**  The Lowes were returning home from a trip to Oregon, travelling down 16th.

**101**  Mrs. Lowe saw three people standing on the side of the road and her husband told her there was a car in the ditch, so she stopped. The men were not in the middle of the road, but near enough to the middle to make her slow down. She was about 25 feet away when she first saw them in silhouette. She agreed that it was pretty dark in the area and that she was almost on top of them before she saw them. She was able to see them much more clearly when she came closer. One male was on his cell phone, and the other two were standing off to the side. One of the other males was holding a cell phone. The male who was talking on the cell phone was agitated and swearing. She asked if they were okay and were told they were. The males declined her offer to phone anyone, so they continued on their way after about two minutes.

**102**  As they were driving, she saw headlights in her rear-view mirror. The headlights actually swerved towards the people on the side of the road in that direction. She had been driving for 20 seconds at 65 to 70 kilometres an hour when she saw this. In her police statement she said she assumed that the swerve had been to avoid contacting these people, but she maintained in her evidence in the trial that it was a swerve towards them. With respect to the statement, she said that what she saw and what her brain told her were two different things.

**103**  When they arrived at the light at 264th to turn left it was red. A big white pickup truck with a silver rack on it came up and turned southbound, or right. There was nothing excessive about the speed of this truck. It just pulled up, stopped briefly to make sure no traffic was coming, and then turned.

**104**  When he and his wife were fifty yards back, Mr. Lowe had noticed a couple of people and a vehicle in a ditch. These people were about a foot on the road side of the fog line. A male was on the cell phone. He was angry and agitated. He was swearing a lot. When he asked if anyone was hurt, the male said, "No, not unless we find the driver."

**105**  Mr. Lowe noticed headlights behind them on 16th when his wife backed up their vehicle to ask if the men needed help. He could not tell if this vehicle behind them was stopped or moving slowly.

**106**  As they pulled away from the males, he saw headlights, but unlike his wife he did not see any swerving towards the males. He was watching back through the mirror on his side of their vehicle for the most part, but did not have it in view a hundred percent of the time. He was sure that he looked at his wife at some point.

**107**  He also noticed the white truck with what he described as an ATV rack turning right on 264th, as his vehicle was stopped at the light. He agreed with the suggestion that it did not seem to be in a big hurry.

**D.** **Mr. Parent's Actions after the Second Incident**

**108**  Mr. Parent and Mr. Teneycke both testified that they drove directly to the Parent residence from the scene of the accident. It is located in the 23700 Block of 8th Avenue in Langley.

*1.* *Brent Parent*

**109**  Mr. Parent parked his truck in the front of the house. It would have been visible to any vehicles driving by. He did a quick look at his side of the vehicle, but figured he would look for any damage to the passenger side from the kick in the morning.

**110**  He said he was "a little bit miffed" at what had happened, but managed to shrug it off.

**111**  He wanted to go to bed, but Mr. Teneycke persuaded him to go into the hot tub. They spent some time in there, catching up on things, and he drank a beer as they did. There was laughter and joking around between them as they caught up.

**112**  His estranged common-law wife Jill Suter, with whom he was sharing the residence pending its sale, had a bedroom above them. She had to repeatedly ask them to be quiet.

**113**  The next morning Ms. Suter woke him rather rudely, because he had kept her from sleeping earlier that morning by his carrying on with his brother in the hot tub. She told him that a friend who lived in the area of the incident the previous evening had phoned to tell her that someone had been killed in front of the friend's house. He realized that this was his vehicle and he began to feel sick and overwhelmed. He was in a panic state. He carried on with his normal work routine for the morning, which involved starting his work vehicle, a cube van that was filled with all his tools.

**114**  He said he wanted some time to consider his position and get legal advice. He did not want the truck to look like the one the police were looking for, so he removed the sled deck. His brother was going to take that truck to the auction that morning with his Castlegar associates, so he allowed him to do so. However, this was with the expectation that his brother would go and consult one of them, Mr. McIntosh, about what had happened, rather than that his brother would go to the auction. Mr. Teneycke confirmed in his evidence that he intended to speak to Mr. McIntosh, whom he regarded as a trusted advisor, for some guidance.

**115**  Mr. Parent testified that there was no plan discussed with his brother about how to extricate themselves from the situation. He left in his work clothes and in the van filled with his tools and containing his dog. He was stopped by the police after leaving the residence.

*2.* *Jill Suter*

**116**  Ms. Suter, who was called as a witness by the Crown, generally confirmed the events following Mr. Parent's return early in the morning. In particular, she confirmed the joviality and high spirits between the men in the hot tub. She had the morning newscast on and when Mr. Teneycke saw the item about the fatal accident, he began to say, "Oh, my God," repeatedly, with his hands on his head.

**117**  When she communicated what she had seen on TV to Mr. Parent, she said he looked sick and white and just stood there. She agreed that he was in a state of shock.

**III.** **POSITIONS OF THE CROWN AND DEFENCE**

**118**  I cannot do justice to the thoroughness and persuasiveness of the submissions, but I will just briefly summarize the main points as I understand them.

**A.** **Defence Position**

**119**  Mr. Parent's counsel reminds me of the essential principle that it is not a question of whose evidence, as between the Crown's witnesses and Mr. Parent, I prefer. Rather it is whether the Crown, on the whole of the evidence, has met its strict burden of proof beyond a reasonable doubt of his guilt on any of the counts on the indictment. In that regard, his counsel emphasizes that Mr. Parent's evidence need only raise a reasonable doubt on any of the counts in order for him to be acquitted of those counts.

**120**  He cautions the Court about the dangers of miscarriage of justice in cases like this one, which involve serious harm and a high degree of public interest, but which ultimately turn on the evidence of witnesses whose credibility may be questionable.

**121**  He submits that the evidence of Mr. Stephen and Mr. Dooley, on whom the Crown's case depends, are inconsistent in very significant ways that cannot be accounted for solely by differing vantage points or by the natural tendency for individuals to recall things differently. These inconsistencies, he submits, are instead an indication that these witnesses are not credible on the critical factual issues that need to be resolved in this case, namely the actions of Mr. Parent in operating his vehicle, both in relation to the Dooley vehicle and to Mr. O'Brien.

**122**  He submits that their accounts of the supposed deliberate forcing of their vehicle off the road by Mr. Parent and his return to drive deliberately towards them are suspect and cannot form the proper basis of convictions for any offence. Their evidence is contradicted by each other, by the expert evidence and by some of the evidence from the Lowes.

**123**  Of particular note is the evidence that he points to showing angry and aggressive posture on behalf of Mr. Dooley prior to the return of the Parent vehicle, which he said is consistent with the hostile reaction that Mr. Parent testified he encountered from the men at the roadside.

**124**  As I perceive it, Mr. Parent's defence to the dangerous driving charge in relation to the first incident is that, while it certainly was ill-advised to have speeded up to prevent the Dooley vehicle from passing him, such poor driving behaviour still fell short of a marked departure from the standard of care of a prudent driver. The contact to the Dooley vehicle was incidental, in this theory, to Mr. Parent's momentary distraction, which was caused by that truck being right beside him and attempting to pass him at high speed in the oncoming lane.

**125**  With respect to the failure to remain at the scene, Mr. Parent's position appears to be that he has rebutted the inference that he failed to adhere to the requirements of s. 252 out of an intention to escape civil or criminal liability. On the contrary, the submission is that he attempted to return to check on the wellbeing of the occupants of the Dooley vehicle, only to be met with hostility and the apparent threat of violence towards him.

**126**  In response to the criminal ***negligence*** and dangerous driving causing death count, Mr. Parent asserts that he was engaged in the prudent driving manoeuvre of advancing slowly towards the accident scene, driving at an angle solely to illuminate it, when he was in effect set upon by two of the occupants, whom the evidence indicates would likely have been Mr. Dooley and Mr. Stephen. Momentarily distracted by their pending attack, he allowed his vehicle to proceed forward at the same speed and in the same direction for a short period, which appears, although he was unable to acknowledge it directly in his evidence, to have had the tragic effect of his truck striking Mr. O'Brien. In the defence theory, this is just the kind of unforeseeable intervening distracting event that cannot be prevented by even the most reasonable driver and is therefore explicitly excused from criminal liability by the case authorities.

**B.** **Crown Position**

**127**  The Crown grounds its submissions in the overarching theory that Mr. Parent, throughout both incidents, was using his large and powerful truck to bully others on the road, and to teach the impertinent occupants of the Dooley vehicle certain lessons. In the Crown's submission, the first incident involved him enforcing his desire to keep the Dooley vehicle behind him and the second involved him swerving at the occupants of the ditched vehicle, to teach them a further lesson.

**128**  Crown counsel emphasized the inherent implausibility of key portions of Mr. Parent's evidence, especially his reasoning behind approaching the accident scene in the manner that he described.

**129**  As to Mr. Dooley and Mr. Stephen's credibility, Crown counsel submits, in effect, that the supposedly significant inconsistencies and contradictions between their evidence and within the evidence of each of them are principally a function of differing perspectives on a brief, highly stressful series of incidents which took place largely in darkness and which involved sudden and urgent threats to their safety, and Mr. O'Brien's. In no way, Crown counsel submits, does their evidence support a reasonable doubt based on any intent on their part to mislead.

**IV.** **DISCUSSION**

**A.** **Legal Principles**

**130**  With respect to dangerous driving, *R. v. Beatty*, [*[2008] 1 S.C.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BB-00000-00&context=), the Supreme Court of Canada discussed the physical and mental elements of the offence of dangerous driving. At para. 43, Justice Charron discussed the *actus reus*:

The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".

Charron J. followed with an explanation of the *mens rea*:

The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens* *rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

**131**  With respect to criminal ***negligence***, the *actus reus* of criminal ***negligence*** is, in the words of the statute, conduct showing "a wanton and reckless disregard for the lives or safety of the others": see *R. v. Tayfel*, [*2009 MBCA 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JBT7-X118-00000-00&context=) at para. 50.

**132**  In *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 para. 32, our Court of Appeal quoted a helpful distillation by the trial judge in that case of the *mens rea* of criminal ***negligence***, as it has been expressed by the Supreme Court of Canada 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=):

That which is common to all charges of criminal ***negligence*** is, in my respectful opinion, to be stated this way: On a count alleging criminal ***negligence***, the Crown is bound to show that the accused's [act ...] represented a marked and substantial departure (as opposed to a marked departure) from the conduct of a reasonably prudent [driver ...] in circumstances where the accused either recognized and ran an obvious and serious risk to the life or bodily integrity of [whomever] or, alternatively, gave no thought to that risk.

**133**  Both of these offences, dangerous driving and criminal ***negligence***, are ***negligence*** based. They both allow for exculpatory defences for those circumstances "where ... a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger": *Beatty*, at para. 37.

**134**  With respect to the failure to remain at the scene of the accident count, the physical and mental elements of this offence were summarized by our Court of Appeal in *R. v. Sadler*, [*2008 BCCA 491*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2YN-00000-00&context=):

[27] It is common ground that the appellant committed the *actus* *reus* of the offence by leaving the scene of the accident without offering assistance to the injured parties and without giving them his name or address. The *mens* *rea* for s. 252 requires proof beyond a reasonable doubt of an accused's specific intent to escape civil or criminal liability. This *mens* *rea* requirement is distinct from the modified objective test used to establish the *mens* *rea* for the offence of dangerous driving.

[28] Section 252(2) creates a rebuttable presumption that an accused intends to escape civil or criminal liability by leaving the scene of an accident. Evidence to the contrary that is not rejected by the trier of fact may rebut that presumption. Case law interpreting this section confirms that "evidence to the contrary" does not shift the burden of proof to an accused. Rather, it provides a basis whereby evidence which tends to show that an accused may not have possessed the specific intent required will support an acquittal verdict.

**135**  Obviously, if I believe Mr. Parent's evidence, or if I do not believe it but it raises a reasonable doubt, I must find him not guilty. Because the charges deal with two separate incidents, representing both his driving conduct itself and his failure to fulfil certain responsibilities afterwards, it is possible for me to believe or be left with a reasonable doubt with respect to his evidence on some counts, but not others. Even if I do not believe his evidence, or it does not raise a reasonable doubt on any counts, I must still go on to consider whether the Crown, on the whole of evidence, has met its burden of proving his guilt beyond a reasonable doubt for any of the offences.

**B.** **Mr. Parent's Evidence**

**136**  I will say as an overview that I found Mr. Parent's evidence unsatisfactory in many respects.

*1.* *The First Incident*

**137**  Dealing first with the incident with the Dooley vehicle, I was unable to accept that Mr. Parent, a very experienced and proficient driver who was used to controlling vehicles even bigger than a Ford F-350, would be unable to contain his truck within its own lane simply because of the presence of the Dooley vehicle alongside him. It makes no sense that simply accelerating to stay ahead of that passing vehicle would make him so vulnerable to moving sideways inadvertently, once the vehicle came up beside him. It also makes no sense that contact would occur three separate times, no matter how closely related in time they may have been, as a result of a mere moment's distraction. This version of events struck me as a fairly clumsy effort by Mr. Parent to distance himself from the obvious conclusion that emerges from the evidence -- that he used movement of his truck to its left, including the resulting contact with the Dooley vehicle, as a means of jockeying with the Dooley vehicle and keeping it behind him.

*2.* *The Second Incident*

**138**  With respect to the second incident, I would say that as a whole Mr. Parent's version of events was inconsistent with common sense and ordinary human experience.

**139**  As Crown counsel compelled him to acknowledge in cross-examination, there was no need for him to have undertaken the driving actions that he took, if his true goal was to check on the wellbeing of the occupants of the downed truck and possibly to render assistance. He could have stopped before the accident scene and illuminated the truck and occupants perfectly well by pulling onto the shoulder and shining his lights down the fog line.

**140**  Leaving aside the issue of civil and criminal liability, which is dealt with by other counts, he made no phone calls in furtherance of his stated desire to assist, when the need for at least a tow truck, if not police assistance, was self-evident.

**141**  He also never satisfactorily explained why he needed to illuminate the accident area any further by approaching it at an angle. His posture of needing to see how the occupants were reacting seems to me to be inconsistent with an interest in their wellbeing and Mr. Parent's attempt to split hairs with Crown counsel about whether the occupants would be angry with him about being driven into the ditch, as opposed to angry for ending up in the ditch, seemed evasive and unhelpful.

**142**  His description of the actions of the occupants that supposedly threatened him is also troubling. In particular, it was not clear why one of them would need to come within five feet of his truck in order to throw a rock or some other object at it. I also question what possible harm could have been inflicted by one of them kicking a formidable vehicle of this kind and what sensible person would imagine that it could.

*3.* *Failure to Remain at the Scene*

**143**  I have already stated that I agree with the Crown's concession, as reflected in its position on Count 3 of this offence, that Mr. Parent was not aware that he had struck Mr. O'Brien until he learned of the fatality later that morning. I nonetheless found his explanation that he did not call the RCMP because he thought he had 24 hours to report an accident, as well as his stated belief that he had done nothing wrong in relation to the first incident, to ring completely hollow.

**144**  Even on his own version of events, he had interacted with the Dooley vehicle in a way that had contributed significantly, if not directly caused, quite a significant accident.

**145**  I think the supposedly hostile actions of its occupants were really neither here nor there, had he retired to a safe distance but remained at the scene, in order to fulfil his duties under the section as best he could. It is noteworthy that he agreed that, as long as they kept the doors locked, he and his brother were perfectly safe. It would also make no sense that he would honestly regard his legal responsibilities as being at an end because the occupants had behaved, in his words "like assholes".

*4.* *Conclusion*

**146**  It follows from what I have said that I did not believe Mr. Parent's evidence and it does not leave me in any state of reasonable doubt with respect to any of the offences.

**C.** **Evidence Called by the Crown**

**147**  I turn then to the question of whether the Crown has proven Mr. Parent's guilt on any of the counts beyond a reasonable doubt.

**148**  First, I accede to the Crown's request and find Mr. Parent not guilty of Count 3, the failure to remain at the scene of the collision with Mr. O'Brien. I infer the Crown's position was based on the body of evidence, particularly that of Ms. Suter, that indicates that Mr. Parent was unaware that he had struck Mr. O'Brien until he was alerted by the news report later that morning. In those circumstances, his duties under s. 252 for that incident would not have been triggered.

**149**  The Crown's case on the remaining counts depends on the evidence of Mr. Dooley and Mr. Stephen as to the movements of the Parent vehicle, as well as to some extent on the examination of physical evidence and the opinions offered based on it by Mr. Gough and the evidence of the Lowes.

*1.* *Credibility, Findings of Fact and Conclusions*

**150**  I have concluded that some aspects of Mr. Dooley and Mr. Stephen's evidence must be approached with caution.

**151**  Mr. Dooley's account of how he attempted to overtake the Parent vehicle is contradicted as to his speed by the EDR data. His description of the front of the Parent vehicle pointing south towards the ditch when it hit Mr. O'Brien is contradicted by Mr. Gough's opinions that there is nothing to indicate that the Parent vehicle was other than parallel to the road axis when it struck him and that, had it struck him with a southbound orientation, it would have thrown him south.

**152**  Mr. Stephen's assertion that no one was swearing in the presence of the Lowes was contradicted by the evidence of the Lowes themselves, which I accept, and by Mr. Dooley's tacit admission that it was certainly possible that he had done so. Mr. Stephen's change at the preliminary inquiry, from maintaining that he could not remember if Mr. Dooley had been on the phone when the Lowes arrived to asserting that he was not assisted by his elaboration on it at trial. He also struggled to articulate the angle of approach of the Parent truck and how it differed in the case of Mr. O'Brien's position from his and Mr. Dooley's.

**153**  It is true as well that the overall narrative of these witnesses about both incidents diverged from each other in many respects.

**154**  However, I do not agree that their evidence about seeing the Parent truck drive over Mr. O'Brien is necessarily contradicted by Mr. Gough's evidence. Throw distances were put to Mr. Gough and he calculated various speeds that correlate to them, but it was not his evidence that Mr. O'Brien was necessarily thrown forward, as opposed to being driven over. Indeed, key aspects of Mr. Gough's evidence had to do with evidence of Mr. O'Brien's contact with the underside of the Parent truck, and possible evidence of one of its tires having driven over his thigh. The apparently low speed of the collision may have been a factor as well, given the absence of deformation to the truck's front grille.

**155**  I do not know the reason for this ambiguity in the evidence, and I will certainly not speculate on it to the detriment of Mr. Parent. But the point is that seeing the vehicle drive over Mr. O'Brien is not in itself at odds with the expert evidence, as I have it.

**156**  Overall, I think that the evidence of both Mr. Stephen and Mr. Dooley is somewhat impaired by a combination of the passage of time since the incident, the stressful circumstances under which these matters occurred (especially the sudden death of a close friend witnessed first-hand), the speed with which events unfolded and the poor conditions for observation.

**157**  I think Mr. Dooley also made some effort to minimize the aggressiveness of his own driving in the run-up to the first incident, as well as his understandable anger and agitation towards the other driver after the crash into the ditch.

**158**  What I did not discern, however, was any deliberate attempt to mislead, or any significant internal implausibility in their basic account of events.

**159**  In its broad parameters, I believe their evidence that Mr. Parent's vehicle aggressively prevented itself from being passed by moving into the eastbound lane to some extent and making contact with the Dooley vehicle, and that upon returning to the accident scene it abruptly swerved towards them in a manner that required them to take urgent evasive movement. I will discuss below what flows from this in relation to the various offences.

**160**  I should say, since he was called as a Crown witness, that I did not find Mr. Teneycke's evidence very reliable or helpful. His alcohol impairment that morning led to a very fragmentary series of observations about the two incidents, in which his descriptions of things he could observe were troublingly vague. He also seemed to me to be highly suggestible when being cross-examined by Mr. Parent's counsel. This is understandable given his relationship to Mr. Parent, but it suggests a degree of partisanship in terms of the outcome that requires an additional degree of caution.

**161**  With respect to the first incident, I find that the Parent vehicle did encroach on the eastbound lane in the course of making contact with the Dooley vehicle.

**162**  The accident reconstruction evidence is very telling in that regard. It is noteworthy that three points of contact find the Parent vehicle ahead of the Dooley vehicle, and travelling at a slightly faster speed, which suggests to me that this contact was used as an additional means of preventing passing.

**163**  It is also noteworthy that, if the Dooley vehicle was travelling up to 83 kilometres an hour and applying 90-plus percent throttle as the EDR data indicates, Mr. Parent must have been exceeding these figures himself in order to remain ahead.

**164**  I can think of no reason why the Dooley group, who were headed to Seattle for a flight to Hawaii and whose driver was passing in the first place in order to hurry up along that journey, would have any interest in engaging physically with the other vehicle that was preventing its passage. I draw the inference rather that Mr. Parent deliberately initiated the physical contact to assert the dominance of his vehicle.

**165**  As to the manner in which the contact resulted in the Dooley vehicle entering the ditch, I prefer the version of Mr. Stephen, which seems to accord more with the EDR's evidence of heavy braking and with Mr. Gough's opinion about the truck's tires indicating a swerve before entering the ditch. I find that Mr. Dooley struggled for control after being rammed and then went into the ditch, as Mr. Stephen described. I also prefer Mr. Stephen's account of the manner in which the Dooley truck approached the Parent truck and sought to overtake it, to that of Mr. Dooley.

**166**  This conduct by Mr. Parent was certainly objectively dangerous, within the meaning of s. 249, and certainly represents a marked departure from the standard of care of a prudent driver in the circumstances. Accordingly, I find Mr. Parent guilty of Count 4.

**167**  Arising from the first incident, Mr. Parent certainly committed the *actus reus* of failing to remain at the scene following the accident with the Dooley vehicle. The three duties under that section are to be read disjunctively, and proof of a failure to do any one of them triggers the presumption that an accused did so with the intent to escape criminal or civil liability: *R. v. Roche*, [*[1983] 1 S.C.R. 491*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M281-00000-00&context=).

**168**  In fact, Mr. Parent did none of them. I have already rejected the suggestion in his evidence of the hostility of the occupants of the other vehicle prevented him from doing so. Had he availed himself of any of the alternative courses of action put to him by Crown counsel, including standing by at a distance, involving the police if his security needed to be ensured, while complying with the section, he could have fulfilled it with no difficulty. It is telling that he did nothing to identify himself or call for assistance, even when he was safely away.

**169**  I find that there is no evidence capable of raising a reasonable doubt with respect to the application of the presumption, and even without it I would have no difficulty finding beyond a reasonable doubt that Mr. Parent left because he did not wish to be saddled with any of the fallout from his behaviour towards the Dooley vehicle at any stage, whether civil or criminal. Therefore I find him guilty of Count 5.

**170**  The charges arising from the interaction between the Parent vehicle and Mr. O'Brien that led to Mr. O'Brien's death are less straightforward. As I have said, Mr. Gough was not able to offer the level of objective assistance that was available in relation to the first instance, because of the absence of physical evidence of the impact point between the truck and Mr. O'Brien. To the extent that he could assist, his opinion about the Parent vehicle likely being parallel to the roadway when it struck Mr. O'Brien, contradicts somewhat the eyewitness descriptions of it being perpendicular or in a southeast orientation when the impact occurred.

**171**  I have already adverted to the confusion about whether Mr. O'Brien was thrown or travelled underneath the truck in the evidence. For this reason it would not be safe for me to rely on the eyewitness accounts of the actual impact with Mr. O'Brien in reaching my decision. The factors that I have already adverted to as limiting Mr. Stephen and Mr. Dooley's ability to observe and recall this accurately, are most acutely in play at this critical point.

**172**  What I am satisfied on all of the evidence is that as it returned to the accident scene, Mr. Parent's truck abruptly swerved towards the three occupants of the Dooley truck, who were at or near the fog line. In addition to the evidence of Mr. Dooley and Mr. Stephen, which I accept on this point, I accept the evidence of Mrs. Lowe that she saw the light of a vehicle swerving toward the people on the road, as tending to confirm their accounts. I am mindful of the fact that Mrs. Lowe originally told the police that she thought the vehicle was swerving to avoid the pedestrians, and that her husband did not see any swerve, although he was for the most part looking back. However, I found her explanation of her thinking when she made the original comment to be believable, and it is ultimately her view of the swerve itself that is confirmatory, rather than her assumption about its purpose. Further, her husband did not lay claim to an uninterrupted view to the rear.

**173**  I also draw the inference from the evidence that Mr. Parent intended this movement of his truck as an aggressive one, to frighten or intimidate the Dooley group, either in response to the residue of their original confrontation, in response to their yelling and waving their arms at him as he approached, or perhaps to both. There is no credible evidence, no matter how angry or aggressive the Dooley group were, that they posed any meaningful threat to Mr. Parent, Mr. Teneycke, their safety or the wellbeing of his vehicle, nor did their presence require him to operate his vehicle in a manner that rendered him susceptible to striking Mr. O'Brien without fault.

**174**  I find that this swerving took Mr. Parent's truck to or over the fog line, and that it was in the course of correcting that swerve and returning to travel straight along its lane of travel that he inadvertently struck Mr. O'Brien, who was somewhat somewhere to the rear of his companions. It is simply not possible on the available evidence to make a more precise finding about where Mr. O'Brien was struck or about whether he was thrown or dragged under the vehicle to his final resting spot or was simply knocked down at low speed and driven over at approximately that location.

**175**  I also find that on all the evidence that this occurred at a relatively low speed, at or less than 25 kilometres an hour.

**176**  In light of these findings, the question becomes what level of liability attaches to Mr. Parent for operating his vehicle in this manner.

**177**  I am satisfied beyond a reasonable doubt that the elements of factual and legal causation are made out with respect to Mr. O'Brien's death, despite the fact that I have found Mr. Parent's collision with him was itself not intended. The act of swerving to frighten the occupants was not just a significant contributing cause, but the factual cause of the death. More significantly, striking others who were not readily visible to him in the course of using his vehicle to scatter some of them was clearly well within the reasonably foreseeable risk of engaging in that kind of negligent conduct.

**178**  The real issue is whether this act of swerving at these men to intimidate them amounts to a marked departure from the standard of care of a reasonable person in Mr. Parent's circumstances, or a marked and substantial departure. The difference is one of degree: see *R. v. L.(J.)* [*(2006), 204 C.C.C. (3d) 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-JP4G-624F-00000-00&context=) (Ont. C.A.).

**179**  At the end of the day, I think that the degree of reckless indifference to the safety of others inherent in using a powerful vehicle such as this, in essence as a type of intimidating weapon, establishes Mr. Parent's conduct as a marked and substantial departure from the standard of care of a reasonable person in his circumstances. Accordingly I find him guilty of Count 1.

**180**  As Count 2 is an included offence of Count 1, I direct a conditional stay with respect to it, pursuant to the rule against multiple convictions.

**D.** **Summary**

**181**  I find Mr. Parent guilty of Counts 1, 4 and 5, I enter a conditional stay with respect to Count 2, and find him not guilty of Count 3.

T.A. SCHULTES J.

**End of Document**

[***Salico Property Marketing Corp. v. Farris Vaughan Wills & Murphy, [2009] B.C.J. No. 2179***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B280-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.C. Grauer J.

Heard: October 22 and 23, 2009.

Judgment: November 3, 2009.

Docket: S020570

Registry: Vancouver

**[2009] B.C.J. No. 2179** | 2009 BCSC 1489 | 2009 CarswellBC 2941 | 182 A.C.W.S. (3d) 63

Between Salico Property Marketing Corporation, Cragg and Cragg Design Group Ltd., Thorcon Enterprises Ltd., George Cragg and Peter Cragg, Plaintiffs, and Farris Vaughan Wills & Murphy and The Estate of Allen Richard Tomlinson, Deceased, Defendants

(98 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Adding new cause of action — Application by plaintiffs to amend statement of claim against former law firm allowed — Original claim alleged law firm provided negligent advice with respect to claim by plaintiffs against their mortgage lender — New allegations law firm lacked knowledge of clause of lending agreement were new causes of action arising from facts discovered during course of litigation — Although statute-barred, adding new causes of action would not prejudice law firm because they were inextricably linked to previous claims and would not tax memories of witnesses.**

**Legal profession — Barristers and solicitors — *Negligence* — In conduct of action — In debtor-creditor proceedings — Application by plaintiffs to amend statement of claim against former lawyer allowed — Original claim alleged lawyers provided negligent advice with respect to claim by plaintiffs against their mortgage lender — New allegations lawyer lacked knowledge of clause of lending agreement were new causes of action arising from facts discovered during course of litigation — Although statute-barred, adding new causes of action would not prejudice lawyers because they were inextricably linked to previous claims and would not tax memories of witnesses.**

**Professional responsibility — Self-governing professions — Duties — *Negligence* — Professions — Legal — Barristers and solicitors — Application by plaintiffs to amend statement of claim against former lawyer allowed — Original claim alleged lawyers provided negligent advice with respect to claim by plaintiffs against their mortgage lender — New allegations lawyer lacked knowledge of clause of lending agreement were new causes of action arising from facts discovered during course of litigation — Although statute-barred, adding new causes of action would not prejudice lawyers because they were inextricably linked to previous claims and would not tax memories of witnesses.**

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| Application by the Cregg brothers to amend their statement of claim against their former solicitors, Farris. The Creggs owned some real estate developments. They were having trouble with their lender for a new project. The lender wanted them to pay some fees before it advanced funding for the new project, intended to be used to pay out a second mortgage from the same lender on the project, until they paid certain fees. They hired a new lawyer, Farris, to potentially sue the lender for failing to advance the money. The lawyer advised them to sue the lender. The lender made a settlement offer before the litigation was commenced, promising to forgo foreclosure proceedings on the second mortgage for several months in exchange for the payment of the requested fees and a release. The brothers were advised by Farris to reject the offer and commence an action. The action against the lender was summarily dismissed because of a clause in the lender's agreement providing it was at liberty to refuse to advance the funds. The brothers decided to sue the lawyer who had acted for them when they entered into the agreement with the lender. They later decided to sue Farris as well, alleging ***negligence*** in advising them to reject the settlement offer and to commence the action against the lender without knowledge of the terms of the lending agreement. They amended the claim to add allegations Farris should have advised them in a more timely manner to sue their former lawyer, to seek independent legal advice as to Farris's failure to note the terms of the agreement, and should have acted to protect their interests in other properties which the brothers lost due to multiple foreclosures that resulted from the initial one by the lender.  HELD: Application allowed in part.  No facts supported the claim Farris failed to advise the brothers in a timely manner that they should sue their former lawyer. This proposed amendment was rejected. The other proposed amendments were new causes of action. They relied on new facts discovered during the process of litigation, to the effect that Farris was not aware of the existence of the no-advance clause in the lending agreement until well into its retainer with the brothers. The causes of action were statute-barred because they related to events occurring more than six years earlier. However, the new facts founding the causes of action were inextricably linked to the previously pleaded claims based on negligent advice. These new claims would not add any new strain to the memories of the material witnesses. |

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court, Rule 18A

Limitation Act, RSBC 1996, CHAPTER 266, s. 4(4)

**Counsel**

Counsel for the Plaintiffs: H.A. Mickelson, Q.C., A. Dosanjh, L. Phillips.

Counsel for the Defendants: J. Killam, Q.C., J. Currie, O. Hyatt.

**Reasons for Judgment**

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| **J.C. GRAUER J.** |

**INTRODUCTION**

**1**  This matter comes before me as an application to amend the Consolidated Statement of Claim. The underlying action is a claim for substantial damages arising out of alleged professional ***negligence*** and breaches of contract and fiduciary duty on the part of the defendant law firm ("Farris") and one of its partners, Mr. Robert Anderson. The claim arises out of events that occurred more than a decade ago. The trial is set to commence on January 4, 2010.

**2**  The plaintiffs take the position that the proposed amendments provide no more than further particulars of already pleaded causes of action. The defendant argues that the proposed amendments amount to pleading new causes of action beyond the limitation date, and are deficient in any event. Accordingly, the defendant submits that the proposed amendments should not be allowed, or should be allowed only with conditions attached including adjournment of the trial, preservation of the limitation defence, and security for costs.

**3**  Some background is in order. I should make it perfectly clear that I make no findings of fact whatsoever. What follows emerges from the parties' submissions and is set forth solely for the purpose of considering this application.

**BACKGROUND**

**4**  For present purposes, the plaintiffs distil down to the brothers Cragg , two architect/developers who had met with some success on the North Shore, including a multi-unit townhouse development known as Illahee. In 1999, their assets included 32 units remaining from this development, which provided equity and cash flow, and a number of other quality residential, recreational and office properties.

**5**  In the 1990s, the brothers assembled land in the area of 15th and Lonsdale in North Vancouver for a development called the "Tower Project". This involved a rather complicated scheme of mortgage financing that was put together in 1998 and 1999. The scheme included mortgages on the land, and construction financing. The second mortgage on the land was provided by a group known as Instafund. The plaintiffs also negotiated with Instafund for a third mortgage on the construction side.

**6**  Instafund provided a commitment letter for this third construction mortgage, with funds to be drawn down by the end of July, 1999. Delays occurred, and in September, Instafund took the position that the plaintiffs should pay "stand-by fees" to make up for the fact that the money had been available, without interest being charged, since July.

**7**  At this stage, the plaintiffs were advised with respect to their financing by a solicitor named Richard Tomlinson, since deceased. On his advice, the plaintiffs maintained that Instafund was not entitled to charge such a fee. Instafund continued to insist on payment of the standby fees, and also purported to reinstate the term of its commitment letter that time was of the essence. When the plaintiffs were unable or unwilling to provide the documentation required by Instafund within the time it stipulated, Instafund declined to advance the monies.

**8**  This was more than just a flesh wound. The construction financing was intended, in part, to allow the plaintiffs to pay out the land mortgages, including the second land mortgage to Instafund, which now went into default.

**9**  The Craggs consulted Robert Anderson of the defendant law firm, with whom they had worked before in their many business dealings. They met with Mr. Anderson on September 16 and 17, 1999.

**10**  After considering the matter, Mr. Anderson is said to have formed the view that the plaintiffs had a good chance of succeeding in a claim against Instafund for breach of contract. As I understand it, this was based upon the assertions that Instafund was contractually bound by its commitment letter, that there was nothing in the commitment letter that would support a claim for standby fees, and that although Instafund was entitled to reinstate the contractual term that time was of the essence, the deadline it had purported to impose was unreasonable in the circumstances.

**11**  I will not go into the details of the advice given by Mr. Anderson, including what adjectives he used and what warnings he gave. Like everything else, that will be for trial.

**12**  Mr. Anderson spoke to Instafund's solicitor about having instructions to commence action. In response, that solicitor proposed a "settlement offer" on October 6, 1999. He made it abundantly clear that Instafund would not reinstate the third construction mortgage. If, however, the plaintiffs would bring current all the arrears outstanding on the second land mortgage, pay fees in relation to the third construction mortgage, including the standby fees, and sign a full release, then Instafund would agree to extend the term of the second land mortgage to February 1, 2000.

**13**  It would appear that at the time, none of Mr. Tomlinson, Mr. Anderson, or the brothers Cragg thought very much of this proposal. It was seen as offering little while demanding a lot. In any event, the advice was to reject it, and it was rejected.

**14**  On October 25, 1999, Instafund commenced foreclosure proceedings on the second land mortgage. Had the plaintiffs accepted and complied with the terms of Instafund's settlement proposal, this could not have occurred before February 1, 2000.

**15**  On November 5, 1999, the plaintiffs commenced action against Instafund on Mr. Anderson's advice, anticipating that the two proceedings would be joined for trial. Instafund filed a pro forma statement of defence.

**16**  On December 8, 1999, Instafund amended its statement of defence to plead the following term of the mortgage, the provisions of which had been incorporated by reference into Instafund's letter of commitment:

4.20 NO OBLIGATION TO ADVANCE

That neither the preparation, execution or registration of this mortgage, nor the advance in part of the monies intended to be secured hereby, shall bind the Lender to advance the monies intended to be secured hereby or any unadvanced portion thereof except where the Lender is obliged to advance under this mortgage any amounts which it is called upon to pay under a cash equivalent instrument, it being understood and agreed that, save as aforesaid, the advance of monies, or any part thereof, from time to time, shall be in the sole discretion of the Lender.

**17**  This was the first time that Instafund advanced this clause as a reason for not funding the third construction mortgage. The plaintiffs rely heavily on the proposition that Mr. Anderson was not previously aware of its existence.

**18**  By January of 2000, it became clear to the plaintiffs that they would be unable to replace the Instafund third construction mortgage, and indeed, that they would be unable to save the development. The Tower Project was therefore listed for sale.

**19**  By February of 2000, Mr. Anderson was considering applying for judgment against Instafund by summary trial, pursuant to Rule 18A. In or around early March of 2000, he asked an associate to research judicial treatment of "no obligation to advance" clauses such as 4.20. The response was a memorandum dated March 20, 2000. The plaintiffs rely heavily on the proposition that Mr. Anderson was not previously aware of clause 4.20's legal effect.

**20**  The thrust of the memo was that the courts generally treated such clauses as meaning exactly what they said, so that a refusal to advance could not constitute a breach of the contract. The only arguable proviso was where there was fraud, bad faith or similar conduct that would take the parties outside the terms of the contract (per *obiter dicta* of Finch J., as he then was).

**21**  The associate also referred to clause 4.39, which provided that in case of conflict between the terms of the commitment letter and the terms of the mortgage, the lender "shall have absolute discretion to determine which terms of the Commitment or this mortgage shall prevail".

**22**  The impact of this memorandum was discussed between Mr. Anderson and Mr. Tomlinson, in the presence of the Craggs. Mr. Tomlinson apparently disagreed with the memorandum and expressed the view that the clause only gave discretion to the lender with respect to the advance of funds after the first draw. Mr. Anderson considered that the views expressed in the memorandum were correct, and that Mr. Tomlinson was wrong. It was not until several months later that he learned that Mr. Tomlinson had advised the Craggs of his view of the effect of clause 4.20 back in September of 1999, telling them not to worry about it.

**23**  The proceedings continued. Mr. Anderson developed a cogent argument that, by its acts and the factual matrix, Instafund must be taken to have elected under clause 4.39 that the terms of the commitment letter would prevail over the terms of the mortgage in so far as the discretion to advance funds was concerned, so that it could not thereafter rely on clause 4.20.

**24**  The courts did not agree. The matter came for summary trial before the Honourable Mr. Justice Vickers, who rendered judgment on December 4, 2000, dismissing the claim. On Mr. Anderson's advice, an appeal was taken. The appeal was dismissed in September of 2001 (per Finch C.J.B.C.).

**25**  Following the decision in the Court of Appeal, the Craggs asked Mr. Anderson about a possible claim against Mr. Tomlinson. On October 22, 2001, Mr. Anderson wrote to the plaintiffs stating as follows:

You have asked that we provide a brief overview of some of the issues that might arise if Salico Property Marketing Corporation ("Salico") and/or others commence an action against the estate of Mr. Tomlinson (the "Tomlinson Action") in connection with the advice he provided relating to the proposed funding of the Tower Project. As we have explained, in view of my being a potential witness in connection with any such action, we would not be able to act on your behalf. Accordingly, we have recommended other counsel who you might consider. ....

**26**  In the meantime, the foreclosure proceedings led to further foreclosures in a classic domino effect. In the end, all of the plaintiffs' properties with equity were sold. Nothing was saved.

**THE PROFESSIONAL LIABILITY PROCEEDINGS**

**27**  After Mr. Anderson's letter of October 22, 2001, the plaintiffs retained H.C. Ritchie Clark Q.C. On January 30, 2002, Mr. Clark commenced action on behalf of the plaintiffs against the estate of Mr. Tomlinson. Jack Webster was appointed to defend the claim.

**28**  Unsurprisingly, given Mr. Tomlinson's death, the evidence of Mr. Anderson was of considerable importance to this claim. For present purposes, it suffices to say that Mr. Anderson cooperated with Mr. Clark, and indeed was examined for discovery by Mr. Webster as a representative of the plaintiffs.

**29**  Equally unsurprisingly, Mr. Anderson took exception when, on January 6, 2004, Mr. Clark commenced action on behalf of the plaintiffs against Farris. Initially represented by C.E. Hinkson Q.C. (as he then was), Farris successfully applied for an order, pronounced January 28, 2005, [*[2005] B.C.J. No. 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S134-00000-00&context=), removing Mr. Clark and his law firm as solicitors of record for the plaintiffs, and enjoining them from acting as counsel for the plaintiffs in the proceeding.

**30**  The plaintiffs were next represented by Murray Clemens Q.C., who was appointed in both actions in July of 2005.

**31**  On September 19, 2005, the Court ordered that the plaintiffs' actions against the Tomlinson Estate and Farris be consolidated. A consolidated statement of claim was to be filed.

**32**  On August 15, 2006, Mr. Clemens issued notice of trial setting the consolidated action for trial for 15 days commencing February 18, 2008. Mr. Clemens subsequently circulated a draft consolidated statement of claim, but it was never filed.

**33**  Farris was represented by Mr. Hinkson until his appointment to this Court in mid-2007, following which Mr. Killam and his firm took over. The trial date was adjourned by consent from February 18, 2008, to June 8, 2009.

**34**  Mr. Clemens obtained an order removing him as the plaintiffs' solicitor of record on October 1, 2008. Current counsel for the plaintiffs began acting at some point thereafter, filing notice of their appointment on February 13, 2009.

**35**  It is noteworthy that the claim against the estate of Mr. Tomlinson was settled on undisclosed terms in January of this year. It is equally noteworthy that only thereafter did the litigation of the plaintiffs' claim against Farris move into high gear. A revamped consolidated statement of claim was filed on June 1, 2009, and examinations for discovery were conducted over the course of the summer. In these circumstances, the trial was understandably adjourned again from June 8, 2009, to January 4, 2010.

**THE EVOLUTION OF THE FARRIS PLEADINGS**

**36**  The relevant paragraphs of the claim against Farris as initially pleaded in 2004 were as follows:

1. On the 13th day of September, 1999, Instafund refused to advance funds to the Plaintiffs in accordance with the commitment letter entered into between them.
2. The Plaintiffs engaged the services of Farris & Company, specifically Mr. Anderson, to advise them as to the appropriate steps to take.
3. Farris & Company advised the Plaintiffs to commence action against Instafund, and the Plaintiffs subsequently did so.
4. The said advice was negligently given in that it was given:
5. Without conducting legal research into the applicable law;
6. Rendered with total disregard of a clause known as the discretion to advance clause, the meaning of which was well known to Farris & Company and which meaning was, in fact and in law, contrary to the advice given by Farris & Company to the Plaintiffs.
7. The Plaintiffs commenced action against Instafund.
8. Shortly thereafter, Instafund offered to settle the litigation on certain terms as to the payment of certain mortgage arrears , and the paying out of certain other Instafund mortgages within three months.
9. The Plaintiffs had the financial capacity and wherewithal to implement the proposed settlement.
10. Farris & Company recommended that the Plaintiffs not accept the settlement, which advice was negligently given in that it was given:
11. Without conducting legal research into the applicable law;
12. Rendered with total disregard of a clause known as the discretion to advance clause, the meaning of which was well known to Farris & Company and which meaning was, in fact and in law, contrary to the advice given by Farris & Company to the Plaintiffs.
13. In reliance on the said advice, the Plaintiffs rejected the settlement offer.
14. On the 14th day of December, 2000, the Plaintiffs' claim against Instafund was dismissed on an application brought pursuant to Rule 18A of the Supreme Court Rules. That dismissal was as a result of the terms of the said discretion to advance clause.
15. The Plaintiffs say that the Defendant throughout owed to them a fiduciary duty and a duty of care to properly advise them on all matters of law and of risk relative to the commencement of their litigation and to its potential settlement.
16. The Plaintiffs say that the ***negligence*** described hereintobefore [*sic*] was, further, in breach of the duty of care and fiduciary duty owed by the Defendant to the Plaintiffs.
17. The Plaintiffs further say that they have suffered loss and incurred expense and damage as a result of the conduct of the Defendant.

WHEREFORE the Plaintiffs claims against the Defendant:

1. Judgment for damages to be assessed;
2. Prejudgment interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*;
3. Costs;
4. Such further and other relief as to this Honourable Court may seem just.

**37**  I observe that paragraph 11 sets forth the general retainer of Farris to advise the plaintiffs as to the appropriate steps to take in response to Instafund's refusal to advance funds in accordance with the commitment letter. In carrying out this retainer, paragraphs 12-13 and 15-17 allege two instances of negligent advice: to commence action against Instafund, and to reject Instafund's settlement offer. In both instances, particulars of the alleged ***negligence*** are pleaded (paragraphs 13 and 17). In paragraph 21, it is alleged that the ***negligence*** thus described further constituted a breach of the duty of care and fiduciary duty owed by Farris to the plaintiffs.

**38**  In Mr. Clemens' draft consolidated statement of claim, the relevant portions were set out in paragraphs 30-36:

1. Subsequent to September 1999, the plaintiffs engaged the services of Farris & Company, specifically Anderson, to provide legal advice and legal services in relation to the refusal of Instafund Mortgage to fund the Third Mortgage Construction Loan.
2. Farris & Company owed a fiduciary duty, a duty of care and a contractual duty to provide the plaintiffs with competent, reasonable and timely legal advice and services in accordance with the standard of care expected of a lawyer in British Columbia (the "Duties").
3. On October 6, 1999, the Instafund Group made a settlement offer to resolve the plaintiffs' potential claim against it arising from the refusal of Instafund Mortgage to fund the Third Mortgage Construction Loan. The offer proposed certain terms by which Salico would pay certain mortgage arrears, and the Instafund Group would agree to extend the term of another, funded Instafund Group mortgage loan to Salico until February 1, 2000.
4. The plaintiffs had the financial capacity and wherewithal to implement the proposed settlement.
5. Farris & Company advised the plaintiffs not to accept the settlement proposed by the Instafund Group (the "Settlement Advice"). In reliance on the Settlement Advice, the plaintiffs rejected the proposed settlement. Instead, Farris & Company advised the Plaintiffs to commence an action against Instafund Mortgage and others (the "Instafund Action"), and the plaintiffs did so on November 5, 1999.
6. By providing the Settlement Advice, Farris & Company acted negligently and contrary to the Duties owed by it to the plaintiffs, as it gave that advice without due consideration of the law, and it failed to advise the plaintiffs that the No Obligation clause provided Instafund Mortgage with a discretion as to whether to fund the Third Mortgage Construction Loan.
7. But for the Settlement Advice, the plaintiffs would have accepted the proposed settlement, and the plaintiffs' loss and damage would have been limited or avoided.

**39**  I observe that in this draft, the instances of ***negligence*** appear to have been reduced from two to one, being the provision of the advice concerning Instafund's settlement offer, which of course predated the commencement of the action. Particulars of the ***negligence*** are provided in paragraph 35.

**40**  The consolidated statement of claim filed on June 1, 2009, set out the following relevant allegations:

1. On or about September 16, 1999, the Plaintiffs engaged the services of Farris & Company, specifically Mr. Anderson, to provide legal advice and legal services in relation to the refusal of Instafund Mortgage Management to fund the Third Mortgage Construction Loan and the consequences arising therefrom. In time, the Plaintiffs also engaged the services of Farris & Company to provide legal services in relation to the Foreclosures.
2. The Plaintiffs say that Farris & Company throughout owed to them a fiduciary duty, a contractual duty and a duty of care to provide the Plaintiffs with competent, reasonable and timely legal advice and services in accordance with the standard of care expected of a lawyer in British Columbia (the "Duties").
3. On or about October 6, 1999, the Instafund Group offered to settle on a global basis the disputes between it and the Plaintiffs (the "Settlement Offer"). The Settlement Offer proposed certain terms including that: Salico would pay certain fees and charges relating to the Third Mortgage Construction Loan; Salico would pay mortgage arrears of a funded Instafund Group mortgage in relation to the Land Financing (the "Land Loan"), and the Instafund Group would agree to extend the terms of the Land Loan until February 1, 2000.
4. The Plaintiff had the financial capacity and wherewithal to implement the proposed settlement.
5. Farris & Company recommended that the Plaintiffs not accept the Settlement Offer (the "Settlement Advice").
6. In reliance on the Settlement Advice, the Plaintiffs rejected the settlement offer. Instead,Farris & Company advised the Plaintiffs to commence action against Instafund Mortgage Management and others (the "Instafund Action"), and the Plaintiffs did so on or about November 5, 1999. Farris & Company acted for the Plaintiffs throughout in relation to the Instafund Action.
7. Farris & Company acted negligently and breached the Duties owed by it to the Plaintiffs by providing the Settlement Advice:
8. Without due consideration of the law;
9. by failing to advise the Plaintiffs that the No Obligation Clause provided Instafund Mortgage Management with a discretion not to fund the Third Mortgage Construction Loan; and
10. By failing to protect the equity in and income stream from the Plaintiffs' property holdings.
11. But for Farris & Company's breaches of the Duties, the Plaintiffs would have accepted the Settlement Offer, and the Plaintiffs' loss and damage would have been limited or avoided.

**41**  Mr. Mickelson maintains that paragraph 35 contains a typographical error, and ought to read as follows:

1. Farris & Company acted negligently and breached the Duties owed by it to the Plaintiffs:
2. by providing the Settlement Advice without due consideration of the law;
3. by failing to advise the Plaintiffs that the No Obligation Clause provided [Instafund] with a discretion not to fund the Third Mortgage Construction Loan; and
4. by failing to protect the equity in and income stream from the plaintiffs' property holdings.

**42**  While the format and syntax of the paragraph support Mr. Mickelson's position, Mr. Killam points out that such a construction would be contrary to the proper Darwinian flow from paragraph 17 of the original statement of claim, through paragraph 35 of the draft consolidated statement of claim to the present paragraph 35. While that may be correct, it seems to me that if the amendments covered by any of the proposed new subparagraphs are to be permitted, then the change in that paragraph's format should be part of that amendment.

**43**  I observe that, typographical error or not, subparagraph 35 (iii) appears for the first time. In his statement of defence, Mr. Killam treated this as a new claim, and pleaded that it was time-barred. He did not apply to strike it out.

**THE PROPOSED AMENDMENTS**

**44**  I turn now to the proposed amended consolidated statement of claim. All remains the same through paragraph 34 of the consolidated statement of claim. The plaintiffs now seek to replace paragraph 35 with the following two paragraphs:

35. On or about December 9, 1999, Mr. Anderson first learned of the existence of the No Obligation Clause upon receiving the Amended Statement of Defence in the Instafund Action. On or about March 20, 2000, Mr. Anderson first learned of the law in relation to the No Obligation Clause.

36. Farris & Company acted negligently and breached the Duties owed by it to the Plaintiffs, including by [by providing the Settlement Advice]: [Editor's note: Text in brackets is struck out in the original.]

1. providing the Settlement Advice [W] [Editor's note: Text in brackets is struck out in the original.] w ithout due consideration of the law;
2. [by] [Editor's note: Text in brackets is struck out in the original.] failing to advise the Plaintiffs in a timely manner that the No Obligation Clause provided Instafund Mortgage Management with a discretion not to fund the Third Mortgage Construction Loan; [and] [Editor's note: Text in brackets is struck out in the original.]

(iii) failing to advise the Plaintiffs that Mr. Anderson had been unaware of the No Obligation Clause and the law in relation to the No Obligation Clause;

(iv) failing to provide adequate advice in relation to

proceeding with and prosecuting the Instafund Action;

(v) failing to advise the Plaintiffs in a timely manner about the Plaintiffs' potential claim against Mr. Tomlinson;

(vi) failing to advise the Plaintiffs to seek independent legal advice after March 20, 2000; and

(vii) [By] [Editor's note: Text in brackets is struck out in the original.] failing to protect the equity in and income stream from the Plaintiffs' property holdings.

**45**  I observe that proposed subparagraphs 35 (iii), (v) and (vi) lack lineage in the previous pleadings.

**THE "LIQUIDATION CLAIM"**

**46**  The matter of amendments does not, however, end there. According to Farris, the plaintiffs intend a further significant change to their claim for which there is no proposed amendment to the pleadings. Mr. Killam describes this as the "liquidation claim", which description I adopt.

**47**  As I understand it, the difficulty arises out of a recent conversation between Mr. Mickelson and Mr. Killam in which Mr. Mickelson remarked that he expected his claim for damages to include the following scenario: had the plaintiffs been properly advised, they would have given up on the Tower Project and would have commenced an orderly liquidation of their assets in or around January of 2000, thereby preserving at least part of their holdings. The properties thus salvaged, Mr. Mickelson suggested, would have a present value in the range of $10 million.

**48**  Mr. Killam states that his understanding throughout the litigation of this claim to date was that the plaintiffs were claiming damages based upon the proposition that had they been properly advised, they would have been able to save the Tower Project. Now, he points out, they are suggesting the opposite: had they been properly advised, they would *not* have been able to save the Tower Project, but would have commenced an orderly liquidation of assets. Mr. Killam asserts that there is no pleading, whether existing or proposed, that would support such a claim. He submits that if the plaintiffs do indeed intend to pursue such a claim, it will fundamentally alter the nature of the case. It follows that the plaintiffs either should be barred from pursuing it, or should be obliged to plead it properly, with the trial being adjourned.

**49**  That Mr. Killam understood the plaintiffs' damage claim to be based upon the proposition that they would have saved the Tower Project is no surprise. That is precisely what was pleaded in reference to the claim against Mr. Tomlinson. After alleging that Mr. Tomlinson negligently advised them that they need not comply with Instafund's demands relating to timing and the payment of standby fees, and noting that Instafund thereafter refused to fund the third construction mortgage and demanded repayment of the second land mortgage, the plaintiffs plead in paragraph 26 of the consolidated statement of claim as follows:

1. The Plaintiff was, as a consequence thereof, unable to proceed with its real estate development, has lost that development and has suffered loss and incurred damage.

**50**  That allegation was not, however, repeated in relation to the claim against Farris. There, the following is set forth in paragraph 36:

1. But for Farris & Company's breaches of the Duties, the Plaintiffs would have accepted the Settlement Offer, and the Plaintiffs' loss and damage would have been limited or avoided.

**51**  Mr. Mickelson accordingly argues that the liquidation claim is simply one scenario to put before the trial judge for the assessment of damages flowing from the already pleaded breaches on the part of Farris. It does not depend upon giving up on the Tower Project; rather, he was prepared to assume the loss of that project for the purpose of quantifying the assessment. More importantly, he submits, it has nothing to do with, and is not dependent upon, his proposed amendments.

**52**  I agree with Mr. Mickelson on this point. While it is open to me to dismiss the plaintiffs' application to amend in whole or in part, it is not open to me to tell the plaintiffs otherwise how to plead their case, or to prohibit them from pursuing any particular argument at trial.

**53**  Moreover, while I accept Mr. Killam's assertion that the liquidation claim, as recently articulated by Mr. Mickelson, represents a brand-new tack in this proceeding, I am not persuaded that it is one that cannot be supported by the pleadings as they presently stand.

**54**  It seems to me that the claim as presently pleaded really comes down to this: Mr. Anderson gave negligent advice when he advised the plaintiffs to reject Instafund's settlement proposal. The advice was negligent because it was given in ignorance of the existence and effect of clause 4.20 of the mortgage. Had the plaintiffs received proper, fully-informed advice, they could and would have accepted the settlement proposal. This would have put off Instafund's foreclosure proceeding at the very least until February of 2000, given the terms of the settlement offer. The plaintiffs' focus would have been on their financial circumstances, rather than on fruitless litigation.

**55**  What might flow from this? One scenario, understood by Mr. Killam to be the pillar of the plaintiffs' case, is that the plaintiffs, free of the stigma of foreclosure, would have been in a position to obtain replacement financing, save the Tower Project, and avoid all that followed from its loss. The defendant, of course, argues that in the circumstances, the plaintiffs had no chance of obtaining replacement financing no matter what; the project was doomed in any event.

**56**  But another scenario, now advanced by Mr. Mickelson, is that in the period of grace obtained through acceptance of the settlement offer, the plaintiffs would have discovered, as in fact they did, that saving the Tower project was impracticable. In that event, there would still have been sufficient time before the Instafund second land mortgage became due in accordance with the settlement's terms, to plan an orderly disposition of assets.

**57**  Whether either scenario, or any part of the plaintiffs' claim, has any merit is outside of the scope of this application. Suffice it to say that, in my view, the liquidation claim is supported by the pleadings as they presently stand. It is a claim that flows directly from the alleged negligent advice pertaining to the settlement offer, and the averment that, properly advised, the plaintiffs would have accepted the offer. The question it addresses is what would have happened had the plaintiffs accepted the offer, from the answer to which their damages may be assessed.

**58**  In these circumstances, no intervention is required. While Farris's understandable surprise at the prospect of having to meet such a claim might support an application for an adjournment of the trial, it is irrelevant to the question of whether the plaintiffs' proposed amendments should be permitted, and if so, on what terms.

**ANALYSIS**

**1. New Causes of Action?**

**59**  Farris submits that the proposed amended paragraph 36 alleges new causes of action, not simply particulars, for which the limitation period of six years has expired.

**60**  The plaintiffs argue that the existing pleadings allege an overarching duty of care that was breached by Farris, of which the proposed amendments simply provide additional particulars. I am unable to accept this characterization of the pleadings.

**61**  From the start, the statement of claim alleged a retainer of the defendant to advise the plaintiffs as to the appropriate steps to take in the circumstances that faced them. The document then went on to allege two instances in which, during the course of carrying out this retainer, Farris gave advice that was negligent. The first was in relation to commencing action against Instafund, and the second was in relation to rejecting Instafund's settlement offer. Particulars of the alleged ***negligence*** are provided in each case, providing the necessary material facts. No other ***negligence*** in the course of the retainer is alleged. In particular, there is no general plea that Farris carried out its retainer negligently.

**62**  Mr. Michelson spent a great deal of time referring to the "narrative" of this case, by which I took him to mean the totality of the factual matrix arising from discovery and discussed between counsel. His point was that the amendments he is now seeking all arise from that matrix. That may be of some importance in considering the question of the balance of justice and convenience. It does not, however, inform the question of whether the proposed amendments constitute new causes of action. That must be determined on the basis of the pleadings alone.

**63**  A cause of action is defined as "the fact or combination of facts which give rise to a right to sue": *Romanchuk v. Revelstoke (City)*, [*[1999] B.C.J. No. 2409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1VY-00000-00&context=) (S.C.); *Battrum v. MacKenzie Estate*, [*2008 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G34Y-00000-00&context=), [*41 E.T.R. (3d) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G34Y-00000-00&context=). I agree with what was said by my brother Macaulay in the *Battrum* case at para. 30:

Accordingly, the focus here should be on the facts set out in the proposed amendments with a view to determining whether they give rise to some additional right to sue that did not already arise from the facts originally pled.

**64**  Proposed subparagraph 36 (iv) flows, in my view, directly from previously pleaded claims and facts, including what is set out in existing paragraph 34. No new facts are necessary.

**65**  Proposed new paragraph 35 sets out two new facts: (1) that Mr. Anderson first learned of the existence of clause 4.20 on or about December 9, 1999; and (2), that Mr. Anderson first learned of the law in relation to clause 4.20 on or about March 20, 2000. These emerged from the evidence developed in relation to the original allegation of ***negligence***.

**66**  On the basis of these new facts, the plaintiffs seek to allege that Farris acted negligently and breached the duties it owed by:

1. failing to advise the plaintiffs that Mr. Anderson had been unaware of clause 4.20 and the law relating to it (para. 36 (iii)); and
2. failing to advise the plaintiffs to seek independent legal advice after March 20, 2000 (when Mr. Anderson learned of the legal effect of clause 4.20 and should have realized that his previous lack of awareness could constitute ***negligence***) (para. 36 (vi)).

**67**  I have some difficulty in discerning what these allegations add to the claim. Certainly they are closely related to the pre-existing claim that Mr. Anderson was negligent in providing settlement advice without due consideration of the applicable law, and in failing to advise about the effect of clause 4.20. But they depend upon newly pleaded facts occurring in a newly pleaded timeframe. I conclude that they therefore constitute new causes of action.

**68**  Proposed subparagraph 36 (v), alleging that Farris was negligent in failing to advise the plaintiffs in a timely manner about their potential claim against Mr. Tomlinson, is not grounded upon any pleaded facts in any previous iteration of the statement of claim, or indeed upon new facts. It is not enough to say that it sufficiently establishes a cause of action because the duty and loss are already pleaded, and here is the breach. Necessary material facts would include what knowledge Mr. Anderson had and when. The proposed pleading and its progenitors are all silent on that.

**69**  Accordingly, I conclude that the proposed amendment set out in subparagraph 36 (v) is deficient, and in any event would constitute a new cause of action if its deficiency were corrected.

**70**  To summarize:

**71**  I find that the allegations set out in proposed subparagraphs 36 (iii) and (vi) are not deficient, but require the support of newly pleaded facts (proposed paragraph 35) and therefore constitute new causes of action. Accordingly, they require further consideration.

**72**  The allegation set out in subparagraph 36 (v) is unsupported by material facts, newly pleaded or otherwise, and is therefore deficient; in any event it would constitute a new cause of action. I would not allow this amendment.

**73**  The allegation set out in subparagraph 36 (iv) is based upon previously pleaded facts and allegations, and does not constitute a new cause of action. I would allow this amendment.

**2. Time-barred?**

**74**  Ms. Currie, for the defendant, argues that the new causes of action the plaintiffs seek to plead all relate to matters occurring between December of 1999 and the summer of 2000. She submits that all of the necessary facts would have been known to the plaintiffs by no later than 2002, when Mr. Anderson was interviewed in the context of the *Tomlinson* action by Mr. Webster in the presence of Mr. Clark.

**75**  Accordingly, Ms. Currie asserts that these new causes of action are clearly out of time (the applicable limitation period being six years) pursuant to the provisions 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=). Alternatively, she submits that if I am unable to determine summarily whether these new causes of action are time-barred, then the amendments should only be allowed on condition that any limitation defence be preserved.

**76**  When the limitation applicable to the causes of action set forth in proposed subparagraphs 36 (iii) and (v) would have commenced running is not clear. The plaintiffs were presumably aware by late March of 2000 of the views expressed in the Farris memo concerning the effect of clause 4.20, and would have known that they had not been told about those views before. What I cannot find on the evidence before me is when the plaintiffs first learned that in fact Mr. Anderson had not known of the clause's existence before December 9, 1999, or of its legal effect before March 20, 2000, as alleged in proposed paragraph 35.

**77**  In *KPMG Inc. v. IMO Industries (Canada) Inc.*, [*2008 BCCA 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M325-00000-00&context=), Bauman J.A. (as he then was), for the Court, said this:

[47] Accordingly, I conclude that the chambers judge faced with an application to amend (which is otherwise proper), under Rule 24(1), and the possible expiration of a limitation period in respect of the cause of action raised in the new pleading in circumstances where it would be inappropriate to decide that issue summarily, should ask herself this question:

Assuming that the limitation period has expired, in the exercise of my discretion under s. 4(4) of the *Limitation Act* would I nevertheless permit the amendment?

[48] If the answer is "yes", the proposed amendment should be allowed, pursuant to the reasoning in [*Brito (Guardian ad litem of) v. Woolley* [*(1997), 15 C.P.C. (4th) 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M227-00000-00&context=) (B.C.S.C.)]. If the answer is "no" (i.e. the loss of a limitation defence would cause such prejudice as would not permit the exercise of the s. 4(4) discretion in favour of the amendment) then the amendment should be allowed without prejudice to the defendant raising the limitation defence at trial. ....

[50] I say this in the context of a Rule 24(1) application which is otherwise proper because, of course, if the application should fail on an exercise of that discretion regardless of the expiration of the limitation period, the application should be dismissed.

**78**  As directed by the *KPMG* case, then, I will proceed to consider whether I should exercise my discretion by permitting the amendments proposed in subparagraphs 36 (iii) and (v) on the assumption that the limitation period has expired.

**79**  In doing so, I take into account the further direction of the Court of Appeal in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=), where Finch J.A. (as he then was) said this:

[45] On principle, therefore, it appears to me that the discretion to permit amendments afforded by both Rule 24(1) and s. 4(4) of the [Limitation] Act was intended to be completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. ....

[67] In the exercise of the judge's discretion, the length of delay, the reasons for delay and the expiry of a limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard should also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action.

**3. Prejudice?**

**80**  As indicated, I will assume for the purpose of this analysis is that the limitation period has expired with respect to the proposed claims described in subparagraphs 36 (iii) and (v). It has often been held that the expiry of a limitation, in itself, is evidence of prejudice, and of course it is invariably accompanied by delay.

**81**  Typically, however, the establishment of significant prejudice normally involves some evidence of ways in which the defendant's ability to defend the new claims has been hampered by the effluxion of time. Here, there was some evidence that documents had gone missing, but that happened long ago in these proceedings.

**82**  In this particular instance, the "new facts" that found the new causes of action are inextricably intertwined with the previously pleaded claim based on ***negligence*** in the giving of advice concerning the settlement offer. The factual matrix really does not change at all. The question of when Mr. Anderson learned first of the existence, and then of the effect, of clause 4.20 has always been front and centre.

**83**  The delay in articulating the further claims connected to those facts is not surprising given that, as I have said, the active litigation of this case in terms of the conduct of examinations for discovery and the finalization of discovery of documents did not get under way until this year. I do not think that the fault for that can be laid at the feet of only one side. Both sides had difficulty with their representation through no fault of their own, and proceedings had to be completed that had nothing to do with the merits of the case.

**84**  As it is, the factual issues raised by the new claims are unlikely to impose any greater strain upon the memories of those involved than do the existing pleadings.

**85**  Ms. Currie argues a further ground of prejudice. She notes that in challenging some of the evidence given by Mr. Anderson on discovery, the plaintiffs rely on evidence he gave back in 2002 when he was interviewed by Mr. Webster, and in 2003 when he was subsequently examined for discovery in the *Tomlinson* litigation, all before Farris was sued. The defendant seeks to develop an estoppel argument out of this narrative. For present purposes, Ms. Currie argues that the prejudice arising to Mr. Anderson because of that unfortunate sequence of events will be magnified if Mr. Anderson is now subject to these further allegations.

**86**  I cannot accept that submission. That prejudice arises from acts that occurred long ago, and have been dealt with by the removal of Mr. Clark and his firm as solicitors of record. It is not connected to any delay. It would be the same if the proposed amendments had been pleaded all along. It is therefore not relevant, in my view, to the balancing of the desire to ensure that all proper claims are adjudicated in this matter against the prejudice caused to the defendant by the passage of time.

**87**  In all of the circumstances, given the context out of which the proposed claims have arisen, I find that the defendants are not unduly prejudiced by their addition even if the limitation period has expired.

**4. Terms?**

1. ***Preservation of defences***

**88**  The defendant has sought, as a term of granting leave to amend, an order preserving its right to argue the limitation defence at trial, and to argue estoppel.

**89**  Give the reasoning set forth in para. 48 of the *KPMG* case, *supra*, I see no reason to permit the defendant to preserve its limitation defence. The prejudice is not sufficient.

**90**  The estoppel defence is not dependent upon whether the amendments are permitted or not. Unlike the limitation defence, which if not expressly preserved will disappear in accordance with s. 4(4) of the *Limitation Act*, there is nothing that threatens the continued existence of any estoppel argument that the defendants see fit to advance.

1. ***Adjournment of the trial***

**91**  This is a complex and significant case. For the plaintiffs, the outcome is of truly vital importance. For the defendant, the professional reputation of a senior and respected member of the bar is at stake. The time spent in active litigation has been relatively short. The plaintiffs are now altering their course, albeit in accordance with the existing factual matrix

**92**  Even though the narrative does not change to any significant degree, it is evident that a great deal remains to be explored on discovery, including the question of what, if anything, flows from the new claims in terms of damages. Experts will need further instruction, and they in turn may require further investigation. Justice will not be served by pressing this matter on to trial in two months.

**93**  In these circumstances, I am satisfied that the interests of justice require an adjournment of the trial as a term of granting leave to amend the consolidated statement of claim. Adjournments no longer need result in long delays, and I note that the plaintiffs have been able to settle at least part of their claim.

1. ***Security for costs***

**94**  The argument of the defendant in support of an order requiring the plaintiffs to post security for costs was based principally on the plaintiffs' decision to pursue the liquidation claim. The defendant characterized this as an about-face by which, in desperation, the plaintiffs were abandoning the claim on which their case had rested for so long, and were venturing into new and inconsistent territory. For this, the defendant argues, the plaintiffs should post security for costs. The expert accounting fees alone would likely range into the six figures.

**95**  It may be that this characterization will prove to be correct, but at present I cannot say. I consider it sufficient to repeat the view I have already expressed that the liquidation claim, while newly articulated, is nevertheless supported by the existing pleadings and is irrelevant to the proposed amendments. In these circumstances, I am not prepared to order security for costs. The plaintiffs are entitled to try their claim without being hampered by such a burden.

**CONCLUSION**

**96**  The plaintiffs have leave to amend the consolidated statement of claim by adding proposed paragraphs 35 and 36, with the exception of subparagraph 36 (v).

**97**  As a term of this order, the trial of this action will be adjourned.

**98**  Costs will be in the cause.

J.C. GRAUER J.

**End of Document**

[***Schlachter v. Foster, [2017] B.C.J. No. 387***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N1N-NSH1-FGY5-M3JK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

R.W. Jenkins J.

Heard: September 15 and 16, 2016.

Judgment: February 24, 2017.

Docket: S028462

Registry: Chilliwack

**[2017] B.C.J. No. 387** | 2017 BCSC 300

Between David Douglas Schlachter, Plaintiff, and James Michael Foster, Defendant

(51 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Rules of the road — Signals and warnings — Evidence and proof — Action by the plaintiff Schlachter in *negligence* against the defendant Foster for damages arising from a 2013 motor vehicle accident allowed — The plaintiff had established that he had been travelling straight through the intersection on a yellow light, under the speed limit, while the defendant had been making a left turn on a yellow light — The plaintiff had the right of way, and the defendant had been negligent in failing to keep a proper lookout and avoiding the collision — Motor Vehicle Act, s. 174.**

**Transportation law — Motor vehicles — Rules of the road — Intersections — *Negligence* — Turns — Left turn at intersection — Action by the plaintiff Schlachter in *negligence* against the defendant Foster for damages arising from a 2013 motor vehicle accident allowed — The plaintiff had established that he had been travelling straight through the intersection on a yellow light, under the speed limit, while the defendant had been making a left turn on a yellow light — The plaintiff had the right of way, and the defendant had been negligent in failing to keep a proper lookout and avoiding the collision — Motor Vehicle Act, s. 174.**

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| Action by the plaintiff Schlachter in ***negligence*** against the defendant Foster for damages arising from a 2013 motor vehicle accident. The plaintiff was driving through a busy intersection on a yellow light. The defendant, making a left turn, also on a yellow light, was struck on the side by the plaintiff's vehicle. The plaintiff testified that he did not have time to avoid the collision, as the defendant's vehicle was suddenly "right in front of me". He testified that, due to heavy traffic, his rage of speed through the intersection was approximately 50 to 60 km/hr, well under the speed limit. The defendant claimed that the plaintiff should have seen his vehicle in time to swerve and avoid him. In his statement to the ICBC, the defendant told the adjuster that the light had been very late amber or red when he proceeded to make the left turn. The defendant testified that the defendant had accelerated, and was going between 90 and 120 km/hr through the intersection. Two eyewitnesses testified that the plaintiff had been the last through the yellow light before the accident. The plaintiff called a mechanical collision reconstruction expert, who testified that the plaintiff's vehicle was travelling at about 54 to 64 km/hr, while the defendant's speed was between 17 and 28 km/hr. The defendant called one independent eyewitness, who testified that the intersection was clear, and that the defendant had made his left turn slowly, and should have been visible.  HELD: Action allowed.  With respect to the evidence, the defendant was comparatively less reliable and realistic than the plaintiff. The evidence of the majority of the independent witnesses, including that of the expert, corroborated the plaintiff's version of the accident. Further, the defendant's own statement to the ICBC adjuster also supported the plaintiff's claim that the defendant had made the left turn on a yellow light. This contravened s. 174 of the Motor Vehicle Act, which provided that a vehicle turning left must yield to a vehicle travelling through an intersection. The plaintiff, in proceeding straight through the intersection, constituted an "immediate hazard". The defendant had not established that the plaintiff had had a realistic ability to stop. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, R.S.B.C. 1996, s. 318, s. 174

**Counsel**

Counsel for the Plaintiff: J.L. Zacharias, B. Vickers.

Counsel for the Defendant: R.F. Shirreff.

**Reasons for Judgment**

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

**Background**

**1**  The sole issue in this case is a determination of liability for damages arising from the motor vehicle accident which occurred on July 2, 2013 at the intersection of Highway 10 and 192nd Street in Surrey, B.C. Immediately before the accident, the plaintiff, Mr. Schlachter, was driving eastbound on Highway 10 when he struck the vehicle owned and driven by the defendant, Mr. Foster, as the latter attempted to make a left-hand turn from the westbound turning lane on Highway 10, south onto 192nd Street.

**2**  In addition to the evidence of the parties, the court received an expert opinion and testimony from an engineer qualified to opine in the field of motor vehicle accident reconstruction, testimony from two witnesses to the accident and evidence from an ICBC telephone claims adjuster who took a statement from the defendant. There are considerable differences between the plaintiff's and defendant's versions of the accident, which I summarize below.

**The Evidence**

**A. The Plaintiff**

**3**  At approximately 5:30 p.m. on July 2, 2013, Mr. Schlachter left work in his 2007 Dodge Ram 3500 pickup truck and travelled eastward on Highway 10, a busy arterial highway with four through lanes of traffic plus turning lanes at many intersections. At the time of the accident, there was considerable eastbound traffic during the afternoon rush hour. The speed limit on the section of Highway 10 surrounding the accident was 70 km/h. Mr. Schlachter was alone in his vehicle.

**4**  Initially, Mr. Schlachter testified that he was travelling in the fast left through lane at 50 to 60 km/h and going "with the flow of traffic" during rush hour. He could not recall if there were other vehicles around him.

**5**  According to Bradley Heinrichs' expert report, filed at trial by the plaintiff (Exhibit 2), approximately 86 to 90 metres west of the intersection where the accident occurred was an advance warning light on Highway 10. It flashed to indicate that the green light at the next intersection, at 192nd St., would imminently turn yellow. In his evidence, Mr. Schlachter could not recall if he had seen the advance warning lights on the day of the accident or even if such lights were in place and in operation. He has since noted that the advance warning light is in place and testified that he had forgotten about that light as he had not travelled on that road for years.

**6**  Mr. Schlachter stated that as he approached the intersection of Highway 10 and 192nd St., he continued driving below the speed limit with the flow of traffic.

**7**  Mr. Schlachter stated that he noticed the light was green when his truck was near the entrance of the intersection and that, as he entered the intersection, the light turned yellow. He made no effort to stop as he stated it was unsafe to do so. He stated he looked up for a split second at the yellow light and when he looked back down "Mr. Foster's car was right in front of me". He stated the defendant's vehicle was a gray Acura from which he had no time to swerve away. He applied his brakes but "hit him right away". Mr. Schlachter's truck came to rest in the eastbound slow lane.

**8**  He then got out of his car and approached Mr. Foster who he said apologized and said "he didn't see me". They exchanged insurance and driver's license information. The paramedics then told him to move his vehicle from the busy intersection and assured him that he could leave the scene.

**9**  On cross-examination, Mr. Schlachter testified that although he had a good view of the intersection as he approached it, he had not seen a vehicle in the westbound left turn lane in front of him onto 192nd St., preparing to turn left. He stated that the first time he saw the defendant's vehicle was when it was "right in front" of him after he had glanced at the lights, which were changing colours. When he looked back down, he saw the defendant's vehicle moving in front of him.

**10**  He stated that he had "no time to take evasive action", he had "no time to do anything" and that he had applied his brakes "hard" when he saw the Acura. He maintained his foot on the brake from the moment of impact until he came to a full stop. He stated that the impact caused his truck to veer into the next lane to the right.

**11**  Mr. Schlachter stated that he knew he had hit the rear panel of the right or passenger side of the Acura; this statement is consistent with photographs of the defendant's vehicle taken after the accident.

**12**  Asked on cross-examination why he failed to see the Acura while it was in the left turn lane waiting to turn, Mr. Schlachter had no explanation for his failure to see the Acura until he was eight feet or one-half car length away from it. He also denied having accelerated when nearing the intersection.

**B. The Defendant**

**13**  At the time of the accident, Mr. Foster was driving home from work at an Acura dealership on Highway 10. He testified that traffic was very heavy in the eastbound direction and that westbound traffic was light. He was first in line to turn southbound onto 192nd St. from the left turn lane. He testified that once the traffic lights on Highway 10 turned green, he advanced into the intersection and waited for traffic to clear since he had missed the left turn green signal.

**14**  He stated that he continued to watch the heavy eastbound traffic and saw the light change to yellow. He noticed a black truck in the eastbound left turn lane, four stragglers pass through the intersection on the yellow light and one car in the slow lane heading east with a semi-cab behind two cars in the fast lane. He continued:

The slow lane looked clear - I turned on 3-4 seconds of yellow, half way through, I saw [the plaintiff's truck] in the slow lane - I hadn't seen the truck, I looked at him and saw him accelerating, I put my foot on the accelerator and tried to continue through the arc of my turn - I saw him accelerate and watched him until he hit me. I saw him with his hands on the steering wheel, looking up at the traffic light.

**15**  Counsel for the plaintiff referred Mr. Foster to the transcript of his examination for discovery in which he testified as follows at pp. 18-19, Q. 116-117:

116 . . . When I talked about the three stragglers there was quite a distance before the next oncoming traffic and that's when I saw the nineties GMC with the white ca[b] (sic) coming and decelerating in the fast lane and that's the - - then there's guys behind him, but at that time I couldn't see that there was anyone there at all. It looked clear to me and that's when I proceeded. I could tell that, that guy in the fast lane coming towards me was decelerating and I had the time to actually make the turn.

117 Q Was that vehicle you described blocking your view of the vehicle you were - -

A No, it was not. I could see down the actual slow lane quite a distance.

**16**  Mr. Foster stated in his July 9, 2013 ICBC statement that the light was either a very late amber or a red when he proceeded to make a turn.

**17**  Mr. Foster testified that his vehicle spun 540 degrees and ended up northbound in the left turn lane on 192nd St. He added that he estimated the plaintiff's truck had been travelling between 90 and120 km/h through the intersection and had been accelerating quickly instead of safely stopping before entering the intersection.

**18**  In a statement given to ICBC on July 9, 2013, Mr. Foster confirmed that the vehicle that struck him had been travelling eastbound in the slow through lane. He denied that the plaintiff had applied his brakes.

**19**  On cross-examination, Mr. Foster testified that he first saw the plaintiff's truck at the "commencement of the solid left turn line". Based upon measurements in the plaintiff's expert report, the beginning of the solid left turn line was several car lengths west of the intersection, closer to the advance warning light than the intersection.

**Other Witnesses**

**Kirby Baum**

**20**  Mr. Baum is employed as a truck driver and was an independent witness called by the plaintiff.

**21**  Mr. Baum testified that on the day in question, he was driving his tow truck eastbound in the fast lane on Highway 10, approximately 20 meters behind Mr. Schlachter's truck, which was immediately in front of him. He testified that at that time, he was driving at 70 km/h and that no vehicles were between him and Mr. Schlachter's pickup. He recalled the advance warning light activating before the truck in front of him passed underneath the advance warning light. He added the Schlachter vehicle was 20 meters from the advance warning light when the light activated.

**22**  Mr. Baum testified that the traffic light at 192nd St. was yellow when the pickup in front of him entered the intersection and that, at impact, the light was yellow.

**23**  After the accident, he stopped at the stop line, activated the beacons on his tow truck and got out to see if everyone was okay.

**24**  On cross-examination, Mr. Baum was asked if there was a semi-tractor in the right turn lane to which he answered "there was not". He added that he saw brake lights on the Dodge pickup come on between one and two seconds before the advance warning light activated. Mr. Baum first saw the advanced warning light activate before he began to decelerate and noticed that, as he slowed down, the distance between him and Mr. Schlachter increased. When the pickup entered the intersection, Mr. Baum was 25 to 30 meters behind it.

**25**  Mr. Baum then testified that the pickup driver was in a position to come to a safe, slow stop.

**26**  Mr. Baum stated he had seen the Acura enter the intersection turning left/southbound and that there was nothing impeding the pickup driver's view from seeing the Acura enter the intersection.

**27**  Mr. Baum anticipated the accident slightly before the pickup entered the intersection.

**28**  Finally, Mr. Baum testified that Mr. Schlachter's vehicle was the last vehicle through the intersection and that no other vehicles stopped or slowed at the intersection before Mr. Schlachter entered it. Mr. Baum's vehicle was the first to stop at the intersection. No other vehicles were at the intersection when he pulled up to it.

**Bradley Heinrichs**

**29**  Mr. Heinrichs was qualified as an expert in the field of mechanical collision reconstruction and his June 17, 2016 report was entered as Exhibit 2 at trial. On p. 8 of his report, Mr. Heinrichs concluded that the likely location and speeds of the two vehicles at impact were:

1. At impact:
2. The Schlachter Dodge may have been in either the left through lane or at the left edge of the right through lane.
3. The Foster Acura was about in line with the northbound turn lane or the raised concrete median south of the intersection.
4. The Schlachter Dodge was probably travelling at about 54 to 64 km/h at impact, with a most likely speed of about 59 km/h.
5. The Foster Acura was probably travelling at about 17 to 28 km/h at impact, with a most likely speed of about 20 km/h.

**30**  He also determined through investigation that the advance warning light on Highway 10 eastbound was located about 86 to 90 meters west of the intersection and was "turned on 5.6 seconds before the eastbound traffic light turned amber" and that the eastbound traffic on Highway 10 "saw an amber light for 4.5 seconds before the red light".

**31**  Mr. Heinrichs also provided calculations including the distances travelled per second at speeds of 50, 60 and 70 km/h, which are, respectively, 13.9 m/second, 16.7 m/second and 19.4 m/second. Considering the advance warning light was 86 to 90 metres from the entrance to the intersection on Highway 10 eastbound, had Mr. Schlachter been travelling at a speed of 60 km/h, he would have travelled 83.5 metres and would have been almost in the intersection within five seconds. Considering the yellow light did not turn on until 5.6 seconds after the advance warning light had been flashing, Mr. Schlachter who testified initially seeing a green light, would have likely noticed the yellow light come on as he entered the intersection. If the yellow light were on when he entered the intersection, Mr. Schlachter would have had the right to proceed. If Mr. Schlachter was travelling any faster than 60 km/h, he would have been well into the intersection if not almost through the intersection within five seconds.

**32**  Mr. Heinrichs' calculations therefore support Mr. Schlachter's evidence that the yellow light came on as he entered the intersection and had not turned red as opposed to the defendant's evidence that Mr. Schlachter had run the red light.

**Richard Churchill-Brown**

**33**  Mr. Churchill-Brown, an adjuster in the telephone claims department for ICBC, was another witness called by the plaintiff. He received a telephone claim from Mr. Foster on July 3, 2013 and simultaneously prepared a Claim File Report based upon information provided to him by Mr. Foster.

**34**  The Claim File Report in part reads as follows:

Description: INS W/B ON HWY 10 IN 3/3 MAKING L/TURN ONTO 192. T/P E/B ON HWY IN 2/4. INS PULLED FWD ON GRN. LIGHT. ON AMBER, INS MADE L/TURN, VEH IN 3/4 E/B STOP'D, INS DIDN'T NOTICE T/P VEH STILL MOVING AND MADE TURN.

**35**  Translating, according to Mr. Churchill-Brown's note of which Mr. Churchill-Brown had no specific recollection, Mr. Foster reported having pulled forward from the left turn lane westbound on a green light and on amber, not noticed Mr. Schlachter's vehicle was still moving when he made a turn.

**Mark Robertson**

**36**  Mr. Robertson was called as a witness by the defence. Immediately before the accident, Mr. Robertson was stopped on the south side of the intersection on 192nd St., and was first in line in the curb lane facing north. He testified that he had been waiting at the red light for approximately 15 seconds and noticed westbound vehicles on Highway 10 waiting to turn left onto 192nd St. He continued that the light when on Highway 10 turned from green to yellow, that traffic was still going through the yellow light, and that when the eastbound curb lane driver had stopped, he noticed a westbound vehicle turning left, which ended up in a collision. He stated that he saw it start a left turn and then it "advanced slowly waiting for traffic to clear and started to make his turn. Traffic was clear when he started to turn ... then he got hit by a truck".

**37**  Mr. Robertson also testified that he "was surprised [the accident] happened. The intersection appeared to be clear and traffic had seemed to slow down and [the defendant] had moved out slowly". Mr. Robertson also testified the light on Highway 10 was still yellow when the defendant's vehicle was turning.

**38**  In cross-examination, Mr. Robertson stated the defendant's vehicle was struck "two to three seconds" after he saw the light turn yellow and that it was "yellow when he started to make the turn". He also stated that the truck was in the "middle left lane" which was understood to be the fast through lane.

**Findings of Fact**

**39**  When assessing evidence of speed, time and distance in motor vehicle cases, statements regarding those facts are inevitably estimates and will commonly vary between witnesses. Five seconds in one witness's evidence could easily range above or below that estimate when attempting to reconstruct what occurred in a very short period of time. Therefore, it is important to keep in mind that such evidence is one person's opinion which can only be considered an estimate.

**40**  Considering the evidence of Mr. Schlachter, as well as the majority of the independent witnesses' evidence as opposed to that of Mr. Foster, I found the evidence of Mr. Foster to be comparatively less reliable and realistic.

**41**  Based upon all of the evidence, I find that Mr. Schlachter's vehicle most likely entered the intersection shortly after the traffic lights for Highway 10 turned yellow. That finding is supported by Mr. Schlachter and Mr. Baum's evidence, Mr. Heinrichs' analysis and my preference of Mr. Schlachter's evidence over that of Mr. Foster.

**42**  Mr. Baum's testimony that the distance between his and Mr. Schlachter's vehicles increased from 20 meters to 25 meters as Mr. Baum slowed to a stop corroborates that Mr. Schlachter was travelling between 60 to 70 km/h, which is consistent with Mr. Heinrichs' estimate of Mr. Schlachter's likely speed at impact: 59 km/h. That evidence is contrary to Mr. Foster's evidence. He testified that Mr. Schlachter's vehicle had accelerated before impact and was travelling at 90 to 120 km/h. I accept the evidence of the plaintiff in this respect.

**43**  Each of Mr. Schlachter, Mr. Baum and Mr. Robertson testified that Mr. Schlachter was travelling in the fast through lane, contrary to Mr. Foster's evidence. I also note that with Mr. Schlachter travelling in the fast through lane while Mr. Foster was waiting to turn left onto 192nd St., Mr. Foster would have a clear view of any vehicles coming eastbound towards him including Mr. Schlachter's vehicle. Mr. Foster also admitted that if Mr. Schlachter's vehicle were in the slow through lane, his view of traffic coming towards him would be clear. I find that Mr. Schlachter was travelling in the fast lane in full view of Mr. Foster.

**44**  I also find, based upon Mr. Foster's evidence and his reporting to Mr. Churchill-Brown that Mr. Foster made a left turn on an amber light and "didn't notice [Mr. Schlachter's vehicle was] still moving" before he turned southbound.

**45**  Finally, I find that the defendant has failed to provide evidence that Mr. Schlachter had an ability to stop. Considering Mr. Schlachter was either entering the intersection or already in the intersection when he saw Mr. Foster's vehicle, Mr. Schlachter would have had no realistic ability to stop. On this point, I find Mr. Baum's evidence to be unhelpful. Mr. Baum was at a distance 20 to 30 metres behind Mr. Schalchter. He was not in a position to do more than guess about Mr. Schlachter's ability to stop. As such, I find the defendant 100% liable for the accident.

**The Law**

**46**  The *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* [the "*MVA*"] includes the following sections that are relevant to this case:

Yielding right of way on left turn

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

**47**  The leading decision, referred to by both parties, on the duty to yield in the case of dominant and servient positions is *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=) in which Harris, J.A. stated at paras. 33 - 35:

[33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.

[34] As observed 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=) (B.C.C.A.) at para. 33, the words "immediate hazard" are "used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, by themselves, define the standard of care in a ***negligence*** action".

[35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment of the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them. [Emphasis added]

**48**  I also refer to the recent decision of *Pirie v. Skantz,* [*2016 BCCA 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J58-W6W1-FG12-61NB-00000-00&context=), where Fitch J.A. refers to the words of the trial judge in *Nerval,* stating:

[11] ...In *Nerval,* at paras. 36-37, Harris J.A. outlined the two part burden placed upon a left turning driver under s. 174, summarized as follows:

1. to demonstrate that when the left turning driver commenced his or her turn, there was no immediate hazard; and
2. if the through driver is found to be the dominant driver, to show that the through driver nonetheless was negligent and at fault for contributing to the accident. [Emphasis in original]

**49**  In *Raie v. Thorpe,* (1963) 43 W.W.R. 405 (B.C.C.A.) [*Raie*] at p. 410, Tysoe J.A. stated:

. . .if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of s. 164.

Section 164 referred to in *Raie* is the predecessor to s. 174 of the *MVA.*

**Analysis and Conclusion**

**50**  Earlier in these reasons, I found that Mr. Schlachter most likely entered the intersection on a yellow light which, in relation to any left-turning driver coming in the opposite direction, results in the through driver, in this case Mr. Schlachter, constituting an "immediate hazard" as contemplated by s. 174 of the *MVA.* Mr. Schlachter was driving at or near the speed limit and was authorized to enter the intersection under a recent yellow light. As stated above, Mr. Foster had a clear view of traffic coming towards him that could constitute an "immediate hazard", and, as a result, was obliged to determine if it was safe for him to complete his left turn. He failed to keep a proper lookout and was negligent in these circumstances.

**51**  The plaintiff has been successful in this trial and will be entitled to costs on Scale B, unless there are factors of which I am not aware. If there are factors of which I am not aware affecting costs, I will receive written submissions regarding the same up to 30 days from issuance of these reasons for judgment.

R.W. JENKINS J.

**End of Document**

[***Suzuki v. Bain Estate, [2005] B.C.J. No. 1968***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1FP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Bauman J.

Heard: June 13 and 17, 2005.

Judgment: September 12, 2005.

Vancouver Registry No. M023771

**[2005] B.C.J. No. 1968** | 2005 BCSC 1276 | 142 A.C.W.S. (3d) 98

Between Charles Suzuki, plaintiff, and Jeremy Duncan Bain, deceased, and Leontine Larsen, defendants

(79 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Damages — General damages — Categories of — Loss of income — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — Physical injuries — Body injuries — Back — Neck.**

|  |
| --- |
| Action by the plaintiff, Suzuki, against the defendant Bain Estate for liability and damages resulting from a motor vehicle accident. Bain was killed when his car failed to negotiate a curve and slid across the centre line and slammed violently into Suzuki's fully loaded, southbound logging truck. Bain's vehicle, upon exiting the curve, fishtailed to his left, then to his right and slid into the logging truck. At the time of the accident, there was evidence that the general area of the curve was contaminated with diesel or another fuel which caused the road to be slippery. Suzuki had been in a prior accident and his ongoing neck and back injuries were exacerbated by the accident in question.  HELD: Action allowed.  On the whole of the evidence, notwithstanding the presence of some substance on the highway, the curve could have been successfully negotiated by a car travelling at a speed appropriate to the known and reasonably foreseeable road conditions, therefore Bain was liable. In terms of damages, Suzuki's pre-existing injuries were taken into consideration and evidence established that his condition changed and worsened after the accident. Based on this, Suzuki was awarded $40,000 non-pecuniary damages, $12,319 for loss of income, $35,000 for loss of future capacity and $720 for cost of future care. |

**Counsel**

Counsel for the Plaintiff: D. Neilson

Counsel for the Defendants: S. Murphy and D.W.S. Harrington

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| **BAUMAN J.** |

1. Introduction

**1**  In the early morning hours of 21 August 2001, Jeremy Duncan Bain was tragically killed when his car failed to negotiate a curve on Highway 5A north of Merritt, British Columbia, slid across the centre line and slammed violently into Charles Suzuki's fully loaded, southbound logging truck.

**2**  Charles Suzuki brings action (in reality the Workers' Compensation Board does as subrogee) against the defendants for damages.

**3**  Liability and quantum are in issue.

1. Liability

**4**  The dynamics of the accident raise an inference of ***negligence*** on the part of Mr. Bain. The apparent presence of diesel or another fuel substance on the wet highway, gives rise to the defendants' submission that no ***negligence*** on Bain's part has been proven on a balance of probabilities.

**5**  The accident occurred at about 7:00 a.m. on 21 August 2001.

**6**  The plaintiff's truck was proceeding south along Highway 5A into the town of Merritt. Mr. Bain, then in his early 20s, was driving north to his workplace at the Quilchena Golf Club. He was driving his mother's Mercury Topaz. It is admitted that Mr. Bain left late for his morning shift.

**7**  The plaintiff approached a sharp curve on Highway 5A which radiated from his right to left. As the plaintiff entered the curve, Mr. Bain's vehicle, on the evidence, was about to exit the curve. Mr. Bain's car fishtailed to his left; he corrected; he fishtailed to his right; Mr. Bain could not arrest the skidding and he slid into the logging truck in the southbound lane.

**8**  The crash was extremely violent. Mr. Bain was killed on impact. Mr. Suzuki was able to control his truck and it came to a controlled stop just south of the curve in the northbound lane.

**9**  At trial, Mr. Suzuki testified that he generally travelled Highway 5A at 80 kilometres per hour, but that he was slowing down for this curve. He stated that when he saw the Bain vehicle coming around the curve, he thought that it was going "too fast for the corner".

**10**  Mr. Suzuki's discovery evidence was put to him on cross-examination. He accepted this answer on discovery: "When I first saw him, as he came around the corner the car was sideways, yes."

**11**  But at trial he maintained, and I accept as accurate, his observation that Mr. Bain appeared to him to be going too fast for the corner.

**12**  Highway 5A has a posted speed limit of 90 kilometres per hour. Approximately 150 metres south of the curve, there is a posted sign indicating a curve and reading "slow ... 60 kilometres per hour" for northbound traffic.

**13**  At the time of the collision, the roadway was wet due to a recent rain. It had not rained in the area for some time.

**14**  A central issue of fact is whether and to what extent the road, in the general area of the curve, was contaminated with diesel or another fuel which caused it to be slippery.

**15**  In this regard, I relate the following evidence which I accept, except to the extent otherwise indicated.

**16**  Wayne Byers, the plaintiff's employer drove this stretch of highway northbound at about 5:00 a.m. that day. The road was dry at this time; it rained later. Mr. Byers had no difficulty negotiating the curve.

**17**  After the motor vehicle accident, Mr. Byers walked the scene without difficulty. He did note, and it is undisputed, that there was a localized spill of diesel fuel from the ruptured tank of the logging truck. This occurred at the time of the collision.

**18**  A fellow driver of the plaintiff's, Mr. Pehr, drove the highway both ways that morning. In particular, he drove south with a loaded truck before the accident when the road was wet. He had no difficulty at the curve.

**19**  Robert Clayton was the first person on the scene after the accident. He stopped 20 feet in front of the plaintiff's truck and walked between the truck and the Bain vehicle. He did so without apparent difficulty, but he said that the roadway, on the walk towards the defendant's vehicle, was "very slick with oil". It is impossible to say whether this was as a result of the violent collision and the virtual destruction of the Bain vehicle, or otherwise.

**20**  Constable Mark Garneau, of the Merritt RCMP, was on the scene shortly after the accident. He had no difficulty with his footing walking along the debris trail at the scene. Nor did Constable Doug Hardy, who also attended the scene. During his time at the scene, Hardy did not witness any sand being applied to the area of the curve. Constable Hardy knew the deceased Mr. Bain and his mother quite well and he accordingly disqualified himself from conducting the accident investigation.

**21**  The highways maintenance contractor, in the person of its manager, Murray Yurkowski, attended the scene about 7:30 a.m. He had no trouble with his footing. He was on the scene three to four hours. He indicated that sand was applied to the roadway in the area of the leaking tank on the logging truck. I infer that there was no general sanding of the roadway. Mr. Yurkowski testified that no particular concerns with the highway in this area were brought to his attention.

**22**  Constable Hardy did note, however, that the roadway was contaminated by an "oily deposit ... maybe diesel" north and south of the accident scene.

**23**  Corporal Brewer, of the Kamloops Detachment of the RCMP, was the accident analyst. He arrived on the scene at 9:00 a.m. He testified that the road was "extremely slippery through the curve ...".

**24**  In light of the evidence of the other witnesses, and in particular that of Mr. Yurkowski, I simply cannot accept the suggestion that the highway was "extremely" slippery to this extent.

**25**  I do, however, find as fact that a substance, likely diesel fuel, was present on the roadway in the area of the curve and that not all of it was referable to the damaged fuel tank on the logging truck.

**26**  The issue which arises is whether the curve, nevertheless, could be negotiated at an appropriate speed.

**27**  I digress to discuss the defendants' primary position: that they have offered a reasonable explanation for how the accident occurred without ***negligence*** on the part of the defendant, Jeremy Bain.

**28**  I begin by concluding that an inference of ***negligence*** arises because the defendant Bain's vehicle slid into the plaintiff's truck while it was properly travelling in the southbound lane: 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.).

**29**  That is, the collision occurred because the defendant's vehicle was in its wrong lane and out of control.

**30**  The cases, including Hackman, dealing with the onus of proof in this type of case were discussed by the Court of Appeal 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=) (C.A.).

**31**  I reproduce the discussion there of the leading authority on point (at [paragraph] 24): Gauthier & Co. v. The King, [*[1945] 2 D.L.R. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B04P-00000-00&context=), [*[1945] S.C.R. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B04P-00000-00&context=)

Turning to the evidence adduced in defence, it was established that the presence of the carrier on the south side of the road at the time of the collision was due to a skid, the rear end of the carrier going around to the driver's left, taking the whole vehicle across the road so that at the time it was run into by the ambulance on its left side, it was across the south half of the highway. Skidding of a vehicle on the highway by itself is a "neutral fact", equally consistent with ***negligence*** or no ***negligence***. The case Pacific Stages Ltd. v. Jones, [*[1928] 2 D.L.R. 897*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F81W-220G-00000-00&context=), [*[1928] S.C.R. 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F81W-220G-00000-00&context=), is an illustration of skidding which was not due to any ***negligence*** of the operator. I do not think the decision in Claxton v. Grandy, [*[1934] 4 D.L.R. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M03P-00000-00&context=), is inconsistent with this view. Accordingly, for the respondent in the circumstances of this case to go no farther than to show that the accident was occasioned by the skidding of the carrier, was not to show "a way in which the accident may have occurred without ***negligence***", in the language of Lord Dunedin in Ballard's case, 60 Sc. L.R. 441.

**32**  Hackman was discussed at [paragraph] 26:

26 The second authority I would refer to is 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.). It was also a case where the defendant slid onto his wrong side of the road in extremely slippery road conditions. The defendant was found without fault by a jury, and the plaintiff appealed on the grounds that the learned trial judge had misdirected the jury. Davey C.J.B.C. giving the judgment of the Court said, at 446-48:

I doubt if the defence advanced by respondent is truly one of inevitable accident. What the parties mean by the defence of inevitable accident in the circumstances of this case is that the respondent attempted to rebut an inference of ***negligence*** that arose from the fact that he collided with the truck on his wrong side of the road, by advancing an explanation of how the collision may have happened reasonably (not, did happen), without ***negligence*** on his part. If respondent's explanation for the skid does not show how it may have happened without ***negligence*** on his part, it does not rebut the inference of ***negligence*** that ought to be drawn from the fact that his car skidded and crashed into the truck on his wrong side of the road: Gauthier & Co. v. The King, [*[1945] 2 D.L.R. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B04P-00000-00&context=), [*[1945] S.C.R. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B04P-00000-00&context=) per Kellock J., at pp. 55-7 and 59 D.L.R. and pp. 152, 153 and 156 S.C.R. ... The jury should have been told, especially in answer to their inquiry, that the collision of respondent's car with the truck on the wrong side of the road as a result of the skid was evidence that the respondent was careless, unless he could explain the skid reasonably by showing how it may have happened without ***negligence*** on his part; that in order to do that respondent would be obliged to show that he did not expect ice at that point, and that he 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. See Claxton et al. v. Grandy, [*[1934] 4 D.L.R. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M03P-00000-00&context=) at p.263; Gauthier & Co. v. The King at pp. 55-6 and 59 D.L.R. and pp. 152 and 156 S.C.R..

**33**  In support of its explanation, the defence here tenders the expert opinion of Corporal Brewer, the RCMP's accident analyst.

**34**  The plaintiff objects to the admissibility of that report and in the event that it is to be admitted (I reserved thereon at trial) tendered the expert reply evidence of Amrit Toor a professional engineer qualified as an expert in mechanical engineering and motor vehicle accident reconstruction.

**35**  The plaintiff objects to the admission of the Brewer report on various grounds, including the fact that Corporal Brewer's scene measurements, drawings and diagrams were apparently lost and therefore unavailable to the plaintiff for the purposes of testing Corporal Brewer's opinion.

**36**  Because of the view I take of the weight to be given that opinion, I will assume without definitively deciding that it is admissible.

**37**  I do, however, excise this portion of the report which is inappropriate speculation in a report of this nature:

... In this case the clear causal factor is the road surface conditions which would have been unexpected. The driver of Vehicle #1 [Bain], would have no way of knowing there was a contaminant on the surface. ...

**38**  Corporal Brewer conducted certain drag factor tests to determine the road surface friction with the possibility of a surface contaminate being present.

**39**  This essential conclusion was reached by Corporal Brewer:

... Using both the coefficient of friction and the radius, the critical speed for the curve was found to be approximately 57 kmh to 68 kmh.

**40**  Under cross-examination, it was noted that the critical speed of 57 kilometres per hour posited a flat road and that of 68 kilometres per hour applied to the super-elevated curve at the scene (8.4%).

**41**  Corporal Brewer then expressed these conclusions:

The collision dynamic is very straight forward.

Vehicle #1 was travelling north bound on the highway. The driver, as he approached the curve a sign is present indicating a curve ahead and an advisory speed of 60kmh. The road speed is 90kmh.

Vehicle #2, a loaded logging truck is travelling south bound.

As the driver of Vehicle #1 enters the curve, his vehicle begins to go out of control. The road surface at the time was contaminated by a substance which appears to have been spilled diesel. The coefficient of friction and curve radius provided for a critical curve speed of between 57kmh and 68kmh which is less than and slightly higher than the advisory speed for the curve.

Vehicle #1 is out of control with the driver obviously attempting to regain control. Had the driver not attempted to regain control the collision would not have occurred on the passenger side but the drivers side. The only exception here is if the vehicle rotated on hundred and eighty degrees. ... Had the driver slowed to the advisory speed there was still a significant probability control loss would still have occurred given the critical curve speed could be as low as 57kmh.

**42**  On cross-examination, it was established that Corporal Brewer arrived at his coefficient of friction by conducting 10 sled tests utilizing a 20 pound sled. The tests measured the pounds required to pull the sled. The 10 results of these tests were: 1:8, 2:5, 3:5, 4:6, 5:5, 6:5, 7:4, 8:6, 9:6, 10:5.

**43**  Corporal Brewer then took the average of these, at 5.5 pounds, and divided by 20 pounds to arrive at a coefficient of friction of 0.27 for the super-elevated grade. He subtracted the super-elevation to reach a coefficient of 0.19 for a flat road. These figures in turn gave rise to his critical speed range.

**44**  The problem with this methodology is the broad range of results (from 8 pounds to 4).

**45**  Amrit Toor criticized this methodology (T. 16 June 2005, p. 4, ll. 8-30):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Exhibit 5. On Exhibit 5, there's a page in which -- I think it's labelled page 6 at the bottom right-hand corner. We can see the weight of the sled was 20 pounds. And then it looks like the sergeant then conducted 10 different tests on the road surface. Number one, it took him eight pounds, and the last one, it took him five pounds to pull the same sled. Number 7 is -- is the one that concerns me. It only took him four pounds to pull that sled. |  |

Now, in experimental techniques, that's 100-percent difference between the lowest force and the highest -- highest force. Once you get that kind of an error, it's time to stop the test and start all over again. Something's gone wrong in the testing.

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|  | Q | Why do you say that? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, it's very much an engineering or technical methodology. When you have a 100-percent variance in your test, it's not statistically accurate because you haven't done enough -- enough tests, and it's not technically accurate because you have 100-percent variance in the force. |  |

**46**  I accept this view and I find that this fact and the loss of Corporal Brewer's working papers makes it impossible to be confident with the results of his tests. I attach no weight to the conclusions in his report. I also accept Mr. Toor's evidence to the effect that the sled test methodology, at least as it was utilized in this case, is not as satisfactory a methodology as that suggested by Mr. Toor (T. 16 June 2005, p. 3, line 22 and following).

**47**  Where does that leave the defendants? As was said in Gauthier & Co.: "Skidding of a vehicle on the highway by itself is a 'neutral fact' equally consistent with ***negligence*** or no ***negligence*** ...". Accordingly for the respondent in the circumstances of this case, to go no further than to show that the accident was occasioned by the skidding of the carrier, was not to show "a way in which the accident may have occurred without ***negligence***", in the language of Lord Dunedin in Ballard's case."

**48**  In my view, given my elementary concerns with the Brewer report, the defendants at bar are in the same position as the respondent in Gauthier & Co.: they have not shown a way in which the accident may have occurred without ***negligence***.

**49**  Regrettably, the whole of the evidence satisfies me that notwithstanding the presence of some substance on the highway, the curve in question could have been successfully negotiated by a car travelling at a speed appropriate to the known and reasonably foreseeable road conditions.

**50**  I find that liability on the part of the defendant driver has been proven.

1. Damages

**51**  The plaintiff was involved in a serious accident in 1995 and he was off work some months as a result.

**52**  There is no dispute that he was still suffering the effects of the first accident, when he was involved in the August 2001 accident and that the second accident exacerbated the injuries he suffered from as a result of the first accident.

**53**  A number of medical reports were tendered and evidence thereon explored, but the most assistance can be found in the reports of Dr. Theo van Rijn, as specialist in physiatry, who has testified frequently in our courts.

**54**  Dr. van Rijn is particularly helpful because he saw and assessed Mr. Suzuki both before and after the second accident, that is the accident which is the subject matter of these proceedings.

**55**  In his report of 20 April 2004, Dr. van Rijn states this under the heading "Diagnoses and Causation":

...

When I last saw Mr. Suzuki I opined that he was experiencing ongoing chronic mechanical back pain (neck and lower back) as a result of his 1995 accident. ...

He had a bit more movement in his lower back when last seen than is now the case. Tests ostensibly stressing both lower extremities were unremarkable at time, whereas now they are. While bilateral active straight leg raising increased his back symptoms before, he was still able to undertake such; now he has extreme difficulty in so doing. Compared with his previous examination, Mr. Suzuki now has more signs of back irritability and limited mobility. He does not have any neurological findings of note and still has mechanical back pain. As he now has more incessant pain and more restriction in mobility, there is a chance that he may have increasing discal irritability and/or some underlying degenerative changes which are becoming more symptomatic. His symptoms are a little more diffuse now and not just at the lower lumbosacral region, as was previously the case.

**56**  Under the heading "Functional Limitations" Dr. van Rijn observes:

While Mr. Suzuki previously had symptoms that affected his lower back and neck when I saw him (in [2001]) about 6 months before his most recent accident, he was reportedly more functional. He had less irritability in his neck and lower back, and was seemingly more comfortable. The accident of 2001 has further aggravated the already symptomatic regions, incrementally increasing his symptoms in those regions which were present before. It is unlikely that he would have experienced such a dramatic and sudden change in his degree of pain and increasing limitations in back function, had it not been for the next accident of 2001. It is now more difficult for him to manage and he relies more on his family to provide assistance about his home. He is determined to remain as functional as possible, at least with respect to employment as be responsible for family expenses.

**57**  As to future employment, Dr. van Rijn relates that his assessment of the plaintiff after the first accident was that "in the long run he would be better suited to employment in less demanding types of work ...". Now, Dr. van Rijn states "I think it is highly unlikely that he will be able to continue to work as a logging truck driver .... It is likely this accident will hasten Mr. Suzuki's decision to seek alternate work."

**58**  Some time in cross-examination of the plaintiff was spent discussing the impact of a slip and fall he suffered at work in December 2003.

**59**  The plaintiff indicated that that slip and fall led to no lost time at work and that, while it aggravated his then existing injuries (from the first accident), that pain passed in a day or so. In the plaintiff's view, that fall has had nothing to do with how he feels today as a result of the second accident.

**60**  On redirect, Dr. van Rijn gave this evidence (pre-trial examination of the witness) in relation to the December 2003 slip and fall (T. 27 May 2005, p. 25, questions 111-113):

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| --- | --- | --- | --- | --- |
|  | Q |  | And in terms of possibilities that something else may have been the sole cause, I would like to ask you what, in your opinion, is the likely cause of the injuries Mr. Suzuki reported to you in April, 2004? |  |
|  | A |  | Well, with reference to his lower back or to his neck or? |  |
|  | Q |  | With reference to specifically the back, as that seems to be what my friend has brought up in terms of the fall. |  |
|  | A |  | I -- I think the initial precipitant was the accident of 1995. I think the accident of 2001 was another factor that further made symptoms worse. And the fall may have contributed to some additionally [sic] amount, but by his reports and just listening to what you say, the amount of vigour in that fall would be much less than what I would assume than the logging truck in an accident of this nature. |  |

So just looking at it in terms of actual forces involved and the strains on the back, certainly a fall can cause this depending on what happens. But sort of a vigorous accident like this certainly could -- would be more likely to cause back pain than -- than -- ongoing back pain than a fall.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And based on the questions that you've been asked by my friend, is your opinion, other than as you've given evidence here today, the opinion in your April, 2004 report at all changed? |  |
|  | A |  | It's not changed in terms of what I think of the priorities in causing his symptoms are. There is a hypothetical case that he may have experienced more problems as a result of the fall which I have to agree to. But I think the major contributing factor why he was most troublesome on the day that I saw him was the accident of 2001. |  |

**61**  I accept this evidence.

**62**  Before leaving the medical evidence, I should comment on the independent medical report of Dr. O.M. Sovio filed by the defence. I did not find it helpful. Dr. Sovio states that judging from Dr. van Rijn's reports (among others) "I do not feel the patient's situation has changed" from the first accident.

**63**  Yet a reading of Dr. van Rijn's 2004 report makes it obvious that the plaintiff's condition has indeed changed.

**64**  Dr. Sovio goes on to say, effectively at least twice: "Whether the patient has more discomfort per se now is difficult to say." This is not useful guidance for the court.

**65**  I turn to the actual assessment of damages.

**66**  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=) of course figures large in the case before me. Particularly applicable is the section in Justice Major's reasons dealing with the "crumbling skull" plaintiff which I find is the case here.

**67**  The plaintiff's pre-existing condition, arising out of the first accident, was inherent in the plaintiff's original position before the second accident.

**68**  Because of this, of the cases cited by the plaintiff, the most helpful is Butterfield v. Choufour, [*[2005] B.C.J. No. 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VJ-00000-00&context=), [*2005 BCSC 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VJ-00000-00&context=), where the plaintiff suffered from a serious pre-existing condition.

**69**  Justice Stromberg-Stein found that the plaintiff suffered a mild soft tissue injury which, due to her underlying and pre-existing condition, had a greater effect "such that she experienced soft tissue injury to a moderate degree." My colleague awarded $50,000 by way of non-pecuniary damages.

**70**  Here, as Dr. van Rijn has noted: "The accident of 2001 has further aggravated the already symptomatic regions [referring to the plaintiff], incrementally increasing his symptoms in those regions which were present before." Further, "his symptoms are a little more diffuse now and not just at the lower lumbrosacral region, as was previously the case."

**71**  In all the circumstances, a fit award for this plaintiff's non-pecuniary damages is $40,000.

**72**  As to past loss of income, I accept the methodology adopted by the plaintiff in Exhibit 2, Tab 9. The plaintiff was off work from the date of the accident until 23 November 2001. I award the sum of $12,319.37 under this head.

**73**  Turning to the loss of future capacity, the plaintiff advances his claim on the lost capital asset approach:

Brown v. Golaiy, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.)

Pallos v. ICBC, [*[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=) (C.A.)

**74**  The plaintiff stresses the evidence of Dr. van Rijn and the Work Capacity Evaluation prepared by the occupational therapist, Gerard Kerr. The plaintiff seeks $50,000 under this head, representing one year's salary to the plaintiff.

**75**  In light of Dr. van Rijn's evidence as to the plaintiff's capacity to continue in his occupation before the second accident and after the first, I conclude that an award of $35,000 under this head is appropriate.

**76**  The plaintiff advances a claim for past and future loss of housekeeping capacity.

**77**  As to any past loss, that has been contemplated in my award for non-pecuniary damages. As to future loss of housekeeping capacity, the record before me was not developed to the extent necessary to allow me to assess any such loss in the manner suggested in Kroeker v. Jansen [*(1995), 123 D.L.R. (4th) 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (B.C.C.A.) and McTavish v. MacGillivray, [*[2000] B.C.J. No. 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=), [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=). I decline to make a separate award under this as a distinct head of loss.

**78**  Special damages are allowed as admitted. Cost of future care at $720 is allowed on the basis of Mr. Kerr's report.

**79**  The plaintiff is entitled to his costs on scale 3, unless there are circumstances which the parties wish to bring to my attention.

BAUMAN J.

**End of Document**

[***Thompson (Litigation guardian of) v. Saanich (District), [2015] B.C.J. No. 2089***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H4P-HBF1-JJYN-B27R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Baird J.

Heard: August 18 and 19, 2015.

Judgment: September 30, 2015.

Docket: 15-0412

Registry: Victoria

**[2015] B.C.J. No. 2089** | [*2015 BCSC 1750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61XK-00000-00&context=)

Between Rebecca Thompson, an infant by her litigation guardian, Sonia Galbraith, Plaintiff, and The Corporation of the District of Saanich, Defendant

(24 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Action by infant plaintiff for damages for *negligence* dismissed — Plaintiff, age 11, was attending day camp offered by defendant District when she fell from playground equipment and was injured — Fall occurred while playing grounders, an improvised version of tag using playground equipment — Plaintiff failed to establish District exposed her to unreasonable risk in allowing game to be played — Grounders was within everyday and reasonably safe range of playground activity for somebody of plaintiff's age and experience — Injury occurred in course of unfortunate accident for which liability could not be imputed to District.**

**Tort law — Occupiers' liability — Duty of occupier — Knowledge of danger — Particular situations — Injury to children — Amusement or other public parks — Action by infant plaintiff for damages for *negligence* dismissed — Plaintiff, age 11, was attending day camp offered by defendant District when she fell from playground equipment and was injured — Fall occurred while playing grounders, an improvised version of tag using playground equipment — Plaintiff failed to establish District exposed her to unreasonable risk in allowing game to be played — Grounders was within everyday and reasonably safe range of playground activity for somebody of plaintiff's age and experience — Injury occurred in course of unfortunate accident for which liability could not be imputed to District.**

|  |
| --- |
| Action by the infant plaintiff, by her litigation guardian, against the District of Saanich, for damages for ***negligence***. The plaintiff, age 11, was enrolled in a summer day camp offered by the District. During recess, the plaintiff and other children played a game, grounders, that involved an improvised version of tag utilizing playground equipment in which the person "it" closed their eyes. The game was organized by the children rather than the District staff. The plaintiff fell from the equipment and struck her head. The program assistant supervising the playground was aware that the children participated in the game. He stated that he had played the game as a child and considered it harmless. The plaintiff claimed that the game was inherently unsafe, or that the particular equipment used was unsafe. The plaintiff sought damages for ***negligence*** and under the Occupiers' Liability Act. The District sought dismissal of the claim. It submitted that the plaintiff was not exposed to an unreasonable risk of harm and that its employees did not breach their duty of care.  HELD: Action dismissed.  The plaintiff fell while avoiding being tagged by the individual who was it. The rules of the game did not require the plaintiff to keep her eyes closed while on the equipment and her eyes were in fact open when she fell. Although the game was not without risk, the District's employees did not expose the plaintiff to unreasonable risk in allowing the game to be played, or fail to adequately supervise the playground. Grounders was within the everyday and reasonably safe range of playground activity for someone of the plaintiff's age and experience. She played the game voluntarily and in the spirit of fun shared by the other children. The plaintiff suffered an unfortunate accident for which no fault could be attributed to the District. |

**Statutes, Regulations and Rules Cited:**

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

**Counsel**

Counsel for the plaintiff: B. McIntosh.

Counsel for the defendant: A. Bookman.

**Reasons for Judgment**

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| --- |
| **BAIRD J.** |

**Introduction**

**1**  This action arises from an unfortunate incident at Gordon Head Middle School in Victoria, B.C. on July 7, 2009. The plaintiff, Rebecca Thompson, then aged 11, was enrolled in a painting, drawing and drama day-camp offered by the defendant, the Corporation of the District of Saanich (the "District"), for children ranging in age from 8 to 12 years. During a morning recess, while she was outside playing a game called grounders with a number other children, the plaintiff fell from a piece of playground equipment and struck her head.

**2**  Liability is the sole issue for me to determine on this summary trial. In June 2014 Master MacNaughton ordered that the question of damages should be tried separately. The parties consented to have the matter dealt with by summary trial. I have been able to find the facts necessary to decide the issues of fact and law involved, and I agree with counsel that summary adjudication is otherwise just, fair and proportionate. The plaintiff has sued in ***negligence*** and under the *Occupiers Liability Act,* *RSBC 1996, c. 337* ("the *OLA"*). The District denies liability and seeks dismissal of the action.

**3**  There were approximately 16 children enrolled in the day-camp. The structured activities -- the artwork and dramatics -- were held indoors, but there were breaks in the daily schedule during which the children enjoyed free play outdoors. The evidence establishes that the plaintiff had played grounders the previous day, and had played it on many previous occasions at her school, always without incident. The game was improvised. The children themselves decided to play it. It was not organized by the District's employees.

**4**  The program assistant who was supervising the playground at the material time knew that the plaintiff and her young peers were playing grounders and did not stop them. Indeed, the evidence suggests that he may well have participated in the game for a time. He deposed in evidence that he had played and enjoyed the game himself as a child and considered it to be perfectly harmless. He described the rules as follows:

Grounders is a version of tag in which one child is "it" and the other children climb on to the playground structure. The child who is "it" attempts to "tag" the children on the playground structure from the ground. The children on the structure move around to avoid being tagged. If the child who is "it" decides to climb on to the playground structure they have to close their eyes. The other children on the playground structure never close their eyes and this gives them a significant advantage. If the child who is "it" opens their eyes while on the playground structure the other children yell "broken dishes, broken dishes." If a child that was not "it" climbed off the playground structure the child who was "it" could yell "grounders" and then the other child who was on the ground would become "it".

**The Duty and Standard of Care**

**5**  There is no doubt that the District owed the plaintiff a duty not to expose her to an unreasonable risk of foreseeable harm: *LaPlante (Guardian Of) v. LaPlante,* [*[1995] B.C.J. No. 1303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62GP-00000-00&context=) (CA), at para. 14. The relevant standard of care is that of a careful and prudent parent: *Myers v. Peel (County) Board of Education,* [*[1981] SCJ 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH11-JPGX-S545-00000-00&context=).

**6**  Section 3 of the *OLA* reads as follows:

**Occupiers' duty of care**

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person...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, [or]
3. activities on the premises...

**7**  The standard of care under the *OLA* is the same as for common law ***negligence***, namely to protect others from an objectively unreasonable risk of harm: *Agar v. Weber* [*2014 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B196-00000-00&context=) at para. 30.

**8**  Our tort system is based on the concept of fault. Accidents are a part of everyday life. The District is vicariously liable for the negligent conduct of its employees but is not strictly or absolutely liable for any and all injuries however sustained by children in its temporary care or control. The District's answer to the whole of the case is that its employees did not fall short of the duty of care imposed on them by law.

**The Position of the Parties**

**9**  The plaintiff argues that grounders is an inherently unsafe activity which the District's employees ought not to have permitted to be played, or, alternatively, that it was unsafe for the District's employees to have permitted it to be played on the particular playground equipment at Gordon Head Middle School from which the plaintiff fell.

**10**  The District denies liability on the basis that grounders is a suitable activity for children of the plaintiff's age and experience, and permitting the game to be played did not expose the plaintiff to an unreasonable risk of harm. There was no evidence, furthermore, that the playground equipment was unsafe, and there was insufficient evidence that permitting grounders to be played on it was unreasonably risky.

**Brief Evidence and Argument**

**11**  The plaintiff submitted evidence from the vice-principal of the plaintiff's school, who deposed that grounders had been banned on his school property because "it has the potential for physical injury to occur". He did not explain what he meant by this, but the plaintiff's mother set out in a separate affidavit that the ban had been imposed because a boy had broken his arm playing the game. She supported the ban because she thought it "really dumb having someone climbing on a jungle gym with their eyes closed, and having other children running away from the person while climbing on the equipment." The plaintiff's mother claimed that she was not aware that the District had failed to impose a similar ban and complained that she had not been notified that her child would be permitted to play grounders at the day-camp. If she had been warned of this possibility, she said, she would have forbidden the plaintiff from playing the game.

**12**  The District, by contrast, presented evidence that grounders is an innocent and minimally risky form of childhood playground activity. In this connection I received not only the testimony of the program assistant whose description of the game appears above, but depositions from other District employees with experience in youth education and recreation. According to them, grounders has been played for years on Saanich playgrounds, including at Gordon Head Middle School, and with the exception of the incident involving the plaintiff, no accidents or mishaps have occurred while playing it. The District presented uncontroverted evidence that in over 11,000 program days of summer youth activity between 2007 and 2012 there were no documented injuries other than in the plaintiff's case and arising from a handful of accidents at a skateboard park. The District submitted that its record of safety is "near perfect" and referred to this as powerful proof that their methods and practices caring for children are safe and sound.

**13**  Counsel for the District characterised the grounders ban at the plaintiff's school as a "knee jerk reaction" to an isolated and reasonably minor incident, and argued that this sort of disproportionate reaction to grossly atypical eventualities would lead to a situation in which "the activities of the young would be unduly circumscribed and only inactivity and inanition could be planned": *Wright v. Cheshire County Council,* [1952] All ER 789 at p. 796.

**14**  I was told that the District takes a more robust approach to children's play. Its programs encourage physical outdoor activity. Risk-taking is encouraged within reasonable limits on the basis that children who never hazard a chance are unlikely to develop properly either physically or emotionally. The District has adopted the sort of thinking expressed in a document, handed up to me without objection as "social fact" evidence, entitled "The 2015 ParticipACTION Report Card on Physical For Children and Youth" (http://www.participaction.com/report-card-2015/). I suspect that most Canadians are aware, in a general way, of ParticipAction's mission for a more vigorous national lifestyle. Their "report card" concludes, amongst other things, that long-term physical health and development should be valued as much as safety, and that rules and regulations designed to prevent injuries and reduce tort liability have become excessive and counter-productive to youth health and fitness. One of their rallying cries is: "Adults should get out of the way and let children play."

**15**  During the progress of this litigation the plaintiff has amended her pleadings a number of times. I gather that, at an earlier stage, the plaintiff claimed the playground structure on which she fell was unsafe and did not comply with "building codes." This is no longer her position. Counsel conceded on the present hearing that the playground equipment in question was in reasonably safe condition and no hazard was caused by the manner of its construction or maintenance. He argued, however, that it was a "complicated" structure, consisting of a number of platforms of different heights, and that care had to be taken in using the equipment. This would seem to me to be undeniable. His argument, in its final iteration, was not that there was anything wrong with the equipment itself, but that the activity permitted on the equipment -- namely grounders -- was not safe.

**16**  For ease of understanding, I have appended to this judgment a photograph of the playground equipment on which the plaintiff was injured. The platform from which she fell is marked "A" and the one on which she landed is marked "B". The evidence establishes that the plaintiff lost her footing on this playground equipment while attempting to avoid being tagged by the child on the ground who was "it". I stress that the rules of the game did not require the plaintiff to keep her eyes closed while on the playground equipment and in fact her eyes were open when she fell.

**Discussion**

**17**  The District conceded that the game of grounders is not without some risk and that accidents can occur in the midst of even reasonably innocuous physical activity. The question is not whether the District's employees, in permitting the game to be played, exposed the plaintiff to the possibility of any risk, however small, but whether they exposed her to unreasonable risk. I have concluded that they did not.

**18**  To the contrary, I am satisfied that grounders falls within an everyday and reasonably safe range of playground activity for someone of the plaintiff's age and experience. I note that the plaintiff was not an infant or toddler but a reasonably mature adolescent who was in the upper range of the age group accepted into the day-camp in question. She was not a small child, in other words, who was led to calamity by a larger one, or a person of immature years who ought not to have been playing on equipment designed for older kids. The plaintiff had experience playing grounders and knew how to do so safely, including on the playground equipment in question. It seems clear on the evidence, furthermore, that she was playing the game voluntarily, happily, and in a spirit of fun that was shared by her playmates.

**19**  The evidence submitted on this hearing establishes, and my own experiences both as a child and a parent confirm, that grounders and games like it involving pursuit and evasion are commonly played by children, who enjoy them -- as did the plaintiff, whose evidence on this point was clear -- because they are exciting and fun. I am prepared to take notice of the fact that, in the overwhelming majority of cases, no mischief comes to anyone from such innocent pleasures.

**20**  Specifically, I find that there is nothing inherently dangerous about grounders such that special training or instruction is required to play it or to superintend children of the plaintiff's age and experience who choose to do so. I must reject the argument advanced by the plaintiff that it was the sort of activity that required parental consent or approval in advance. There is no doubt that games like grounders involve a small degree of risk, as do all children's outdoor activities involving running, jumping, climbing, tagging, chasing, dodging, feinting, and so on. But judging the matter by the objective measure of the reasonably careful and prudent parent, I conclude that the risk of harm inherent in such games is sufficiently remote that to permit children to play them is not unreasonable.

**21**  The evidence satisfies me, furthermore, that the plaintiff and her peers were adequately supervised during their play time. I repeat that the District's duty to the plaintiff did not include the removal of every possible danger that might arise while she was in the care of its employees, but was only to protect her from unreasonable risk of harm. A supervisor was close at hand minding the children throughout the recess. There was nothing to suggest that he was doing so other than diligently and conscientiously. He was standing on the playground equipment near to the plaintiff at a vantage that gave him a good view of the game and the state of play. There was no evidence that any of the children were behaving recklessly or aggressively or that there was anything unpleasant, malevolent or hazardous about their manner of interaction. The plaintiff was not pushed or touched. She said quite simply that she was moving backwards away from the child who was "it" and lost her footing.

**22**  I sympathise strongly with the plaintiff and her family. What little I was told about the consequences of this accident suggested that the plaintiff's injuries were not trivial. But I am afraid that the consequences of the plaintiff's misadventure cannot transform the District into a no-fault insurer, and perfection is not the standard of care to be discharged by its employees when minding school-aged children.

**Decision**

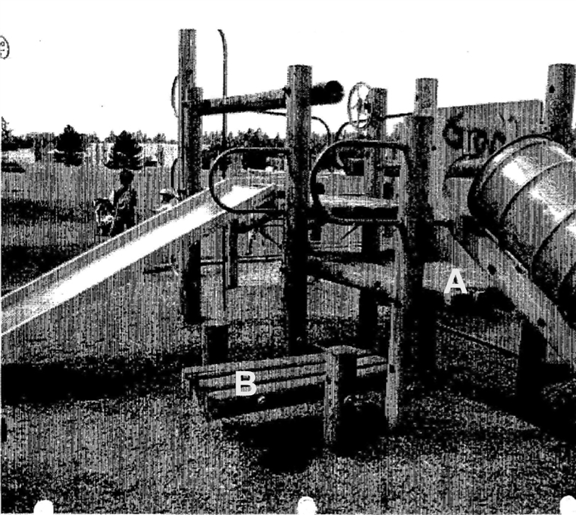
**23**  I have come to the conclusion that what occurred in this case was a most unfortunate accident for which no fault can be attributed to the District. The plaintiff has failed to establish that the District's employees exposed her to an unreasonable risk of foreseeable harm, or failed to adequately supervise the innocent playground activities in which she was engaged with other blameless children on the occasion in question.

**24**  It follows that the action must be dismissed. The District is entitled to its costs if demanded.

BAIRD J.

\* \* \* \* \*

**APPENDIX**



**End of Document**

[***Thon v. Podollan, [2001] B.C.J. No. 206***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15Y-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.F. Wilson J.

Heard: January 9 - 12 and 16 - 19, 2001.

Judgment: February 5, 2001.

Vancouver Registry No. B991391

**[2001] B.C.J. No. 206** | 2001 BCSC 194 | 102 A.C.W.S. (3d) 904

Between Tammy Thon and Tanya Thon, plaintiffs, and Edward Podollan and Alex Podollan, defendants

(60 paras.)

**Case Summary**

**Damage awards — Injury and death — Multiple injuries — Neck injuries — Soft tissue injuries — Damages — Special damages — Loss of wages — General damages — General damages for personal injury — Pain and suffering, loss of amenities and other nonpecuniary damages — Torts — *Negligence* — Motor vehicle — Contributory *negligence* of driver or passenger, failure to use safety equipment (incl. seat belts).**

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| Assessment of damages suffered by the plaintiffs, who were sisters, in a motor vehicle accident. They were 19 and 17 years old at the time of the accident. The defendants alleged contributory ***negligence*** by the plaintiffs. The plaintiffs were seated in the back seat of the vehicle which was not equipped with seat belts. The vehicle rolled over. The youngest sister was treated for head, shoulder, neck and back pain. She complained of severe headaches, cuts and bruising. She had scarring to her shoulder. The eldest sister suffered back and neck pain and complained of headaches to the date of trial. She also had pain in her elbows and hands. Two years after the accident, the eldest sister picked up a log at work and subsequently suffered headaches and neck and shoulder pain similar to that experienced after the accident. She obtained employment that did not require her to do heavy lifting. The younger sister did not work, and testified that she was unable to pick up her child as a result of her injuries.  HELD: The sisters were contributorily negligent for 10 per cent of their injuries as a result of their failure to ensure that the vehicle had seat belts.  They were both awarded $35,000 in non-pecuniary damages. The eldest sister was entitled to $4,000 for past wage loss for the period after the job injury when she was unable to work. The sisters were entitled to $30,000 and $20,000 respectively in respect of loss of future earning capacity. They were entitled to $2,000 each to cover the costs of exercise programs. Each of the sisters suffered soft tissue injuries. The eldest sister's job injury was an aggravation of the injuries sustained in the accident. Both sisters were likely to have some permanent problems with their neck and back. They were likely to be able to carry on their proposed occupations but would be restricted in their ability to do heavy or repetitive lifting. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*.

**Counsel**

H.D. Giesbrecht, for the plaintiffs. G.P. Brown and M.G. Thomas, for the defendants.

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| **A.F. WILSON J.** |

I. INTRODUCTION

**1**  The claims of the plaintiffs, Tammy Thon and Tanya Thon, arise from a single vehicle rollover accident in Vernon, British Columbia, on July 20th, 1995. The defendants, Edward Podollan and Alex Podollan, the owner and driver of the vehicle, respectively, were served substitutionally, and have never appeared. The action is defended on their behalf by Insurance Corporation of British Columbia pursuant to s. 20(7) of the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*.

**2**  Although I.C.B.C., on behalf of the defendants, was not prepared to admit liability, fault for the accident was not in issue at the trial. However, a defence of contributory ***negligence*** was raised: that the plaintiffs assumed a risk in driving with Alex Podollan, in that they were seated in the back seat, which was not equipped with seat belts. Apart from that issue, the matter is an assessment of damages, with the major issue being the extent of any ongoing disability.

II. THE ACCIDENT

**3**  In the early part of 1995, Tammy and Tanya, who are sisters, lived in Regina. Tammy was in grade 12, and Tanya in grade 10. Their parents had separated, and their mother moved to Vernon, and their father to Hope. They decided to move to the lower mainland of British Columbia, where Tammy planned to work, and Tanya planned to attend school. On the way, they stopped to visit their mother and friends in Vernon, where they had previously lived.

**4**  On the evening of July 19th, 1995, they were at the residence of Jonah, the boyfriend of Consetta, who, with her sister Bonita, were old friends of Tammy and Tanya's. Late that evening they were bored, and decided to go to the beach. Bonita called a friend of hers, the defendant, Alex Podollan, who was not known to Tammy or Tanya. He and two male friends came to Jonah's, picked up Tammy, Tanya and Bonita, and they went to the beach. The vehicle he was driving was a 1978 Jeep, with no roof, but with a roll bar. It had seat belts in the front seat, but not in the back. Alex drove, with Bonita beside him, sitting on a box, and one of the fellows beside her. All of them wore seat belts. Tanya sat behind Alex, with Tammy beside her, and the other young man on the passenger side in the back.

**5**  After spending some hours at the beach, they left, intending to return to Jonah's. The seating arrangement was the same as before. The drive takes about 15 to 20 minutes. Before the accident, there was nothing out of the ordinary in Alex's driving. As he approached the intersection of 32nd Avenue and Pleasant Valley Road, he was faced with a stop sign, and a blinking, flashing light. However, he did not come to a full stop. Rather, when they reached the intersection, he made a hard turn to the right while the vehicle still had some momentum. That caused the vehicle to roll onto its left side, slide down the road for some distance, and then flip over onto its top, the position it was in when it came to a stop.

**6**  The three occupants of the front seat ended up hanging upside down, restrained by their seat belts, with their heads not in contact with the ground. Alex had what Tammy described as a "nasty gash down his left forearm". Bonita had bruising of the shins. The other fellow in the front of the vehicle had no apparent injuries. When the Jeep rolled on to its side, Tanya put her left arm around the roll bar. When it came to a rest, she ended up under the Jeep. She recalls hitting her head when the Jeep flipped on to its left side, and she recalls bleeding from her left temple. She also noticed that she was bleeding from her left wrist and shoulder. Tammy was thrown from the Jeep. Tanya remembers her lying on the ground to the left of the vehicle, and that she was initially unconscious, although she did eventually respond to Tanya's calls. Tanya noted that the wooden box which Bonita had been sitting on in the front seat was also thrown out, and ended up about two feet from Tammy's head. It is unclear what happened to the third fellow who was seated on the back seat beside Tammy, but he had no apparent injuries.

**7**  Following the accident, Alex, Bonita and Tanya were taken by ambulance to the hospital, where they were treated. Tammy went with them, but refused treatment, as she did not realize she was injured.

**8**  Both Tammy and Tanya did have some beer to drink over the course of the evening, so that Tanya said she felt, "a little bit of a buzz", and Tammy described herself as having, "a nice glow", but neither were intoxicated. The evidence is that Alex Podollan had no beer, or other alcohol, to drink. I find that alcohol is not a factor in this accident.

III. INJURIES AND TREATMENT

**9**  I find both Tammy and Tanya to be credible witnesses with respect to the injuries they received, and the effect of those injuries. Counsel for the defendants has raised issues arising from the clinical records and medical reports: generally, that there were few attendances on doctors; when one or the other, but particularly Tanya, did attend upon doctors, the history taken does not reflect all of the complaints made at trial; and that some of the complaints only arose well after the accident. The best example of the last item is Tanya's complaints about functional problems with her shoulder, with respect to which there was no clinical record of a complaint to a doctor until October, 1998. I prefer the evidence of Tammy and Tanya to that based solely on the medical records. I accept that there are a number of reasons why the medical records may not have fully reflected their injuries: they moved around a considerable amount following the accident, so there was no single doctor following the course of the injuries; they tended not to attend doctors regularly because, as Tammy put it, when she did see doctors, she was just told it would heal with time and rest; and some of the problems may have been masked by other problems which seemed more severe at the time, or arose only when the area in question was put under stress. For example, the problems with Tanya's shoulder arose only after the birth of her child, when she put stress on the shoulder by lifting her child.

1. Tanya

**10**  Tanya was age 17 at the time of the accident, and is now 23.

**11**  Before the accident, Tanya was in good health, with no physical problems. For the three months before the move from Regina, she and Tammy had been working out at a gym.

**12**  When she was treated, by the ambulance attendants, and at the Vernon Jubilee Hospital, Tanya had complaints of pain all over, but particularly in her head, left shoulder, where there was a deep abrasion, her neck and lower back. X-rays were taken of her left shoulder and cervical spine, with no bony abnormality noted.

**13**  Tanya described her injuries, and the problems arising from them, as: really bad headaches, which lasted a long time; a cut on her left temple; scratches on her face; scarring and pain in her left shoulder; bruising on her ribs on the left side; really bad pain in the lower back; inability to turn her neck; and a left wrist abrasion. The abrasion to her left temple, the scratches on her face, the abrasion on her left wrist, and the bruising in her ribs on the left side cleared up within three weeks to one month.

**14**  With respect to the headaches, Tanya said she had constant pounding and severe headaches for the first month. She denied the description in the clinical records of Dr. Ursula Asche, when she saw Tanya on July 25th, 1995, of "some minor headaches". Tanya did return to school in Regina that fall. She said she was still having really bad headaches at that time. However, they did improve over the next one and one half years. By then she was having them only about twice a week. She says she now gets headaches at least once a month, particularly when she is sitting for an extended period of time. She says that has been the situation for the last three to four years.

**15**  With respect to her neck, she said when she woke up the next day, her whole neck was stiff. Since then, she said the neck pain and headaches have been associated, with a similar course of recovery. She did receive massage therapy on two occasions, in August, 1995, on referral from Dr. Ursula Asche. However, she said it felt as if the massage was "digging into the raw muscle", and the neck pain and headaches got worse, so she stopped. She says that she now experiences neck pain very rarely, again when she sits too long, in association with the headaches.

**16**  With respect to her lower back, she felt pain right away. She said that she could do very little in the first month except sit and take Tylenol, because of the pain. When she returned to school in the fall, it caused her a lot of pain to sit, so her teacher allowed her to get up and walk around. She aggravated her back when attempting to pick up a basket of laundry in January, 1997, for which she received four physiotherapy treatments. At that time, she was taught some exercises, which she continues to do. She said her back was bad for the first year, but had improved by the time she moved to Campbell River in the spring of 1997. She said she still has problems when she sits too long, and so has to get up and walk. She also says that holding her daughter, who was born in January, 1998, affects her back. She said her back has been at the current level for the last two years.

**17**  Finally, she sustained the abrasion to the left shoulder, which has been the most serious injury. She said the skin was taken off the top of her shoulder, and she had two deep holes in it. It became infected after the accident. It took about three months for the scar to heal, and she is left with an oval-shaped scar approximately 1" x 2", which she is self-conscious about when she wears sleeveless clothing. She said the problems with her shoulder were not initially apparent, and that it became worse only after her back became better. Since then, and for the last three to four years, she has the following problems: she is not able to lift, as when she does so, she gets pain and a burning sensation; she gets pain "out of the blue", consisting of a burning, rubbing feeling in the shoulder, which she gets at least once a month, which lasts for the whole day; when she moves her shoulders, she gets a grinding and cracking sound in both shoulders. She says that as a result of the problems with lifting, she cannot pick up her daughter. She attempts to avoid the problem by not using her left arm for lifting. She said she has seen no change in that condition over the time since the accident. However, in the examination for discovery, on December 8th, 2000, she said her shoulder was resolving. In explaining that answer, she said what she meant by that is that she avoids using her left arm, so she does not have as much pain. However, that is not normally what would be meant by the word "resolving" (which was the word used by her, rather than one put to her in cross-examination). I find it most probable that she has experienced improvement with her left shoulder.

1. Tammy

**18**  Tammy was 19 years of age at the time of the accident, and is now 25.

**19**  Like Tanya, Tammy was in good health, with no physical disabilities, before the accident. She and Tanya had been working out at the gym for the three months before they left Regina.

**20**  Tammy initially refused treatment by the ambulance attendants, and at the hospital. However, she went to the hospital the next day. According to the hospital record, she had complaints with respect to her low back, and of pain and stiffness on both sides and the back of her neck. The assessing physician also noted an abrasion of the right elbow. The hospital record indicates that x-rays of the left elbow and lumbar spine were ordered, but the reports of those x-rays are not in the records.

**21**  Tammy summarized her injuries, and the effect of them, as extreme neck pain causing headaches at the base of her skull; pain in her shoulders, elbows and wrists on both sides; pain in her lower back; and twitching of her left thumb, with associated numbness in the last two fingers of her left hand.

**22**  The pain in the neck and headaches occurred together, and were constant for the first three months. She was able to take up employment as a flag person commencing November 7th, 1995. However, it appears there had been improvement before that. In her journal entry on September 24th, 1995, she noted substantial improvement, even in the last week. She began looking for work around the end of September, 1995, although said that was only for light work. After she started work as a flag person, she said she got pain in the neck, and associated headaches, only when she was lifting, or if she was in cold conditions too long, as a result of "balling up" her shoulders and neck. By the time she moved to Campbell River in the spring of 1997, she was having only occasional headaches, when lifting. However, on July 31st, 1997, an incident occurred at work which caused her to have the neck pain and headaches at similar intensity to those experienced after the accident. That improved after about a month. Since then, she has worked in a pawn shop. She said that repetitive lifting in that job caused tenseness in her neck, which brings on headaches. She said that she has the headaches now maybe once per month, and that she is cautious in what she does, to avoid straining her neck.

**23**  With respect to her shoulders, there has been a problem with them knotting up, and having a tense feeling. She said that was associated with the neck pain and headaches, but it is not as much of a problem. It is now only in her left shoulder, caused by repetitive lifting, and now occurs about once or twice a month. She said the incident at work on July 31st, 1997, also affected her left shoulder.

**24**  With respect to her back, Tammy said she had pain in her low back immediately after the accident, so that it was hard to bend over. For the first three months, she was not able to sit still, so had to get up and walk around. However, by the time she got the job as a flag person, her low back was improved. It was not aggravated by the work as a flag person, nor by the incident at work on July 31st, 1997. She said her back has progressed well; she now only gets back pain if she has to lift a heavy object, such as a 25" television, or if she has to do repetitive lifting (although the effect of that is more on her left shoulder and neck). However, she says that, as a result of that injury, she is not able to lift heavy items at work, such as a tool box, or boat motor, so always arranges to have a male co-worker available to do that.

**25**  With respect to her elbows, Tammy says that her right elbow is abraded, and she still has scars. She also had an injury to her left elbow, although that has been less significant. She said her right elbow was extremely painful in the first three months, and very sensitive for the first six months, so that even brushing of clothing on it would cause pain. It also became infected. She said that her right elbow is still very sensitive. She gave an example of bumping it lightly on a safe at work, which caused pain for a month, so that she could not rest it on anything. She said, as a result, she is very careful with her right elbow, and does not lean on it. She has also noted that both of her elbows lock when she lifts something heavy, and that she has to snap her arms straight, which causes pain.

**26**  The twitching of the left thumb, and associated numbness in the fingers of the left hand, has caused a considerable amount of interest in her treating doctors, and resulted in neurological examinations. However, it appears to be of less concern to Tammy than the problems with her neck, left shoulder and right elbow. The thumb twitching started shortly after the accident, with Tammy being unable to control movement of the thumb from side to side, even if she held it with her hand. However, it has not been painful, and it appears the main concern to her has been what it was caused by. She said that right after the accident, she experienced it daily, sometimes lasting for hours. However, for the last two years, she has experienced it about three times per month. Tammy did note the numbness in the fingers of the left hand, starting at about the same time as the twitching of the left thumb started, but it did fully resolve within six months.

**27**  There has been an issue as to whether the incident at work, on July 31st, 1997, caused an aggravation of injuries received in the motor vehicle accident, or was an independent injury. If the injuries sustained at that job would not have occurred but for the injuries previously sustained in the motor vehicle accident, then the defendants are liable for those injuries, even if the injuries sustained in the motor vehicle accident were not the sole cause of the subsequent problems: 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=). To determine that, it is necessary to consider the circumstances of the injury at work. They are also relevant to Tammy's prognosis: if related to her injuries arising from the motor vehicle accident, that does indicate, at least at that time, a greater susceptibility to problems arising from lifting.

**28**  After being unemployed for approximately one year, Tammy moved to Campbell River in the spring, 1997. She obtained employment at Renewable Resources, an organic waste site. Initially, she had a light job, working on the weigh scales. However, about two months before she was injured, she was switched to a job operating a loader. That required her to do some lifting, to sort rocks from bark mulch and logs, and to put the logs into the bucket of the loader.

**29**  On July 31st, 1997, she picked up the end of a log, estimated to be three and a half to four feet long, and to have an estimated weight of thirty to forty pounds, to put it into the bucket of the loader. She heard a "squishy noise" in her neck, then a snap, or crack, which was very painful. She said she had never had any injury like that before. She had had no problems with lifting before the motor vehicle accident. The problems which she had were similar to those following the motor vehicle accident: neck pain going into headaches, and stiffness and soreness of her left shoulder. She was seen by Dr. Proctor, who referred her for physiotherapy, which she received on three occasions in August.

**30**  Dr. Hershler, a specialist in physical medicine and rehabilitation, to whom Tammy and Tanya were referred by their lawyer, suggested a number of factors to assist in determining if the injury was related to a pre-existing condition, or resulted from independent trauma: the similarity of the complaints; the time between the resolution of the complaints and the new injury; whether the injury was the result of a minor or a major event; and whether the injury resulted from repetitive activity or a discrete event. In this case, the complaints following the incident were the same as some of those following the motor vehicle accident. The incident took place more than two years after the motor vehicle accident. Tammy was sufficiently recovered within approximately three months to return to work, and did not miss any work after that time as a result of the injuries, although she did say she had occasional problems with her neck, left shoulder, and headaches with repetitive lifting, including while working at Renewable Resources, before the July 31st, 1997, incident. The event which provoked the injury can only be considered a minor one, the lifting of approximately thirty or forty pounds, which Tammy said she could have done before the motor vehicle accident. It did occur as a result of a discrete event, rather than repetitive activity.

**31**  In conclusion, I accept Tammy's evidence that it is not the type of lift which would have caused her injury before the motor vehicle accident. I conclude that it was an aggravation of the injuries sustained in the motor vehicle accident, rather than an independent trauma.

IV. PROGNOSES

**32**  Medical reports have been filed with respect to each of Tanya and Tammy by Dr. Gerd Asche, family physician, Dr. Hershler, a physiatrist, and Dr. Hepburn, an orthopaedic surgeon. In addition, the medical reports of Dr. MacFadyen, a neurologist, have been filed with respect to Tammy.

**33**  Although both Tammy and Tanya attended the clinic operated by Dr. Gerd Asche and his wife, Dr. Ursula Asche, starting on July 25th, 1995, he first saw Tammy on February 8th, 1996, and Tanya on October 20th, 1998. I give little weight to his opinions. He arrived at diagnoses with respect to Tammy which were not supported by any of the other medical practitioners, and which were not relied on by counsel for the plaintiffs. He relied on the clinical records made by his wife, sometimes drawing inferences which were not justified. For example, in referring to the entry on July 25th, 1995, which records a complaint of "minor headaches" by Tanya, he assumed that there must have been more than that from the fact that a neurological examination was requested. He also relied on facts not supported by the evidence, such as Tammy's position in the Jeep, and that she was not able to return to work as a flag person due to her injuries.

**34**  The reports of Dr. McFadyen relate to the possibility of neurological damage, as indicated by the twitching of the left thumb, and the sensitivity of the right elbow. He found no neurological abnormalities, and that is not disputed.

**35**  That leaves me with the reports of Dr. Hershler, the physiatrist to whom Tammy and Tanya were referred by their lawyer, and Dr. Hepburn, an orthopaedic surgeon who examined them at the request of defence counsel. Each saw them on only one occasion. Although there are differences in their findings on their physical examinations, the differences in their prognoses appear more philosophical than medical: Dr. Hershler assumes that when symptoms continue five and a half years after the accident, there is unlikely to be further recovery; Dr. Hepburn, on the other hand, assumes that if there is no pathological reason for the ongoing complaints, that there likely will be continued improvement. Based largely on that difference of approach, Dr. Hershler expects a partial permanent disability, while Dr. Hepburn expects no functional disability.

1. Tanya

**36**  Dr. Hershler concluded that Tanya sustained soft tissue injuries, particular to the left shoulder capsule. On his physical examination, he noted that Tanya's left shoulder drooped compared to her right shoulder, and that the left pelvis was more rotated than the right. In his evidence at trial, he attributed that to compensation, due to overuse of the right shoulder in order to avoid use of the left shoulder. That finding was not noted by Dr. Hepburn, but Dr. Hershler said that was entirely consistent with her muscles being fatigued, as a result of use of the shoulder, at the time of his examination, and not being fatigued when she was examined by Dr. Hepburn. Dr. Hershler did note fluid, flexible and pain-free movement of the spine, with full range of motion. He also noted full range of motion of the shoulder joint, although cracking sensations were audible when she moved her scapulo-thoracic joints, and a grinding sensation was notable in the left glenohumeral joint with passive movement. The most significant finding was that pressure on the front of the left shoulder capsule brought tears to Tammy's eyes because of the pain, which he said was light palpation. At trial, he said those tears were spontaneous and involuntary, and were a very unusual reaction. He concluded that there was an inflammation of the biceps tendon where it enters the shoulder joint. Dr. Hepburn, on his physical examination, did not make a similar finding. He noted only "minimal tenderness" on palpating the same area. The explanation given by Tanya for that was that he had only touched her lightly, and not in the precise area where she had received the pain when examined by Dr. Hershler. I do not accept that. Dr. Hepburn, when he did his examination, had Dr. Hershler's report, and was well aware of that finding. He says that he did a full examination of the area, which I accept.

**37**  In his prognosis, Dr. Hershler says this:

The prognosis for complete pain-free recovery is poor. Tanya has now had these symptoms for over five years and is still extremely sensitive to palpation of the left shoulder capsule. This is clearly the reason for the ongoing pain. She will be limited in her ability to do heavy lifting with the left arm and will intermittently be affected by sharper pains. This will probably be permanent.

It is unlikely that any treatments will be of use to her.

Tanya is fortunate that she is right hand dominant and will probably be able to do most activities around the house but will be limited in her ability to do two-handed tasks that involve heavy repetitive use of the left arm.

Unlike Dr. Hepburn, he did not consider that exercising would assist Tanya, in essence, because there is no evidence of muscle weakness or wasting.

**38**  Dr. Hepburn also noted no indication of wasting or weakness in the shoulder muscles. His prognosis was as follows:

... I feel the long term prognosis should be good and she does indicate that her symptoms have gradually improved over the years. I think ultimately and especially if she attempts to get herself fit with a view to perhaps entering the prison service, she should become asymptomatic in the absence of what would appear to be any serious orthopedic or neurological injury. She did not appear to be excessively tender over her scar in the anterior capsule of the shoulder and I could not define any indication of intra-articular pathology in either shoulder or AC joint that would cause her to remain permanently troubled by the residual symptomatology that she has at this time.

He thus recommended a program of stretching and strengthening exercises. He said with such a program, "she would likely become asymptomatic".

**39**  Dr. Hepburn's prognosis appears to rely significantly on a gradual improvement of the symptoms over the years. As noted above, that was contrary to Tanya's evidence at trial. In particular, she said she had only experienced the problem with her left shoulder with lifting after the birth of her child, in January, 1998, when lifting her. However, as also noted above, at the examination for discovery she did indicate the problem was "resolving".

**40**  Part of the problem in assessing Tanya's claim is that she has not done any heavy work, which would test her ability to do such work, since the accident. The type of incidents which have aggravated her complaints have been things such as bending over to pick up a laundry basket, and carrying her infant child. However, it has now been more than five years since the accident, and I accept Tanya's evidence that she does have problems when lifting, notwithstanding the regular light regime of exercise she does at home. I thus conclude that she is likely to have continuing pain on a permanent basis, even if she does the type of exercise program recommended by Dr. Hepburn. However, I do not find that pain to be such that she would be disabled from most activities, or occupations, except those involving heavier repetitive lifting with both arms. In particular, I am not satisfied that her injuries would prevent her from carrying on her proposed occupation as a correctional officer.

1. Tammy

**41**  Dr. Hershler found that Tammy's history and physical findings were also consistent with soft tissue injuries. The only physical finding of note was tenderness of the C5-6 ligament, especially on the left side, and tender muscles adjacent to that region. Otherwise, the examination was normal. In particular, he noted "extremely fluid and flexible movements of the spine generally", with no limitation in range of movement. He said the prognosis for full functional recovery for Tammy is reasonably good. However, it is his opinion:

She is, however, not capable of doing heavy manual labour that involves repetitive heavy lifting. She can lift light objects on an isolated basis but cannot do heavy repetitive lifting.

He based that opinion on the incident at work in July, 1997, and the tenderness of the ligament and muscular structures of the neck on his examination. Although he considered the injury in 1997 to be as a result of repetitive lifting, rather than a discrete event, I do not find that significantly affects his opinion.

**42**  Dr. Hershler did not deal with the sensitivity in the elbows, to any extent, in his report, apart from noting no neurological abnormalities.

**43**  On his physical examination, Dr. Hepburn noted full and pain-free range of movement of the neck, shoulder and lumbar spine. He did note pain in the thoracic spine, but it subsided and did not recur. He did note extreme sensitivity to even light touch in the back of the right elbow. Otherwise, his examination was normal. His subsequent review of Tammy's x-rays resulted in a conclusion that they were essentially within normal limits. He doubted if there was any significant degenerative changes at the C3-4 level. He concluded:

She may occasionally have symptoms in the thoraco-lumbar area of the back but as far as I could determine from today's physical examination there is no indication that she sustained serious spinal injury in the cervical, thoracic or lumbar area that I would say temporarily disables her or would in future permanently disable her.

**44**  He concluded that her right elbow sensitivity related to the motor vehicle accident, but that it "should perhaps gradually improve slowly with the passage of time." He did not feel the sensitivity in the elbow would disable Tammy from the performance of any activity or exercise. He recommended strengthening and stretching exercises, such as swimming or attendance at the gym "if she found her back symptoms were to become debilitating." In cross-examination, he conceded that while he felt that exercises would improve her condition, as they would with Tanya, he could not guarantee full recovery.

**45**  In conclusion, I find that Tammy does have ongoing problems, including susceptibility to injury, in her neck and back, which is likely to be permanent. As with Tanya, I find that it is not likely to restrict her from any activities, or occupations, other than those involving heavy or repetitive lifting. She also has the ongoing sensitivity of the elbow, which is likely to continue for an indeterminate period.

IV. NON-PECUNIARY DAMAGES

**46**  Counsel for the plaintiffs submits that non-pecuniary damages for each of Tanya and Tammy should be assessed in the range of from $35,000 to $45,000. Counsel for the defendants submits that the appropriate award for Tanya is $25,000, while that for Tammy is $24,000.

**47**  Like counsel, I find there is very little to distinguish between Tammy and Tanya in terms of the assessment of non-pecuniary damages. Each sustained soft tissue injuries in the accident; had an initial very painful period of recovery; was able to return to school in September, in the case of Tanya, and to work in November, in the case of Tammy; have had ongoing soft tissue problems aggravated by heavy or repetitive lifting; and will likely have ongoing complaints, but not such as would disable them from any activities except heavy or repetitive lifting. Tammy has had the additional complications of the twitching of the left thumb, and the sensitivity of the right elbow, but her prognosis is better, at least according to Dr. Hershler.

**48**  In Baas v. Jellema, [*[1998] B.C.J. No. 918*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S2J2-00000-00&context=), April 21, 1998, Vancouver Registry No. CA021856 (B.C.C.A.), the Court concluded that the range for non-pecuniary damages for a plaintiff with soft tissue injuries to her neck and back, a nine-month period of disability, a good prognosis, with some ongoing problems three years after the trial on undertaking heavy activity, was between $30,000 and $40,000. It is a good comparable to the cases of Tanya and Tammy, as, while the initial period of disability was longer, the long-term effects appear to be less. I have also reviewed the other cases provided by both counsel, and found the following to be particularly useful: Leung v. Testani, [*[1997] B.C.J. No. 1661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0T8-00000-00&context=), July 9th, 1997, Vancouver Registry No. B950949 (B.C.S.C.); Jones v. Fletcher, [*[1993] B.C.J. No. 2963*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63MM-00000-00&context=), May 11th, 1993, Dawson Creek Registry No. 8786 (B.C.S.C.); and Sine v. Roome, [*[2000] B.C.J. No. 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X208-00000-00&context=), January 28th, 2000, Vancouver Registry No. B954529 (B.C.S.C.). Based on the above, I assess non-pecuniary damages for each plaintiff in the amount of $35,000.

VI. PAST WAGE LOSS

**49**  No claim for past loss of earnings is made on behalf of Tanya.

**50**  On behalf of Tammy, three periods of wage loss are put forward: the period immediately after the accident, until she became employed as a flag person on November 7th, 1995; the period from the spring, 1996, after work as a flag person was no longer available that year, until the spring, 1997, when Tammy commenced employment at Renewable Resources; and the period after the injury at work on July 31st, 1997, until Tammy became employed at a pawn shop in Campbell River, a period of approximately one and one half months. Counsel for Tammy suggests that an award of between $5,000 and $7,500 is reasonable, after deduction of social assistance and unemployment insurance benefits received during the periods Tammy was not working. For the first period, immediately after the accident, she suggests a calculation based on Tammy's earnings as a flag person, of $1,280 per month, less the social assistance of $550 a month she received during that period. However, Tammy was not employed at the time of the accident, and was enroute to the lower mainland, where she intended to look for work. It is to be expected that she would have been unemployed for at least some period of time before getting employment. With respect to the second period, Tammy's counsel points out that she had worked in reforestation in previous summers, and that she did like to work. However, there is no evidence of any search for work in this period, so it is difficult to determine what is attributable to the injuries received in the accident, which had not disabled her from working as a flag person, and what to the lack of availability of other employment. As to the period after the injury at work on July 31st, 1997, in view of my finding that it is attributable to the motor vehicle accident, some allowance must be made for that. Rather than attempting a precise arithmetic calculation, after taking into account unemployment insurance and social assistance payments, which must be deducted, (M.M. v. R.F., [*[1997] B.C.J. No. 2914*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2MF-00000-00&context=), December 30th, 1997, Vancouver Registry No. CA021823 (B.C.C.A.)), I allow $4,000.

VII. LOSS OF FUTURE EARNING CAPACITY

**51**  In opposing the claims for loss of future earning capacity, counsel for the defendants relied on the line of cases that the plaintiffs "must prove that this future loss is a real possibility and there is a reasonable chance that this loss may occur": Elash v. Durocher, [*[1993] B.C.J. No. 3124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M21B-00000-00&context=), February 19th, 1993, Vancouver Registry No. B906218 (B.C.S.C.), para. 34, following Steenblok v. Funk [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (B.C.C.A.), leave to appeal to S.C.C. refused [*(1991), 51 B.C.L.R. (2d) xxxv*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24C9-00000-00&context=); and Kovats v. Ogilvie [*(1971), 17 D.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X48T-00000-00&context=) (B.C.C.A.). The plaintiffs, however, rely on the "loss of capital asset" approach, as set out by Finch J. in Brown v. Golaiy, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (B.C.S.C.) December 13th, 1995, Vancouver Registry No. B831458; Palmer v. Goodall [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.); and 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.). In Pallos v. I.C.B.C. [*(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.) at para. 29, Finch J.A. stated:

In my respectful view, a consideration of this issue should not have been limited to the test established in Steenblok v. Funk (supra). The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

In this case, I am satisfied that there is a loss of a capital asset in the cases of both Tanya and Tammy, as they are likely disabled from future employment involving heavy or repetitive lifting.

**52**  In the case of Tammy, that is perhaps easier to assess, as she has an employment history. Before the move to British Columbia, she had been trained as a flag person and in reforestation, and had worked in tree planting and pruning, and building trails. After the accident, she was able to work as a flag person, but when she took a job which involved lifting, she aggravated her previous injuries. Since the fall, 1997, she has worked, happily, in a pawn shop, and intends to continue to do that. However, she avoids heavy or repetitive lifting and ensures that there is a male employee available to do that. Counsel for the defendants makes a valid point, that she ensures it is a male employee, from which it may be inferred that she thinks that the work is not just too heavy for her because of her injuries, but too heavy for any female. I accept, however, that she is somewhat restricted in that job (although there is no evidence that has affected her earnings). However, if she lost that job, she would likely be restricted in the type of employment available to her. She would be unlikely to be able to do the heavy work involved, for example, in reforestation or trail building. In assessing Tammy's claim for loss of earning capacity, I found the cases of Cumming v. White Estate, [*[1998] B.C.J. No. 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1JJ-00000-00&context=), February 5th, 1998, Vancouver Registry No. B940311 (B.C.S.C.), and Dyck v. Ratcliffe, [*[1997] B.C.J. No. 2723*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2BK-00000-00&context=), November 25th, 1997, Vernon Registry No. 14104 (B.C.S.C.) to be useful. I award Tammy $30,000 for her loss of future earning capacity.

**53**  With respect to Tanya, she has no employment history out of the home. She attended school before the accident, and returned to it after the accident, eventually completing grade 12. Since the birth of her child in January, 1998, she has been a full-time mother. However, she has hopes to establish a career as a correctional officer. Although she has concerns about being able to do the physical test necessary to qualify, there is no evidence that she would not be able to perform the physical requirements of the job. I consider the likelihood of her seeking employment involving heavy or repetitive lifting to be less than is the case with Tammy. Newcombe v. Belanger, [*[1992] B.C.J. No. 636*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M118-00000-00&context=), May 21st, 1992, Vancouver Registry No. B883222 (B.C.S.C.) appears to be the most comparable case. As in that case, I award $20,000 to Tanya for loss of earning capacity.

VII. SPECIAL DAMAGES

**54**  The claims for special damages are in the amount of $180.00 for Tammy, and $60.00 for Tanya, with respect to treatment costs for which they have been billed, but have not paid. They have not been disputed. I allow the amounts as claimed.

VIII. COST OF FUTURE CARE

**55**  Dr. Hepburn recommends an exercise regime, involving swimming and working out at a gym, for both Tammy and Tanya. There is not much evidence of those costs: Tammy said she checked with the gym around the corner from her home, and it would charge $55.00 per month, while the pool across the street charges $185.00 for six months, and $290.00 for a year. Extended over a lifetime, even the present value of that would be substantial. However, I note that both Tammy and Tanya attended a gym before the motor vehicle accident, before their move from Regina, and it would thus be expected that they would do that, to a certain extent, in any event. However, the courts should take a generous approach in considering awards which might assist an injured plaintiff to return to a pre-accident condition. I thus award each of Tammy and Tanya $2,000 to cover additional costs of exercise programs as a result of their injuries.

IX. CONTRIBUTORY ***NEGLIGENCE***

**56**  Counsel for the defendants submits that the plaintiffs were contributorily negligent in assuming the risk of driving in the back seat of the Podollan vehicle when it was not equipped with seat belts. He submits that if they had refused that risk, by not getting in the back seat of a vehicle not equipped with seat belts, they would not have sustained their injuries. He submits that an apportionment of at least 30% contributory ***negligence*** against the plaintiffs is warranted, relying on: Baumeister (Guardian ad litem of) v. Drake, [*[1986] B.C.J. No. 3008*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23GX-00000-00&context=), September 3rd, 1986, Vancouver Registry Nos. B841405 and C854316 (B.C.S.C.); Kendall v. Fontaine, [*[1995] B.C.J. No. 1636*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0PW-00000-00&context=), July 10th, 1995, Vancouver Registry No. B911290 (B.C.S.C.); Greenall v. Watson, [*[1995] B.C.J. No. 2326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B248-00000-00&context=), November 9th, 1995, New Westminster Registry No. SO0497 (B.C.S.C.); James (Guardian ad litem of) v. Hruschak, [*[1997] B.C.J. No. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S329-00000-00&context=), January 21st, 1997, Vernon Registry No. 10109 (B.C.S.C.); and Hartviksen v. Riedener, [*[1998] B.C.J. No. 533*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S21M-00000-00&context=), March 10th, 1998, Vancouver Registry No. B964767 (B.C.S.C.). Counsel for the plaintiffs submits that those cases can be distinguished, that they involve partying where the driver was drunk (Baumeister), or the plaintiff was drunk (Kendall), where the driver was inexperienced (Hartviksen), the plaintiff failed to wear an available seat belt (Greenall), or the passenger sat in the back of a pick-up truck, where no seats were available (James). Those distinctions are certainly valid, but they go to the circumstances of the apportionment, rather than to the principle itself. That principle was expressed by Viscount Simon in Nance v. B.C. Electric Railway Company, [*[1951] A.C. 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4VS-00000-00&context=) at p. 611:

A defendant must prove to the satisfaction of the jury that the injured party did not in his own interests take reasonable care for himself and contributed, by this want of care, to his own injury.

**57**  I find the defendants' argument that, in this case, Tammy and Tanya did not take reasonable care for their own interests, and thus contributed to their own injuries, by riding in a vehicle not equipped with seat belts, to be unanswerable. Counsel for the plaintiffs submits that, even if the defendants have established the first part of the so-called "seat belt defence", as set out in Gagnon v. Beaulieu, [*[1977] 1 W.W.R. 702*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1X8-00000-00&context=), (B.C.S.C.), they have not established the second branch, that the injuries would have been prevented or less severe if it had been worn. However, the argument is not that the injuries would have been prevented or reduced, if the plaintiffs had worn an available seat belt. Rather, it is that the injuries would have been avoided entirely if the plaintiffs had not assumed the risk of riding in the back of the Jeep without seat belts. As counsel for the defendants pointed out, the important distinction between choosing to ride in a vehicle without a seat belt, and choosing not to wear an available seat belt, relates to the consequences of the ***negligence***. In the former circumstances, the exercise of reasonable care would have avoided the injuries in their entirety; in the latter circumstances, involvement in the accident would not have been avoided, and the issue thus arises as to whether the injuries would have been reduced by seat belt usage. The issue is thus not whether the injuries would have been prevented or less severe if a seat belt had been worn, but rather whether the injuries would have been prevented or less severe if the plaintiffs had chosen not to ride in the back seat of the vehicle, when it was not equipped with seat belts. That, obviously, has been established. It is thus different from such cases as Koopman v. Fehr, [*[1993] B.C.J. No. 1405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3VG-00000-00&context=), May 19, 1993, Vancouver Registry No. CA014720 (B.C.C.A.), in which the issue was whether the plaintiff sustained greater injuries as a result of travelling in the box of a pick-up than he would have had he been riding restrained in the interior of the cab of the vehicle. I thus accept that there was contributory ***negligence*** on the part of the plaintiffs which contributed to their injuries.

**58**  I am left with the issue of the percentage of contributory ***negligence*** to attribute to the plaintiffs. Counsel for the defendants, as I noted, suggests that it should be at least 30%, based on balancing the social value or utility of going to the beach as against the risk in getting into the Jeep. He notes that there was no compelling reason for the plaintiffs to get into the Jeep and travel to the beach. I am not satisfied the apportionment should be that high. In that regard, I note that the driver had not been drinking, and there was no indication of any problems with his driving. Neither girl had consumed sufficient alcohol such that she was unable to determine what was in her own best interests. This was not a situation where the girls were in the box of an open pick-up, where there were no seats. Rather, they were in the back seat of the Jeep; the problem was just that those seats were not equipped with seat belts. Although the Jeep did not have a roof, it was equipped with a roll bar. In those circumstances, the primary cause of the injuries sustained by the plaintiffs was the ***negligence*** of the defendant driver, in causing the vehicle to roll over. I do not consider the assumption of risk by the plaintiffs in this case to be comparable to that assumed by plaintiffs in cases in which an apportionment of 30% contributory ***negligence***, or higher, has been made, such as where the plaintiff has got into a vehicle with a drunk driver. In fact, I consider the assumption of risk by the plaintiffs to be less than that if seat belts had been available, but they had failed to use them. In the circumstances of this case, I assess the contributory ***negligence*** of the plaintiffs to be 10%.

X. SUMMARY

**59**  In summary, I assess the claims of the plaintiffs as follows:

1. Tanya

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $35,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of earning capacity | 20,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | 60.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care | 2,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Subtotal | $57,060.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Less 10% apportionment of |  |  |
|  | contributory ***negligence*** | 5,706.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $51,354.00 |  |

1. Tammy

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $35,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss | 4,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of earning capacity | 30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 180.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future cost of care | 2,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Subtotal | $7l,180.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Less 10% apportionment of |  |  |
|  | contributory ***negligence*** | 7,118.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $64,062.00 |  |

**60**  Unless there are matters of which I am not presently aware, the plaintiffs will be entitled to their costs, on scale 3. If there are such matters, the parties have liberty to apply.

A.F. WILSON J.

**End of Document**

[***Slater v. Gorden, [2017] B.C.J. No. 2510***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R61-GMR1-JG02-S4NN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

C.L. Forth J.

Heard: October 30, 31, November 1-3 and 6, 2017.

Judgment: December 8, 2017.

Docket: M167014

Registry: New Westminster

**[2017] B.C.J. No. 2510** | [*2017 BCSC 2265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5S8R-H431-F30T-B4NJ-00000-00&context=)

Between Jaime Jocelyn Patricia Slater, Plaintiff, and Sydney Niccole Gorden and Paul Millard Gorden, Defendants

(226 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Soft tissue — Psychological injuries — Depression — Considerations impacting on award — Temporary total or partial disability — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Vehicle driven by plaintiff was rear-ended by vehicle driven by defendant — Plaintiff suffered soft tissue injuries to neck, left shoulder, low back and left hip area — Plaintiff continued to have chronic pain in low back and left hip area that was unlikely to resolve — Plaintiff also developed depression and mood changes — Plaintiff awarded total damages of $449,385.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Past loss of income — Employment income — Expenses and expenditures — Housekeeping services — Non-pecuniary loss — Pain and suffering — Affecting mobility --Affecting social relationships — Affecting recreational activities — Prospective pecuniary loss — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Plaintiff's vehicle was rear-ended by vehicle driven by defendant — Liability was admitted — Plaintiff suffered soft tissue injuries to neck, left shoulder, low back and left hip area — Chronic pain in low back and left hip area that was unlikely to resolve — Plaintiff also developed depression and mood changes — Plaintiff awarded non-pecuniary damages of $135,000, past wage loss of $17,685, damages for future loss of earning capacity of $270,000, future care costs of $1,700 and $25,000 for loss of housekeeping capacity.**

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| Action by Slater for damages for personal injuries suffered in a motor vehicle accident. Slater was injured when the vehicle she was driving was rear-ended by the vehicle driven by Gordon. Liability for the accident was admitted. Slater was an RCMP officer. She was in a common-law relationship and had two daughters. Slater was always a physically active individual who enjoyed jogging, hiking and biking. She would regularly work out at home. Prior to the accident, Slater had suffered left shoulder and right foot injuries during RCMP training, but neither injury had caused her any ongoing problems. As a result of the accident, Slater suffered soft tissue injuries to her neck, left shoulder, lower back and left hip, along with some psychological impact. She submitted that her ongoing symptoms impacted her career, relationships, home life and activities. She had to take an administrative position at the RCMP and was not able to return to active duty. Her relationship ended and she had not been able to play as active a role in her daughters' activities. While acknowledging that Slater was injured in the accident, Gordon challenged the nature, extent and seriousness of the injuries and the resulting losses she claimed were caused by the accident.  HELD: Action allowed.  Slater suffered soft tissue injuries to her neck, left shoulder, low back and left hip area. While she substantially recovered from the neck and left shoulder injuries, she continued to have chronic pain in her low back and left hip area that was unlikely to resolve. Slater also developed some psychological issues of depression and mood changes that continued to impact her. The appropriate award for non-pecuniary damages was $135,000. Slater was off work for almost one year and then had a gradual return to work from June to September 2015. However, she continued to be paid by the RCMP. Slater was awarded $17,685 for loss of overtime. Slater proved that her injuries impaired her earning capacity. She was rendered less capable of earning income from all types of employment. In the RCMP setting, she was restricted to administrative jobs. She was awarded $270,000 for loss of future earning capacity. The award for future care costs was $1,700 for some further counselling and $25,000 for loss of housekeeping capacity. The total damage award was $449,385. |

**Counsel**

Counsel for Plaintiff: Jacob R. Parkinson.

Counsel for Defendants: Trevor E. Hande.

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

**Introduction**

**1**  The plaintiff, Jaime Slater, was injured in a motor vehicle accident that occurred on May 20, 2014 in Langley BC. She was driving a 2014 Hyundai Elantra sedan on Highway 1 near the 264th street exit when the traffic came to a stop. She stopped her vehicle. While stopped she was rear-ended by a vehicle driven by Sydney Niccole Gorden. Ms. Slater commenced this action against the defendants, Paul Millard Gorden, as the owner of the vehicle, and Sydney Niccole Gorden, as the driver, seeking damages for the injuries she sustained in the accident. The defendants have admitted liability for the accident.

**2**  The defendants concede that Ms. Slater was injured in the accident and suffered physical and psychiatric symptoms as a result. However, the defendants disagree with the plaintiff about the nature, extent and seriousness of the injuries and the resulting losses she claims were caused by the accident.

**3**  The defendants also allege a failure to mitigate.

**Issues**

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

1. What is the nature, extent and duration of the injuries suffered by Ms. Slater as a result of the accident?
2. What is the appropriate award for general damages for pain and suffering?
3. Should there be an adverse inference drawn for the failure of the defendants to obtain and serve a report from Dr. Masri?
4. What is the appropriate award for past wage loss or loss of earning capacity?
5. What is the appropriate award for future wage loss or loss of earning capacity?
6. What is the appropriate award for future care costs?
7. What is the appropriate award for special damages?
8. Has Ms. Slater failed to mitigate her damages, and if so, what would the appropriate reduction be?

**Background**

**5**  Ms. Slater was born on August 2, 1976 in Prince George, BC. She had an active childhood participating in volleyball, basketball, cycling and rollerblading. She left high school in Grade 11 after becoming pregnant with her first child, Justin. She returned to school to complete her Grade 12 equivalency and took some pre-medical courses at a college.

**6**  She worked for a number of years in the auto parts business in Prince George. She started as a driver and moved up into supervisory roles. Her older brother became an RCMP officer in 2003, which sparked her interest in that career. In August 2008 she commenced her RCMP training after going through extensive medical, aptitude and physical testing.

**7**  In February 2009 she completed her RCMP training and was posted to the Chilliwack detachment as a general duty constable. Her career aspirations were to become a corporal and then a staff sergeant preferably working at a smaller RCMP detachment.

**8**  In 2010 she moved in with Scott Simpson, an RCMP officer that she met in training in Regina. They were in a common-law relationship until separating in May 2016.

**9**  Ms. Slater was always a physically active individual who enjoyed jogging, hiking and biking. She would regularly work out at home.

**10**  She went on to have two daughters, now aged 16 and six, for whom she strives to provide the very best.

**11**  Ms. Slater had proven to be a very valued member of the RCMP prior to the accident. She had glowing commendations in her performance evaluations. The comments included that she "was a very productive watch member, exceeded all expectations, is quickly becoming one of the strongest members on the watch, would be an excellent supervisor and is a dedicated member." One evaluation noted that Ms. Slater demonstrated the "CORE values of the RCMP."

**12**  On May 20, 2014, Ms. Slater was stopped on Highway 1 when she was struck from behind by a vehicle driven by the defendant, Ms. Gorden. Ms. Slater saw the vehicle coming in the rear-view mirror. The only evasive step she could take was to turn her wheels towards the centre of the stopped traffic in a hope that she would not significantly impact the stopped vehicle in front of her. The approaching vehicle appeared to be going highway speeds and did not appear to brake before hitting her. Mr. Simpson attended at the accident scene and did not see any skid marks on the road. Ms. Gorden did not testify but in her discovery evidence admitted that she did not slow her vehicle down and she believed she was going approximately 80 kilometers an hour.

**13**  Ms. Slater recalls a significant impact. The estimate of the repair costs to her vehicle was $12,169.64. Both vehicles involved in the accident were ultimately written off.

**14**  Ms. Slater testified that when she was hit from behind, she was thrown forward. She felt like she was in shock. She got out of her vehicle because she saw smoke coming from the hood of the vehicle that hit her. She was concerned for the well-being of the other driver. She approached the other vehicle to tell the driver to get out of the vehicle. The driver of the vehicle would not get out of her car. She noticed that driver had her cellphone tucked in her lap.

**15**  Fire personnel, an ambulance and the police arrived. Ms. Slater recalls that when she provided her driver's information to the fire personnel, she noticed that her left arm dropped. She did not note any other injuries at the scene of the accident. She called Mr. Simpson to come and drive her home. She later noticed sharp pain in her left shoulder that travelled down her arm to her hand.

**Credibility and Reliability of Evidence**

**16**  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:

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

**17**  The defendants submit that Ms. Slater had a tendency to be vague in her evidence and exaggerate certain evidence. The examples they provided relate to Ms. Slater's testimony that her relationship with her husband was perfect prior to the accident and that they were very active together. It was only in cross-examination that the extent of their physical activities came out. A further example was testimony as to the physical component of Ms. Slater's relationship with her children. In cross-examination she admitted that her oldest daughter was not a physically active girl.

**18**  I am not persuaded that these examples are particularly significant in the context of all of the evidence. I do not agree that they support that Ms. Slater had a tendency to exaggerate the extent and nature of her injuries. Specifically, in respect to the suggestion that Ms. Slater testified that her relationship with her husband was perfect, her testimony was more accurately that her life was completely flipped upside down, that is, she had a perfect home life, her perfect world, and a good relationship that had its ups and downs. She did not testify that her relationship with her husband was perfect.

**19**  The defendants submit that Ms. Slater had a disconcerting tendency to contradict documentary evidence and even her own medical legal reports when they undermined her claim. I find no support for such an assertion.

**20**  The evidence of non-medical witnesses was consistent with Ms. Slater's evidence in respect to the impact the injuries have had on her life. The evidence of the medical experts supported the evidence of Ms. Slater.

**21**  Ms. Slater testified in a forthright, honest and straightforward manner. Her integrity shone through, and members of the public in Chilliwack and now in Langley should feel privileged to have such an outstanding officer providing service to them. She continues to be a very valued member of the RCMP.

**22**  I find that reliance can be placed on Ms. Slater's evidence in respect to the pain she feels and the impact the accident has had on her life. I find that less reliance can be placed on her evidence on the RCMP promotions process since it is something that goes beyond her personal knowledge.

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

**Plaintiff's Position**

**23**  As a result of the accident, Ms. Slater suffered soft tissue injuries to her neck, left shoulder, lower back and left hip, along with some psychological impact.

**24**  Prior to the accident, she had suffered left shoulder and right foot injuries during RCMP training, but neither injury had caused her any ongoing problems. She was able to carry out her job as an RCMP officer on active duty prior to the accident. She would occasionally have headaches after a long shift, particularly if she was dehydrated.

**25**  Ms. Slater testified that since the accident, the pain in her left arm and shoulder is better, although she still gets left arm and shoulder pain if she uses her arm. She has adjusted her behaviour to avoid aggravating her arm and shoulder. Her main problems are the ongoing symptoms of low back and hip pain, which she experiences on a daily basis. These symptoms are exacerbated by a range of activities, including standing, sitting, driving and daily household chores. Ms. Slater has developed migraine headaches that are connected to her neck strain.

**26**  Ms. Slater submits that her ongoing symptoms have impacted her career, relationships, home life and activities. She has had to take an administrative position at the RCMP and has not been able to return to active duty. Her relationship with Mr. Simpson has ended and she has not been able to play as active a role in her daughters' activities. She feels like she has been a failure as a parent. She is no longer as active physically. Her sleep has been affected. She has become withdrawn, moody and depressed.

**27**  Her treating family physician and other medical experts testified that she has developed chronic pain, which is permanent.

**Defendants' Position**

**28**  The defendants' position in respect to the psychiatric symptoms is that they are now mild.

**29**  The defendants agree that Ms. Slater suffered some soft tissue injuries but contend that she is still able to do many of her regular activities, although on a restricted basis.

**30**  Since the accident, Ms. Slater has been able to maintain a level of fitness to the extent that her cardiovascular health is excellent and her overall fitness level is not bad.

**31**  The defendants note that Ms. Slater suffered from two pre-existing conditions, respecting her right foot and left eye, which have a risk of impacting her future occupation.

**32**  They also submit that her relationship with Mr. Simpson had pre-existing stressors that played a role in the breakdown of their relationship.

**Applicable Law**

**33**  In order to establish that the accident caused her injuries, Ms. Slater must prove on a balance of probabilities that but for the accident she would not have suffered the injuries for which she complains.

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

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

**Application of the Law to the Facts**

**36**  Ms. Slater testified that when she was hit from behind she felt shocked, the impact was severe, and it pushed her vehicle forward. She was able to exit her vehicle, and it was while speaking to fire personnel that she noted some weakness in her left arm.

**37**  She was picked up by Mr. Simpson who drove her home. At home she noticed pain in her left shoulder that travelled down her arm. On May 22, 2014, she attended her family doctor, Dr. Benjamin Baby, complaining of pain in her left shoulder and a burning sensation down her left upper arm. She also had pain in her low back and left hip. Dr. Baby diagnosed a soft tissue injury and recommended ice packs, physiotherapy and the use of Advil.

**38**  Ms. Slater attended physiotherapy at PhysioStation, which did not provide much relief. She was subsequently referred to Performax, where she participated in an active rehabilitation program. She has attended in excess of 100 physiotherapy treatments. She has also sought treatments from massage therapists, chiropractors, counsellors and naturopaths.

**39**  She was away from work for about a week and upon her return she noted an exacerbation of her symptoms. In June 2014, she stopped working and did not return until June of 2015, when she began a gradual return to work program.

**40**  She continued to see Dr. Baby on a regular basis. She tried various therapies including physiotherapy, registered massage therapy, kinesiology, acupuncture, chiropractic and naturopathic remedies, all of which have only provided temporary relief.

**41**  On September 16, 2014, she underwent an MRI of her lumbar spine. This demonstrated mild degenerative changes in the lumbar spine from L4 to S1 levels with mild bilateral facet degeneration. There was a small disc bulge at L5-S1 but no evidence of cord or nerve root impingement. On the same day, she had a left shoulder arthrogram that demonstrated a small tear of the subscapularis tendon and a possible sprain or partial-thickness tear of the superior glenohumeral ligament.

**42**  She began a gradual return to work program with the RCMP in June 2015, and by September 2015 was working full-time on administrative duties. She is now primarily restricted to office work and finds some of those tasks boring.

**43**  She has also been restricted from returning to many of her previous non-work activities including jogging, hiking and biking. She has returned to her household activities but she is much slower in carrying them out. She has been unable to fully participate in her daughters' activities, in particular, activities with her youngest daughter.

**44**  All doctors who examined Ms. Slater agree she was injured in the accident.

**45**  Dr. Baby, her treating family doctor, prepared a report and testified at trial. Dr. Baby has been Ms. Slater's family doctor since approximately 2010. Dr. Baby was not aware of any pre-accident conditions that Ms. Slater was suffering from or that were causing any ongoing problems prior to the accident. Dr. Baby testified that Ms. Slater did have an ongoing left eye condition, but that it was stable and not interfering with her duties as an RCMP officer. He testified that she had a right foot condition, but that it did not interfere with her police duties.

**46**  Dr. Baby's opinion is that Ms. Slater is suffering from chronic myofascial pain in her neck, left shoulder, lumbar back and left hip, and mild generalized anxiety, all as a result of the accident.

**47**  He further opined that Ms. Slater is totally disabled from her regular occupation as a general duty police officer. He does not anticipate that she will ever be able to return to active police duties. He opined that her injuries have interfered with her non-work activities including exercising and caring for her daughter.

**48**  Dr. Baby's prognosis is that since Ms. Slater is still experiencing symptoms, it is likely that the pain will not ever totally resolve. He predicted she will continue to experience chronic pain in the future, and her injury should be considered permanent. He testified that the prognosis for a complete recovery is poor.

**49**  He opined that Ms. Slater would benefit from ongoing access to rehabilitation therapies such as physiotherapy or registered massage therapy. He testified that these therapies may give her temporary relief but would not cure her symptoms. His view is that she may benefit from access to a personal trainer to provide her with conditioning opportunities.

**50**  Dr. Baby testified that Ms. Slater reported adverse side effects from the medications he prescribed. He noted that he is reluctant to prescribe sleep medication to police officers and will only do so if the sleep issues are severe. His understanding of Ms. Slater's sleep issues is that they were not incapacitating her and she was only having trouble sleeping off and on.

**51**  Dr. Christopher Watt, a certified Sports Medicine Physician and specialist in occupational medicine, provided an expert report and testified at the trial. Dr. Watt assessed Ms. Slater on February 22, 2017, for a work capacity evaluation. He based his opinion on her occupational health history, a physical examination and a review of documents provided. His opinion was that Ms. Slater suffered from post-traumatic myofascial pain syndrome to her neck, left shoulder, low back and left hip, as well as mild depression. His opinion was that these conditions were all caused by the accident.

**52**  Dr. Watt was not aware, at the time he prepared his report, that Ms. Slater had injured her left shoulder during RCMP training. He did, however, have an opportunity to review the pre-accident records after the preparation of his report. He testified that his opinion did not change after reviewing the pre-accident records. The left shoulder problem appeared to have happened in 2008 or 2009 and there was no further mention of left shoulder problems in the records. Further, Ms. Slater reported leading a very active life after this event.

**53**  His opinion is that the bilateral lumbar facet arthropathy was probably aggravated by the accident. He testified that facet arthropathy is wear and tear on the facet joints and that all individuals after a certain age will develop this condition. As a result of having this condition, Ms. Slater was more vulnerable to traumatic injury.

**54**  Dr. Watt's prognosis is that Ms. Slater is at her maximal medical improvement with respect to her neck, shoulder, back and hip impairments. She has undergone excellent medical and rehabilitation treatment and she continues to experience functionally limiting pain in her neck, left shoulder, back and left hip. This pain will be permanent. He does not expect any further degeneration except in respect to her low back, which due to the bilateral lumbar arthropathy may slowly progress, resulting in gradually increasing pain and physical limitations.

**55**  On cross-examination, Dr. Watt did not agree that Ms. Slater would have developed back symptoms without the accident. He explained that the natural history of facet arthropathy was a "very, very slow progression" over many years.

**56**  He opined that she is fit to return to office-based police work with some field work. She is not fit to return to general duty police work as a result of her current impairments. Dr. Watt testified that general duty police work is a safety-critical job, which means a job where if an individual makes an error it could result in serious injury or death to the individual, co-workers or the public.

**57**  Dr. Watt recommended that Ms. Slater have access to "intensify needle-based treatments", being trigger point injections, and that she may be a candidate for Botox injections for her neck and upper back pain symptoms. He recommended that she have a progressive exercise program with a fitness trainer for a six-month period. For her mild mood disorder, he recommended a trial on antidepressant medication, which may help improve her mood, sleep quality and overall ability to cope with her ongoing chronic pain symptoms. For normalization of her sleep, he recommended she try a low dose of tricyclic medication. He further recommended a mindfulness-based practice for coping with chronic pain. Finally, he recommended she have her iron level assessed to ensure that she is not suffering from any iron deficiency.

**58**  Dr. Auby Axler, a specialist in psychiatry, provided an expert report and testified at trial. Dr. Axler assessed Ms. Slater on June 19, 2017. Dr. Axler diagnosed Ms. Slater with mild Somatic Symptom Disorder, mild Persistent Depressive Disorder, and Adjustment Disorder with anxiety. He opined that the accident was the cause of her pain, anxiety and depressive symptomology. He agreed that a trial of antidepressants should be made. He noted that this medication had been offered to Ms. Slater and she had declined to take it. He testified that because of Ms. Slater's side effects to the other antidepressant medication, her reluctance to take further medication was understandable.

**59**  He testified that the adjustment disorder was at the lowest end of the spectrum of trauma-induced psychological conditions, with post-traumatic stress disorder occupying the top of the spectrum. He also testified that this adjustment disorder was specifically related to driving, and that at the time of his assessment of Ms. Slater it was not a significant problem.

**60**  He further recommended additional psychotherapy consisting of cognitive behavioral therapy. His opinion is that with a different therapist for psychotherapy while taking an antidepressant, her depression, anxiety and even pain could improve to some degree. He testified that cognitive behavior therapy can be very effective to treat persistent depression.

**61**  On June 1 and 16, 2017, Ms. Slater was assessed by Mary Carman, an occupational therapist, for a physical capacity evaluation and cost of future care analysis. Ms. Carman carried out a series of tests to assess Ms. Slater's physical capacity. She found that Ms. Slater provided a full and consistent effort. Her testing supported that Ms. Slater had restrictions in sustained sitting, stooping, bending, crouching, kneeling and twisting strength. Her opinion is that Ms. Slater is non-competitively employable on a part-time or full-time basis with the potential to work in limited, light, and some medium-strength occupations. Based on the description of duties as a plainclothes officer or general duty officer provided by Ms. Slater, this evaluator was of the opinion, based on the testing, that Ms. Slater does not meet the full demands of a general duty officer or plainclothes officer.

**62**  Ms. Carman provides an opinion on the future care needs of Ms. Slater, based on the recommendations made by Dr. Baby and Dr. Watt.

**63**  On June 22, 2017, Ms. Slater was assessed by Niall A. Trainor, a vocational rehabilitation consultant, for a vocational assessment. Mr. Trainor provided a vocational rehabilitation assessment report and testified at trial. Mr. Trainor's opinion is that Ms. Slater does not meet the physical requirements of general duty policing. She can continue working in an accommodated position performing office-based investigation, research and administrative support functions. He concludes that Ms. Slater is less competitively employable than she was prior to the accident. He recommends that she would benefit from a vocational case manager to help explore specific job goals and retraining options. The cost of this would be in the range of $1,000 to $2,000.

**64**  Based on my review of the medical evidence, I find that Ms. Slater has suffered soft tissue injuries to her neck, left shoulder, low back and left hip area. While she has substantially recovered from the neck and left shoulder injuries, she continues to have chronic pain in her low back and left hip area. This pain can flare up depending on her activities.

**65**  There is no evidence that the pre-accident bilateral lumbar facet arthropathy was symptomatic prior to the accident. It is likely that the accident aggravated this pre-existing degenerative condition.

**66**  In addition to the physical injuries, Ms. Slater has developed some psychological issues of depression and mood changes that continue to impact her.

**67**  All of the medical experts agree that Ms. Slater will continue to suffer chronic low back and left hip pain on a fluctuating basis. The general consensus is that she has had the appropriate rehabilitation treatment, and it is unlikely that anything will resolve her chronic pain.

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

**68**  Ms. Slater seeks an award of $150,000 to $175,000 for general damages. The defendants submit that the appropriate award for general damages is $85,000 to $100,000.

**Applicable Law**

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

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

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

[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=)).

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

**73**  The correct approach to assessing injuries that depend on subjective reports of pain was discussed in *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) by McEachern C.J.S.C. (recently quoted with approval in *Edmondson v. Payer*, [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=) at para. 2). In referring to an earlier decision, his Lordship said:

In *Butler v. Blaylock*, [[*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=)] decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**74**  Ms. Slater relies on *Felix v. Hearne*, [*2011 BCSC 1236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-625V-00000-00&context=); *Kallstrom v. Yip*, [*2016 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1JY-00000-00&context=); *Sebaa v. Ricci*, [*2015 BCSC 1492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-N221-JW5H-X0MC-00000-00&context=); *Kim v. Lin*, [*2016 BCSC 2405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MJ7-NBJ1-F1WF-M26W-00000-00&context=) [*Kim*]; *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=) [*X. v. Y*.]; and *Chawla v. Lambright*, [*2017 BCSC 1884*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PTJ-X351-FD4T-B2T9-00000-00&context=), to support the argument that the appropriate award of general damages should be in the range of $125,000 to $200,000. In a number of these cases, the accident(s) and resulting damages were more severe than in the case at hand.

**75**  Ms. Slater suggests that the *Kim* case is the most analogous to the situation that she faces. In that case, an award of $175,000 was made for non-pecuniary damages. A review of the *Kim* case supports that the magnitude of injuries that Ms. Kim sustained were far more extensive than those sustained by Ms. Slater. Ms. Kim's diagnoses included a concussion, chronic pain, bilateral sacroiliitis, fibromyalgia, L-spine disc prolapse, S-1 nerve compression, almost complete lack of mobility in her lower back, depression and insomnia. A further significant factor is that Ms. Kim was found to be permanently unemployable.

**76**  The defendants rely on *Bains v. Gret's Projects Inc.*, [*2017 BCSC 1530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PDG-D481-FJDY-X20P-00000-00&context=) [*Bains*], the cases cited in *Bains*, and *Snidal v. Spires*, [*2015 BCSC 446*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60GY-00000-00&context=) [*Snidal*], to support their argument that the appropriate award for general damages should be in the range of $85,000 to $100,000.

**77**  The *Bains* case involved a plaintiff, aged 27, who was injured in a motor vehicle accident. She suffered injuries to her neck, both shoulders, mid back, low back, right hip and thigh, right leg, and right ribs. She further suffered from headaches, anxiety, interrupted sleep, and chronic pain as a result of the accident. The court found that she would possibly have pursued a career in law enforcement with the Canadian Border Services Agency but for the accident.

**78**  The plaintiff in *Bains* missed two and one-half weeks of work and then participated in a gradual return to work. As of the trial, the expert medical evidence still gave some prognosis for recovery for some of the symptoms with appropriate therapy. A further complicating issue was that the plaintiff was deconditioned.

**79**  The court found that the plaintiff had not pushed herself in active rehabilitation and was selective in the therapies in which she participated. Further, the plaintiff ignored the advice of numerous treating physicians and therapists who recommended that she exercise properly. The court found that the plaintiff had not exhausted all recovery avenues.

**80**  After considering a number of cases, Madam Justice Young noted at para. 68:

[68] After considering all of the authorities and the relative age of some of the awards for similar injuries, and in particular, the chronicity of the plaintiff's symptoms and the poor prognosis for recovery and my finding that the plaintiff was selective in the therapies that she followed, I award $95,000 for non-pecuniary damages.

**81**  The defendants submit that the case of *Sekihara v. Gill*, [*2013 BCSC 1387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25G-00000-00&context=), in which a non-pecuniary award of $130,000 was made, illustrates why the range sought by Ms. Slater is too high. The plaintiff in *Sekihara* was 29 years old at the time of a motor vehicle accident that caused soft tissue injuries to her neck and lower back, as well as depression. She was a World Cup snowboard competitor and a sports photographer. She was in peak condition. Her neck pain quickly resolved and her depression symptoms were treatable, but she was left with chronic lower back pain.

**82**  The impact on Ms. Slater is akin to the impact on Ms. Sekihara in that both their injuries had and continue to have ongoing impacts on their lives. This was a 2013 decision, and therefore with inflation the award would be roughly $138,000 today.

**83**  In *Snidal*, a 20-year-old lifeguard suffered soft tissue injuries to her neck, back and right shoulder, and experienced headaches and depression. The accident had an impact on her occupation, but, as the judge noted, the plaintiff was not a career-oriented person. The plaintiff was involved in a supportive common-law relationship and was planning to get married and have children. The non-pecuniary award was $85,000. It is clear to me that the impact on Ms. Slater, particularly in respect to the loss of her ability to work in her chosen career of general duty policing, is far greater than the impact on the plaintiff in *Snidal*.

**Application of the Law to the Facts**

**84**  As stated earlier, Ms. Slater suffered soft tissue injuries to her neck, left shoulder, lower back and left hip area. She continues to suffer from daily pain and stiffness primarily in her low back and left hip area.

**85**  Ms. Slater presented as someone who likes to be in control, and it appears that the ongoing symptoms and their lack of resolution have been particularly difficult for her to adjust to. She testified as to the impact that the accident has had on her life, in that she feels she has lost everything that she worked "super hard" to achieve: her career, her personal life, and her physical well-being.

**86**  With respect to her career, she has lost the ability to perform the type of police work that provided her the greatest enjoyment, that is, general duty police work out on the road. The accident has caused a significant change to Ms. Slater's ability to undertake general police duties. She has not been medically cleared to work, and the medical opinion supports that Ms. Slater currently cannot return to general police duty. Further, it appears unlikely that she will be able to do so in the future. She has been able to remain an RCMP officer but on administrative duties only.

**87**  She is concerned that she will not have the same opportunity for advancement. She does not find her job in the Serious Crime Unit as enjoyable as her previous role, and she finds it more depressing and mentally draining as she has to deal with serious files for extended periods. Her current role mainly involves computer work in the office, which she finds far less stimulating than the general duty work.

**88**  Ms. Slater has become more withdrawn from her work colleagues, family and friends; her relationship with her common-law husband has ended; and she has not been able to participate in her children's activities to the same extent. Her sleep is affected and she frequently wakes up at night.

**89**  The defendants submit that the Ms. Slater's relationship with Mr. Simpson prior to the accident was not as positive as Ms. Slater testified. The suggestion is that there were stressors that existed prior to the accident. I accept that is accurate, but it is speculative whether those stressors would have resulted in the relationship ending. The evidence of both Ms. Slater and Mr. Simpson supports that the impact of the accident and the changes in Ms. Slater post-accident assisted in the breakdown of the relationship.

**90**  Cathy Dean, Ms. Slater's mother, testified as to the impact the accident has had on her daughter. She testified that she noticed a change in her personality after the accident, namely that Ms. Slater was irritable, withdrawn, and increasingly distant and difficult to engage. She also testified to witnessing Ms. Slater in pain after a short walk and not being able to pick up her youngest daughter. Ms. Dean also witnessed Ms. Slater and Mr. Simpson grow apart.

**91**  Ms. Slater testified that she has become moody and irritable. She feels down and does not want to participate in social activities. She finds that she is now much more emotional and susceptible to break down.

**92**  I have reviewed the various cases provided, and in assessing the particular circumstances of Ms. Slater, I am of the view that the appropriate award for non-pecuniary damages is $135,000.

**Adverse Inference for Not Calling Dr. Masri**

**93**  As referenced in *Kallstrom v. Yip*, [*2016 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1JY-00000-00&context=) at para. 347, the law on adverse inferences is:

[347] *Thomasson v. Moeller*, [*2016 BCCA 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HX7-VJ11-FCSB-S401-00000-00&context=), is a recent example of the Court of Appeal dealing with the question of an adverse inference being drawn for failing to call a medical witness at the trial of an MVA personal injury claim. The Court stated:

[34] I first observe that "[w]hether an adverse inference is drawn from failure to call a witness is a question for the trier of fact": *Buksh v. Miles*, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=) at para. 33. Nor is a judge bound to draw an adverse inference from the failure of a witness or party to testify: *Weeks v. Baloniak*, [*2005 BCCA 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4DP-00000-00&context=) at para. 12.

[35] The law relevant to adverse inferences was helpfully summarized in *Zawadski v. Calimoso*, [*2011 BCSC 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2R4-00000-00&context=), where Mr. Justice Voith stated:

[149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, [*2000 BCCA 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61CW-00000-00&context=) at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, [*2001 BCSC 1126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-240G-00000-00&context=) at para. 127; *Lambert v. Quinn* [*(1994), 110 D.L.R. (4th) 284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JTNR-M30K-00000-00&context=) (Ont. C.A.) at 287.

**94**  Ultimately, a judge is not bound to draw an adverse inference from the failure of a witness or party to testify: *Thomasson v. Moeller*, [*2016 BCCA 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HX7-VJ11-FCSB-S401-00000-00&context=) at para. 34, citing *Weeks v. Baloniak*, [*2005 BCCA 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4DP-00000-00&context=) at para. 12.

**95**  Ms. Slater attended an independent medical examination, at the request of the defendants, with Dr. Masri, an orthopedic surgeon. Ms. Slater seeks to have an adverse inference drawn from the failure of the defendants to call any evidence from Dr. Masri or tender a report from him. The plaintiff's submission is that the Court should assume that Dr. Masri's evidence would have supported a finding that Ms. Slater suffers from chronic pain and depression, and that these are permanent.

**96**  The defendants say that there is no basis for any adverse inference to be drawn since Dr. Masri is an orthopedic surgeon and this case involves issues relating to chronic pain, a topic on which a physiatrist's opinion is more suitable.

**97**  I find that there should be no adverse inference drawn against the defendants for their decision not to request a report from Dr. Masri. To draw an adverse inference every time a defendant does not order a report arising from a medical examination of the plaintiff is not appropriate. It may well be that Dr. Masri's opinion was not helpful to the defendants or perhaps his opinion added nothing to the opinions already expressed.

**98**  Ultimately, there must be something more before an adverse inference is drawn. As has been the case on several occasions in which this court has declined to draw an adverse inference against the plaintiff for the failure to call a physician, there is an insufficient basis here to draw an adverse inference against the defendants: see *Djukic v. Hahn*, [*2006 BCSC 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1TD-00000-00&context=) at para. 60; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, [*2011 BCSC 762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S25C-00000-00&context=) at paras. 118-122; *Love v. Lowden*, [*2007 BCSC 1007*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XK-00000-00&context=) at paras. 57-58.

**Past Loss of Wages or Income Earning Capacity**

**Applicable Law**

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

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

**101**  The issue of whether wages received by an injured plaintiff should be deducted from the plaintiff's claim for lost wages has received much judicial attention. The Supreme Court of Canada noted in *Ratych v. Bloomer*, [*[1990] 1 S.C.R. 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6549-00000-00&context=) at 981:

The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account.

**102**  In *Cunningham v. Wheeler*, [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=), the issue of benefits was considered, and the Court found that when benefits are not in the nature of insurance, the right of the payor to be reimbursed is determinative of the issue, and not whether the right had been exercised, at 415-416:

Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits if they are found to be in the nature of insurance. However, if the benefits are not "insurance" then the issue of subrogation will be determinative. If the benefits are not shown to fall within the insurance exception, then they must be deducted from the wage claim that is recovered. However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right. [Emphasis added.]

**Application of the Law to the Facts**

**103**  Ms. Slater was off work for almost one year and then had a gradual return to work from June to September 2015. Since September 2015, she has been working full-time in an administrative role, initially with the Chilliwack detachment and since January 2016 with the Langley detachment. She is an investigator in the Serious Crime Unit with the Langley detachment.

**104**  The RCMP has four job categories: level 1 for specialist training such as police dog training, level 2 for general duty, level 3 for some restrictions on wearing a uniform, and level 4 for administrative duties.

**105**  Prior to the accident, Ms. Slater had a level 2 designation, meaning she was able to do general duty policing. In order to have a level 2 designation, employees must pass medical testing.

**106**  Ms. Slater now has a level 4 designation, which means she is restricted to duties solely related to law-enforcement support or administration.

**107**  The evidence supports that as a regular member of the RCMP, Ms. Slater has indefinite sick leave and that while away on medical leave, she continued to receive her full salary and allowance. She has been fully compensated by her employer for wages during her time away from work in the amount of approximately $85,000. Ms. Slater testified that her employer has not talked about repayment with her.

**108**  The plaintiff's position is that the defendants should not be entitled to the benefit of a private insurance scheme, and that the onus is on the defendants to produce evidence that the RCMP has irrevocably waived its right to repayment.

**109**  The plaintiff relies on the case of *X. v. Y.*, in which the court, at para. 224, outlined the pivotal question as, "whether the evidence supports a finding that the RCMP has formally waived its right, based on the principle of subrogation, to reclaim the compensation for the wages and benefits paid to the plaintiff from the date of the accident to the date he returned to work."

**110**  The court found as follows:

[228] Inspector D. stated that he was not aware of the RCMP seeking reimbursement for the wages or benefits paid to the plaintiff during his time off; however, he did not state that the RCMP would not seek reimbursement in the future or had relinquished its right to do so. He did not explicitly state that he was authorized to bind the RCMP. He merely commented on the current policy. The plaintiff has not received any notification, written or otherwise, that the RCMP has waived its right to reclaim the wages and benefits it paid him as a result of the accident.

[229] I am not persuaded that the evidence establishes that Inspector D., with full authority, clearly and unequivocally made an informed decision to waive the RCMP's right with full knowledge of the effect of that waiver. In short, the Inspector's testimony regarding the RCMP's current policy position does not constitute a formal release or waiver of the RCMP's right to reclaim the money it paid to the plaintiff for wages and benefits.

[230] Therefore, I conclude that the plaintiff is entitled to an award for past loss of earning capacity. The loss of earning capacity is quantified up until April 2006, when the plaintiff returned to work, by the amount of wages he would have earned if his capacity had not been impaired by the injuries sustained in the accident: *Bradley* [*[2010] B.C.J. No. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at para. 33. The gross wage loss from the date of accident to the date of his return to work is 42 weeks, which equates to $53,855.52 based upon the calculations provided to me. Counsel have leave to apply if they cannot agree on this calculation.

**111**  Kevin Turnbull, Chartered Accountant and Economist, provided a report on past wage loss dated September 22, 2017, and testified at trial. His report sets out a net past wage loss of $17,685. This amount was calculated by reviewing the amount of average overtime Ms. Slater was paid in 2012 and 2013, being an average of $11,633. Mr. Turnbull then reviewed the amount of income that Ms. Slater was paid in 2014 to the date of the trial in 2017, and calculated the difference. His opinion is premised on the assumption that Ms. Slater would have continued to earn more than her base salary in the years after the accident.

**112**  Overall, Ms. Slater seeks an award of $103,000 for the combined loss of past regular wages and overtime.

**113**  The defendants concede that Ms. Slater did suffer from the loss of overtime and that the loss as quantified by Mr. Turnbull at $17,685 is probably accurate. However, the defendants do not agree that the plaintiff has proven an entitlement to the $85,000 for which she has already been paid by the RCMP. They submit that the onus is on Ms. Slater to establish the nature of the benefit she was receiving, and that she has not proven that she was paying for this benefit.

**114**  I will award the sum of $17,685 for the past wage loss claim of the plaintiff. I am not convinced that the evidence in this case supports an award of the past wage loss in light of the amount already paid. There should be evidence led by the plaintiff with respect to either the nature of the benefit plan under which the amount was paid (e.g. insurance), or the RCMP's right to subrogate.

**115**  The evidence in this case does not support a finding that the amount paid was in the nature of insurance. Furthermore, unlike the evidence in *X. v. Y.*, the evidence in this case does not support a finding that the RCMP has the right of subrogation to reclaim the amount paid to the plaintiff. There was no evidence whatsoever led on these issues. There remains an onus on the plaintiff to lead some evidence and she has failed to do so.

**Loss of Future Earning Capacity**

**Applicable Law**

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

**117**  In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based on speculation: *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 [*Rosvold*]; *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 [*Perren*]. Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 17. As observed by the Court of Appeal in *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=) at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award.

**118**  Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play in the particular case. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed, but the result must be fair and reasonable: *Rosvold*, at para. 11; *Jurczak v. Mauro*, [*2013 BCCA 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S46D-00000-00&context=) at para. 36.

**119**  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. The essential task of the court is to compare the likely future of the plaintiff's working life had the accident 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. 33.

**120**  Evidence of ongoing pain may be sufficient to ground a substantial possibility that the plaintiff's pain will adversely affect his or her future ability to work. This may hold true even where, at the time of trial, the plaintiff has not missed work due to the injury: *Clark v. Kouba*, [*2014 BCCA 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1F1-00000-00&context=) at para. 33; *Williamson v. Suna*, [*2009 BCSC 576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M26V-00000-00&context=) at paras. 52, 55, 62.

**121**  There are two possible approaches for assessing the loss of future earning capacity: the "earnings approach" from *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.) [*Pallos*], and the "capital asset approach" 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=) (C.A.) [*Brown*]. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren*, at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset approach" is more appropriate: *Perren*, at para. 12.

**122**  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*, at para. 43; *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 [*Gilbert*].

**123**  The capital asset approach involves considering factors such as (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*, at para. 8; *Gilbert*, at para. 233; *Morgan 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 [*Morgan*].

**124**  Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan*, at para. 56.

**Application of the Law to the Facts**

**125**  It is this head of damages that represents the most significant and complex aspect of Ms. Slater's case and generates the most disagreement between the parties. In analyzing this claim, the following issues must be addressed:

1. Reliance on Mr. Turnbull's report;
2. Loss of promotability;
3. Loss of overtime;
4. Negative contingency for the pre-existing conditions; and
5. Risk of discharge from the RCMP.

**Plaintiff's Position**

**126**  Ms. Slater is advancing a claim for loss of future earning capacity and loss of pension benefits on the basis that prior to the accident, she would have been promoted on a regular basis and would have achieved the ranking of staff sergeant. As a result of the accident, she will always be restricted to administrative duties. She has lost the opportunity to be promoted since promotions are not available to officers with a level 4 designation. She has also lost the opportunity to work overtime and the resulting financial benefit.

**127**  The plaintiff's counsel submits that the loss of earning capacity is the appropriate approach in this case. Ms. Slater relies on a report by Mr. Turnbull to quantify that loss. She seeks an award of between $700,000-$850,000 for the future loss of earning capacity, including her loss of pension benefits.

**Defendants' Position**

**128**  The defendants' position is that Ms. Slater has lost some future capacity but has not proven the magnitude of the loss as set out in Mr. Turnbull's report. The defendants' positon is that Ms. Slater may have been promoted but there is a lack of evidence to support that she will not be promoted in the future. Furthermore, Ms. Slater continues to be employed by the RCMP with full compensation, and there is no risk that she will face early discharge.

**129**  The defendants submit that the appropriate approach is the loss of capital earning approach, and accordingly one year's wage should be awarded. This would be an award of $91,000.

**Reliance on Mr. Turnbull's Report**

**130**  Mr. Turnbull tendered a report and testified at trial in respect to issues relating to future wage and pension losses. With respect to these losses, Mr. Turnbull was given the following assumptions:

1. As a result of the accident, Ms. Slater will never advance beyond the rank of constable for the remainder of her career;
2. But for the accident, she would have progressed on the following basis:
3. to rank of corporal in 6-8 years, promoted as of January 1, 2017;
4. to rank of sergeant in 2-3 years, promoted as of January 1, 2020;
5. to rank of staff sergeant in 2-3 years, promoted as of January 1, 2023;
6. for all of the ranks there is a two-step pay scale with the second step reached after one year at the new rank.

**131**  I am not convinced that these assumptions were reliable. There were five RCMP officers that testified. A summary of their RCMP histories are as follows:

1. Constable Wilson has been an RCMP officer for 11 years and he has not been promoted;
2. Constable Simpson has been an RCMP officer for seven years and he has not been promoted;
3. Corporal Adrian has been with the RCMP for 21 years and remains a Corporal;
4. Corporal Purdy has 12 years of experience with the RCMP and was promoted to a Corporal in December 2016;
5. Sergeant Rayworth, who was promoted from Constable to Corporal after seven years of service and then at some point to a Sergeant, has 15 years of experience with the RCMP.

**132**  None of the RCMP officers that were called to testify have achieved the rank of staff sergeant in 14 years, which was one of the assumptions provided to Mr. Turnbull. Of particular significance is Corporal Adrian, who after 21 years of experience remains a Corporal. There was no evidence called by the plaintiff to support how many officers are promoted and the average length of time required to achieve promotions.

**133**  It is my view that the report of Mr. Turnbull on the future loss of earning capacity relies on assumptions that were not proven at trial, and, as such, little weight can be placed on the amounts listed in that report.

**Loss of Promotability**

**134**  There is evidence that supports that Ms. Slater was highly regarded by her superiors prior to the accident and was likely to receive a promotion at some point in her RCMP career. She was marked for early promotion in the sense that Sergeant Rayworth testified that Ms. Slater was one of the officers that were discussed as showing leadership potential. He testified that she had all the traits that are looked for when considering promotions. Her supervisors' pre-accident performance reviews were very positive on her future.

**135**  There was both conflicting evidence and a lack of evidence on the issue of promotion availability for RCMP officers with a level 4 designation.

**136**  It is clear that Ms. Slater remains a highly valued RCMP officer and that her supervisors remain impressed with her abilities. As noted in the 2017 performance review, "Jaime has been a welcome addition to SCU and brings a strong work ethic. She has been excellent for team building and taking on a more involved leadership role will be her next step." Constable Wilson, a colleague, testified that she was an extremely hard worker, thorough in her investigations, a leader on the team and a "go-to" person. Corporal Adrian described Ms. Slater as being very diligent in her work and producing exceptional work. Corporal Purdy testified that Ms. Slater is a "real good member" and he would like to have more like her since she is so good at her job. He noted that she requires little supervision.

**137**  Ms. Slater's evidence was that although she has not applied for a promotion, her understanding is that she cannot be promoted as a level 4 because she is not medically cleared. Ms. Slater based this understanding on what a friend and the officer in charge told her. These individuals were not called to give evidence.

**138**  The evidence of Corporals Adrian and Purdy conflicted to some extent as to the opportunities for promotions with a level 4 designation. Corporal Adrian's evidence was that most of the jobs would require a level 2 designation and that any job requiring only a level 4 would likely go to those who are more senior. Corporal Adrian testified that Ms. Slater's future promotions would be limited. She did concede in cross-examination that there is a very wide range of jobs in the RCMP. Sergeant Rayworth testified that there are fewer level 4 designated jobs available.

**139**  Corporal Purdy's evidence was that because Ms. Slater has a level 4 designation, she has no opportunity for advancement. He testified that she needs a clean bill of health to be promoted. A further impediment to Ms. Slater's future advancement is that she is not getting experience in all the different areas of police work. In any job for which she would apply, she would likely be met with other individuals who have had broader ranges of experience.

**140**  The plaintiff could have but did not call conclusive evidence to establish that an officer with a level 4 designation cannot be promoted. Corporal Purdy has never worked in the human resources department of the RCMP. There was no documentary evidence adduced of any RCMP policies that prohibit the promotion of individuals who are on administrative duties.

**141**  The defendants could also have called evidence that supported the policy of the RCMP to accommodate while outlining the promotion policy. As noted in *X. v. Y.*, an inspector who was the RCMP officer in charge of the Employee and Management Relations office in BC was called by the defendants. In that case, the inspector gave evidence on the scope of the RCMP's policy for accommodation. It supported that accommodation within the RCMP does not impact a member's access to pay increases and promotions: at paras. 194, 197.

**142**  It is unfortunate that the parties in the case both failed to call this type of witness who would have assisted the Court on these crucial factual issues. I am left to decide the issue on the limited evidence provided.

**143**  The evidence supports that there are thousands of job opportunities for RCMP officers across Canada. The number of those jobs available to level 4 designated individuals is not known. I am further convinced that Ms. Slater will have the opportunity of advancement in the Serious Crime Unit. However, those opportunities will be much more limited as a result of her restriction to administrative duties.

**144**  Overall, I find there is a real and substantial possibility that Ms. Slater would have been promoted and that now she faces a significantly restricted pool of available jobs and is less likely to be promoted.

**Loss of Overtime**

**145**  Ms. Slater was working overtime in the past, and therefore the past wage loss claim has been calculated on her loss of overtime pay. Ms. Slater is not prohibited from overtime in her new role, but her evidence is that there is less opportunity for overtime and she physically cannot cope with overtime.

**146**  I find that there is a real and substantial risk that Ms. Slater will have less opportunity to work overtime and that this will have some pecuniary impact on her.

**Negative Contingency for Pre-existing Conditions**

**147**  The defendants submit that the pre-existing conditions respecting Ms. Slater's right foot and the diagnosis of adult vitelliform macular dystrophy in her left eye are negative contingencies in respect to her future career path. Their submission is that there is a possibility that her chronic right foot condition and vision will deteriorate to the point where she will not meet the requirements for her occupation.

***Right Foot***

**148**  Ms. Slater first noted a problem in her right foot during RCMP training in late 2008. Her evidence was that during the final circuit training, her right foot slipped on the stairs exercise, but she was able to complete the circuit with a good time. She was also able to participate in the final march in the front row at her graduation. After the stairs incident, she would notice stiffness in her right foot after jogging for about 20 minutes. When it felt stiff, she would push it against the curb and it would snap.

**149**  Ms. Slater reported this to her family doctor, and she was sent to a foot specialist. She was advised that no treatment was needed. She testified that her right foot was currently not a problem.

**150**  Following the incident, she was able to do extensive physical exercises, including the Grouse Grind, and work as a general duty police officer without any issues.

**151**  Dr. Baby testified that he referred Ms. Slater to an orthopedic surgeon who diagnosed her with a condition which is not serious and required no treatment. His understanding was that the condition did not interfere with her duties as an RCMP officer.

**152**  I do not find that there is any real or substantial possibility that the right foot condition will manifest in the future to the extent that it will impact Ms. Slater's career or other activities.

***Adult Vitelliform Macular Dystrophy of the Left Eye***

**153**  Ms. Slater was diagnosed with a condition called adult vitelliform macular dystrophy of her left eye in December 2016. Ms. Slater first noticed a shading in her left eye in 2012. She saw her family doctor who referred her to specialists. Ms. Slater's understanding is that she continues to have 20/20 vision in both eyes and the condition of her left eye is stable.

**154**  Dr. Baby testified that it is his understanding that Ms. Slater's vision tests have been variable; however, he did not agree that the vision tests support degeneration of her eyesight. Dr. Baby did not agree that Ms. Slater's diagnosed condition is degenerative.

**155**  There was no evidence from an eye specialist that Ms. Slater's condition would deteriorate to the extent that she would not meet the RCMP vision requirements. In my view, there is not enough evidence to support that this scenario is a real and substantial possibility.

**156**  Without the benefit of any expert evidence from an ophthalmologist or eye specialist, it is too speculative to consider that Ms. Slater will be impacted by vision issues in the future.

**Risk of Discharge from the RCMP**

**157**  I find that Ms. Slater is not likely to leave the RCMP in the future. Ms. Slater testified that she has not considered leaving. She has not explored any other job opportunities.

**158**  I do not find that there was persuasive evidence that the RCMP will terminate Ms. Slater and force her to leave the RCMP. The overwhelming evidence supports that, even post-accident, she remains a very valued employee. As Mr. Trainor testified, the RCMP as an institution is better than other employers in taking the duty to accommodate seriously and placing people in administrative positions. In his report he notes that: "It is my understanding that Ms. Slater's risk of unemployment is virtually zero."

**159**  The RCMP has already accommodated Ms. Slater in her move from Chilliwack to the Langley detachment and into an administrative position. As noted in the evidence, the RCMP confirmed that there was a strong likelihood that Ms. Slater will be a permanent level 4 employee and that the Langley General Investigative Section will be accommodating her. This is what has happened. I do not find that it is a real and substantial possibility that Ms. Slater is or will be at risk of being discharged because of her current designation.

**Summary**

**160**  I find that Ms. Slater has proven that the injuries she has sustained have impaired her earning capacity. Ms. Slater has been rendered less capable of earning income from all types of employment. As a result of her physical restrictions, she is less marketable as a potential employee. In the RCMP setting, she is restricted from a wide range of active duty positions and is restricted to administrative jobs. It does not appear from the evidence that this will change in the future. There is additionally the risk of a loss of overtime opportunities.

**161**  Bearing in mind the applicable principles in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of $270,000 is the present value of a fair and reasonable measure of Ms. Slater's future loss of earning capacity and loss of pension.

**Cost of Future Care**

**162**  Ms. Slater advances a claim for cost of future care in the amount of approximately $100,000 to $150,000. This is comprised of items related to occupational therapy ergonomic assessment, physiotherapy exercise program, counselling, injections, homemaking assistance, supplies, and potentially some equipment.

**163**  The defendants submit that Ms. Slater is not entitled to any award of future care costs.

**Applicable Law**

**164**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.) [*Milina*]; *Spehar v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=) at para. 55; *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.

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

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

**167**  In *Penner v. Insurance Corporation of British Columbia*, [*2011 BCCA 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1R6-00000-00&context=) at para. 13, the court noted that common sense should inform awards of cost of future care, quoting *Travis v. Kwon*, [*2009 BCSC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B110-00000-00&context=):

[109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*[1978] 1 W.W.R. 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=).

[110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

[111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

**Analysis**

***Occupational Therapy Ergonomic Assessment***

**168**  Ms. Slater, as a member of the RCMP, is entitled to any ergonomic assessment that is needed. This is supported by the evidence of when she returned to work: the RCMP provided to her an ergonomic chair and a sit-stand desk to use. Ms. Slater is aware that there is a process to request an assessment through the RCMP at her new office in Langley, but she has not yet done so. There is no basis to make an award for this item.

***Physiotherapy Exercise Program***

**169**  The recommendation of Ms. Carman is that Ms. Slater participate in an active exercise program to maintain her future strength and stability. She recommends that Ms. Slater return for some further physiotherapy sessions to assist in the development of an exercise program. Ms. Carman accepts Dr. Watt's recommendation that Ms. Slater have 25 to 30 sessions with a kinesiologist over a six-month period for the purpose of supervising Ms. Slater's involvement in this exercise program.

**170**  Ms. Slater has already attended in excess of 100 physiotherapy sessions with two providers, PhysioStation and Performax. Ms. Slater testified that the physiotherapy treatments were not helpful and that the kinesiologist was mentally helpful but did not help with the pain. She is well acquainted with how to exercise and has extensive experience in fitness and maintaining her own fitness. She has implemented her own home exercise program using exercises suggested by the physiotherapist and kinesiologist she has seen in the past.

**171**  All of the medical experts who examined Ms. Slater find that she is in good shape. To her credit, she has not allowed herself to become deconditioned as a result of her chronic pain. Dr. Watt's examination of Ms. Slater confirmed that she had not experienced any wasting of her muscles and had normal range of motion in her neck and shoulders. Further, her core strength and physical fitness were "not that bad".

**172**  She has not had any formal physiotherapy since she completed her gradual return to work in approximately September 2015.

**173**  Ms. Slater is an individual who has a high motivation to maintain her fitness, as demonstrated by her current fitness and conditioning level. Ms. Carman noted that she had excellent cardiovascular health. She is able to maintain this through her home exercise program that she has already implemented with the past input of physiotherapists and a kinesiologist. There is no need for her to have the further services of these types of professionals.

**174**  Ms. Slater's own evidence supports that she is aware of how to maintain her fitness and has in place a fitness program that she follows at home consisting of stretches, weight-training and cardio. She testified about how, in the past, she has had a gym membership but that she prefers to work out at home. Ms. Slater wants to be home for her daughters, and with her level of experience in fitness training, it does not seem likely that she will want to spend time in the gym away from them. Ms. Slater is not the type of individual that needs encouragement or support to be active. She has always lived an active life and understands the importance of being fit.

**175**  With respect to funding for a gym pass, Ms. Slater has used a gym in the past, for spin classes, but as mentioned, she has developed her own home fitness program. She has also used the gym at work. She wants to spend as much time with her daughters as she can. It makes sense then that she incorporates her exercise program around her daughters' schedules while she is at home. Therefore, no funding is necessary for a gym pass.

***Counselling***

**176**  The plaintiff suggests taking the midpoint of the various scenarios for an amount of $1,700. The recommendation made by Dr. Axler was that Ms. Slater have additional psychotherapy around cognitive behavioral therapy to assist her with her depressed mood and anxiety related to motor vehicles.

**177**  Ms. Slater tried some psychotherapy in the past but she did not find it helpful. She did find the counselling she received from Back in Motion helpful in getting her back driving on the highway.

**178**  It appears that the issue of Ms. Slater's anxiety related to motor vehicles has substantially resolved. Ms. Slater has returned to driving, and there is no evidence to support that she is currently suffering from anxiety related to driving.

**179**  With respect to her depressed state and mood, it is reasonable that Ms. Slater have funding to try some further psychotherapy. Ms. Slater does have access to counselling at the RCMP, but she is reluctant to pursue this option since her understanding is that her counselling records would form part of her RCMP file accessible to others.

**180**  The defendants submit that Ms. Slater's reluctance to use the counselling provided by the RCMP is not reasonable.

**181**  Ms. Slater's concern respecting an RCMP counsellor is understandable, and, as such, an award will be provided for her to access a psychotherapist for some further therapy. I find that it is reasonable that some funding be provided for ten further sessions of psychotherapy with a registered psychologist. That amount is $1,700.

**182**  In my view, the mindfulness sessions do not come within the ambit of a treatment that is medically justifiable and reasonable for Ms. Slater.

***Trigger Point Injections/Botox Injections***

**183**  Dr. Watt recommended that Ms. Slater be referred to a physiatrist for a course of trigger point injections. Ms. Slater has tried two types of injections - prolotherapy and platelet-rich plasma injections - both of which provided no relief. Ms. Carman notes that any trigger point injections done by a specialist physician would be at no cost.

**184**  Ms. Slater testified that she was concerned about having trigger point injections. She felt she may end up hurting herself if the injured areas were numbed and she participated in more activities.

**185**  Dr. Baby testified that facet joint blocks are not curative for myofascial pain, and the most such injections would provide would be a temporary reduction in symptoms.

**186**  I do not find that there is enough evidence to support that Ms. Slater would benefit from this therapy. In addition, there is a significant risk she would not have this treatment performed.

**187**  In respect to Botox injections, Dr. Watt noted that Ms. Slater may also be a candidate for Botox injections for her neck and upper back pain symptoms. It is my view that this is not enough of a medical endorsement to support an award for these treatments. The current focuses of Ms. Slater's pain complaints are not her neck and upper back but her lower back and left hip. There was no medical evidence at this trial supporting that Botox injections in those areas are medically justifiable.

**188**  There will be no future care costs awarded for these items.

***Platelet-Rich Plasma Injections/ Adjustments***

**189**  Ms. Slater initially tried saline injections with a naturopath, which did not work. She then tried the platelet-rich plasma injections from another naturopath as a last treatment option. She testified that the treatments did not assist her. She did consult Dr. Baby about this treatment and he gave her a referral to try it.

**190**  There is no medical justification for such an award to be made, as Ms. Slater testified the platelet-rich plasma treatments she received in the past were of no assistance to her. In closing submissions, the plaintiff's counsel did not seek any future amount for this type of treatment.

***Vocational Rehabilitation Services***

**191**  Ms. Carman testified that she would amend her report to support the recommendations made by Mr. Trainor. Mr. Trainor's opinion was that Ms. Slater would benefit from the support of a Vocational Case Manager to help explore specific job goals and retraining options at a cost of $1,000 to $2,000.

**192**  In closing submissions, the plaintiff's counsel abandoned this item of future care costs.

***Homemaking Assistance***

**193**  The plaintiff seeks homemaking assistance until the age of 80. Ms. Slater is able to carry out all of her housecleaning duties but has to pace herself. She finds that when doing some tasks, she experiences more discomfort. Her evidence was that immediately after the accident, her mother assisted her for a period of time but then she resumed the housekeeping responsibilities. Her evidence was that Mr. Simpson was not involved in any of the housekeeping responsibilities before or after the accident.

**194**  Ms. Carman recommends that Ms. Slater have four hours of housekeeping assistance every two weeks and 10-12 hours of seasonal cleaning each year.

**195**  Ms. Slater is capable of doing all housework, although it takes her more time. Dr. Watt noted in his report that Ms. Slater was independent for all instrumental activities of daily living (grocery shopping, housekeeping, childcare, etc.). He did not recommend any assistance for these activities.

**196**  If a plaintiff's homemaking/housekeeping capacity has been diminished, they are entitled to a separate compensation for that loss: *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 paras. 24-26. I adopt the analysis of Dardi J. in *X. v. Y*. as follows:

[256] In their submissions on future care costs, the defendants conceded that the plaintiff, until at least age 70 when he likely would have required assistance in any event or would have moved from his home, is reasonably entitled to an annual allowance for gardening services in the range of $500-$700, home maintenance in the range of $1,000-$1,500, and janitorial services of $300. Doctrinally, I am of the view that compensation for these services properly should be addressed under loss of future housekeeping capacity. The underpinning for an award is a recognition of the impairment to homemaking capacity. In contrast to an award for future care, the issue of whether the plaintiff used any of these services in the past and the likelihood of whether or not the plaintiff would hire replacement help in the future does not inform the analysis: *McTavish* [*[2000] B.C.J. No. 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) at para. 43.

[257] The plaintiff did most of the gardening prior to the accident. He has resumed mowing the lawn. However, he will have some limitations in the future relating to periodic weeding and seasonal and heavier yard tasks, including when he experiences episodic aggravation of his symptoms. For the purposes of my assessment, I have estimated an annual allowance of $900 per year as a reasonable replacement cost for his services.

[258] The plaintiff also performed all his own home maintenance, including painting and home repairs, prior to the accident. He has resumed some participation in those activities. However, Ms. T. in her evaluation acknowledged his limitations for some tasks that would be "too onerous in terms of overall symptom aggravation and overall endurance". I have assessed an annual replacement cost in the range of $1,500 per year for those tasks.

[259] Although the evidence does not support a finding that a regular home-cleaning service is required, it would be reasonable to award an annual allowance of $500 for the replacement cost of hiring assistance for seasonal tasks and those tasks requiring heavy lifting, and to replace services when the plaintiff experiences periodic flare-ups.

[260] For the purposes of my assessment, I have considered the multipliers in the cost of future services in Mr. B.'s report, and I have taken into account that by the age of 70, the plaintiff would have moved from his home or would have required assistance even if he had not been injured.

[261] Keeping in mind that an award for loss of housekeeping capacity is intended to compensate the plaintiff for a diminished loss of capacity and is not a mathematical calculation, I assess a fair award to be $40,000 for the future loss of housekeeping capacity.

**197**  It is my view that the appropriate approach is to award to Ms. Slater an amount for her diminished housekeeping capacity and not for future housekeeping services. I find that it is reasonable that Ms. Slater will need assistance with some of the heavier housekeeping services that she currently finds difficult to accomplish in a timely fashion. The award for diminished housekeeping capacity is $25,000.

***House and Yard Maintenance Assistance***

**198**  Ms. Slater seeks house and yard maintenance assistance until the age of 75. Ms. Slater currently lives in a townhouse and pays strata fees. The strata is responsible for the outside maintenance of the home. When she was living with Ms. Simpson in a single family home with a large lot prior to the accident, Ms. Slater did not participate in the outdoor maintenance. This is not an area of particular interest to her. She is not a gardener as her mother confirmed.

**199**  Ms. Slater did not testify to any particular house or yard maintenance assistance she required. The one example given by Ms. Carman was that Ms. Slater had not hung pictures. The evidence does not support that Ms. Slater would have difficultly hanging a picture even if she had to briefly use a step ladder or stool to do so.

**200**  The other examples given by Ms. Carman to support the need for this future care award, such as shoveling snow, washing windows, painting, assembling furniture, and cleaning out the garage or storage areas, were not supported in the evidence.

**201**  Some of the tasks, such as outdoor window washing requiring the use of ladders, long handled tools, and buckets are ones that many homeowners would contract out. In this case, there was no evidence on whether this is something the strata would pay for.

**202**  In light of the evidence in this trial, I see no basis for any award for home and yard maintenance.

***Equipment***

**203**  Ms. Slater has purchased anti-fatigue mats. Their life expectancy of 15-20 years would take this plaintiff to an age at which, due to other factors, she may need such mats anyways. I see no basis in providing funding for these items.

**204**  The other equipment costs were abandoned by the plaintiff during closing submissions.

**205**  The award for future care costs is $1,700 for some further counselling and $25,000 for loss of housekeeping capacity.

**Special Damages**

**206**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, at para. 281; *Milina*, at 78.

**207**  Ms. Slater claims $6,502.40 for the cost of platelet injections at Kingsway Naturopathic Clinic and mileage to attend for these treatments.

**208**  She testified that she sought this treatment because she felt she had no other options. She spoke to Dr. Baby who told her that he did not believe they would work but was prepared to sign a referral so she could seek to have the costs covered by her extended health. It is not clear in the evidence if her extended health did reimburse her for this treatment.

**209**  Dr. Baby testified that if a patient requests a referral for treatment other than standard treatment, he will provide it so long as he does not think it will cause any adverse effect.

**210**  Dr. Watt testified that the naturopathic remedies that Ms. Slater tried are expensive and have limited proof of efficacy. If the treatments help, he is pleased to support patients trying them.

**211**  The injections did not assist Ms. Slater.

**212**  Plaintiff's counsel referenced the decision in *Schenk v. Stanislaw*, [*1992 CanLII 925*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2MX-00000-00&context=) (B.C.S.C.) to support that naturopathic treatments have been reimbursed as special damages. Each case turns on the evidence adduced. In *Schenk*, the plaintiff was receiving treatments from the naturopath similar to chiropractic adjustments and the use of a TENS machine. There was no conclusive medical evidence that these treatments were ineffective. However, the medical recommendation was that after two years of naturopathic treatments they were to be discontinued. The court allowed for the costs of some limited naturopathic treatments and mileage for the sum of $431.

**213**  I am not satisfied that, in light of the evidence, Ms. Slater has met her onus that this course of treatment was reasonable and appropriate in the circumstances. In making this determination, I rely on the fact that Dr. Baby told Ms. Slater that he did not think the treatment would work, and the opinion of Dr. Watt, who stated that such treatments have limited proof of efficacy: see e.g. *Fullerton (Guardian ad litem of) v. Delair*, [*2005 BCSC 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S18N-00000-00&context=) at para. 355; *Lee v. McGuire*, [*2005 BCSC 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3XB-00000-00&context=) at para. 19; *Foster v. Kindlan*, [*2012 BCSC 681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3NG-00000-00&context=) at para. 124. As such, no award is made.

**Failure to Mitigate**

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

**215**  Once the plaintiff has proved the defendants' liability, the defendants must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert*, at para. 202.

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

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

**217**  The defendants agree that Ms. Slater has participated in the great majority of the treatments her care providers have recommended. The defendants submit that the failure of Ms. Slater to take medication that was recommended by her treating physician was not reasonable. Their suggested reduction for a failure to mitigate in this case is 5%.

**218**  The defendants relied on the case of *Smith v. Poustie et al.*, [*2000 BCSC 1816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M40H-00000-00&context=), in which the plaintiff failed to attend physiotherapy and refused to take any medication whatsoever. Both of these therapies had been recommended by her treating physician. The court found that if she had tried these therapies, she may have improved. The plaintiff in that case was overweight. The court determined that a 20% reduction was appropriate for the failure to mitigate (at para. 34).

**219**  Ms. Slater tried two antidepressant medications and she found that she had a bad reaction to them. She developed an upset stomach and felt drowsy. Dr. Baby has recommended some other medications but he testified that he generally does not prescribe medications for sleep because they are habit-forming. His view was that the medications may help with covering up the symptoms but they will not cure her problems.

**220**  Instead of relying on medications, Ms. Slater has tried to keep as active as possible. She has been quite successful in doing so. She is very concerned about the potential risk of addiction to medications, a concern that Dr. Baby shares.

**221**  Dr. Baby testified that he did not feel that sleep medications would significantly improve her symptoms and that it is best that she stay away from them because she had experienced side effects in the past.

**222**  Ms. Slater is held to a standard of reasonableness, not perfection, and mere delay in seeking recommended treatment is not necessarily unreasonable: see e.g. *Lourenco v. Pham*, [*2013 BCSC 2090*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S42X-00000-00&context=) at paras. 49-56. In any event, the defendants have not shown on a balance of probabilities that taking some other medications would have reduced Ms. Slater's symptoms. The fact that earlier treatment may have been efficacious is insufficient: see e.g. *Smith v. Both*, [*2013 BCSC 1995*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3WT-00000-00&context=) at paras. 110-111; *Manson v. Kalar*, [*2011 BCSC 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KS-00000-00&context=) at para. 40.

**223**  I see no basis to reduce the damages for a failure to mitigate.

**Conclusion**

**224**  In summary, Ms. Slater is entitled to the following damages:

1. Non-pecuniary damages: $135,000
2. Past income/earning capacity loss: $17,685
3. Future income/earning capacity loss: $270,000
4. Loss of housekeeping capacity: $25,000
5. Cost of future care: $1,700
6. Special damages: O

**TOTAL:** $449,385

**225**  Ms. Slater is entitled to interest on the past wage loss claim.

**226**  If the parties are unable to agree on costs, plaintiff's counsel is at liberty to file a written submission within 60 days from the date of this judgment. Counsel for the defendants is to file written submissions in response within 15 days of receipt of the plaintiff's submissions. Any reply submissions must be filed within 10 days.

C.L. FORTH J.

**End of Document**

[***Belos v. Michaels, [2017] B.C.J. No. 1372***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P2G-8RN1-FG68-G03P-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

H. Hyslop J.

Heard: November 29-30, December 1-2 and 5-7, 2016.

Judgment: July 14, 2017.

Docket: 45779

Registry: Kamloops

**[2017] B.C.J. No. 1372** | 2017 BCSC 1217

Between Andreas Belos, Plaintiff, and Nathan James Michaels, Defendant

(221 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Soft tissue — Leg injuries — Knee — Fibromyalgia or chronic pain — Psychological injuries — Depression — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Plaintiff came off of motorcycle while taking action to avoid collision when defendant negligently entered intersection — Plaintiff was left with soft tissue injuries which turned into chronic pain — Plaintiff also suffered road rash, bruises and lacerations that eventually resolved — Plaintiff awarded non-pecuniary damages of $75,000, $16,500 for past loss of income, $100,000 for loss of future earning capacity, special damages of $13,553.45 and $19,938.60 for future care costs.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting mobility — Affecting social relationships — Affecting recreational activities — Prospective pecuniary loss — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Plaintiff came off of motorcycle while taking action to avoid collision when defendant negligently entered intersection — Plaintiff was left with soft tissue injuries which turned into chronic pain — Plaintiff also suffered road rash, bruises and lacerations that eventually resolved — Plaintiff awarded non-pecuniary damages of $75,000, $16,500 for past loss of income, $100,000 for loss of future earning capacity, special damages of $13,553.45 and $19,938.60 for future care costs.**

**Transportation Law — Motor vehicles and highway traffic — Rules of the road — Intersections — *Negligence* — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Plaintiff alleged defendant drove his motor vehicle into intersection causing plaintiff to take evasive action — Manoeuvre resulted in plaintiff losing control of motorcycle and falling on to road — Defendant was negligent in entering intersection and was entirely liable for accident — Motor Vehicle Act, ss. 175, 186.**

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| --- |
| Action by the plaintiff, Andreas Belos, for damages for injuries suffered in a motor vehicle accident. On June 30, 2010, Belos was driving his motorcycle northbound on a road. As he approached an intersection, he alleged that the defendant, Nathan Michaels drove his vehicle into the intersection, posing a risk of collision. Belos said that he took evasive action to avoid a collision. In doing so, he lost control of his motorcycle, tumbled onto the road and was injured. At the time of the accident, Belos was dressed in appropriate motorcycle gear, including footwear. Belos claimed to have suffered soft tissue injuries to his spine, injuries to his left hip and knee, road rash, lack of strength, chronic pain disorder and somatic symptom disorder. Belos received medical treatment from his family doctors, and treatment from physiotherapists, massage therapists, a rolfer and chiropractor. Belos sought non-pecuniary damages, as well as damages for past loss of income, loss of future earning capacity, cost of future care and special damages. Michaels argued that he was not an immediate hazard when he was in the intersection. He claimed that Belos created an immediate hazard by the manoeuvre he took, and so he was responsible for the accident. Michaels maintained that Belos did not mitigate his damages by failing to pursue a rehabilitation program and seek a psychological assessment.  HELD: Action allowed.  Michaels was aware, or should have been aware, of an approaching hazard. Belos was slowing down when he entered the intersection. When Michaels first saw Belos, his vehicle was moving forward and only stopped when Michaels observed the motorcycle. Belos took the only action he could reasonably take, which was to swerve and brake. The manoeuvre caused the motorcycle to come out from under Belos, with Belos landing on the road. Michaels was negligent when he entered the intersection and was entirely liable for the accident. Belos was 37. His injuries included road rash, bruises and lacerations that eventually resolved, leaving some scars. He was left with soft tissue injuries which turned into chronic pain. Belos was diagnosed with Somatic Symptom Disorder. The pain that Belos felt was real and interfered with many aspects of his life. He had difficulty getting a full night's sleep. He lost much of his fitness. He had just enough energy to work during the day, and no energy for other activities. Non-pecuniary damages were assessed at $75,000. Michaels failed to prove that Belos' injuries would have lessened had he taken the rehabilitation program. Belos did not fail to mitigate his damages. But for the accident, Belos would have earned $16,500 more. He was awarded that amount for past wage loss. Belos was awarded $13,553.45 for special damages and $6,560 to meet his subrogated obligations to his insurer. Belos was awarded $19,938.60 for future care costs for a kinesiologist and physiotherapist, a rehabilitation program and counselling. Belos suffered a loss of future earning capacity. He would likely have flare-ups of short duration and dependent upon any stressors in his life that may or may not affect him. He was awarded $100,000.00 for loss of earning capacity. The total amount awarded was $231,552.11. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 175*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0H9-00000-00&context=), s. 186

Supreme Court Civil Rules, *B.C. Reg. 168/2009*., Appendix B, Scale B

**Counsel**

Counsel for the Plaintiff: J.M. Hogg, Q.C., G.J.R. Thomson.

Counsel for the Defendant: S.C. Driver.

**Reasons for Judgment**

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| **H. HYSLOP J.** |

**INTRODUCTION**

**1**  On June 30, 2010, the plaintiff was driving his motorcycle northbound on Copperhead Drive in Kamloops, British Columbia. As he approached the intersection of Copperhead Drive and Hugh Allan Drive, he alleges that the defendant drove his vehicle into the intersection, posing a risk of collision. The plaintiff states that he took evasive action to avoid such a collision. In doing so, he lost control of his motorcycle, tumbled onto the road and injured himself.

**2**  The plaintiff says that the defendant caused the accident and should pay him damages for his injuries. The defendant disagrees.

**THE ACCIDENT**

**3**  On June 30, 2010, after work, the plaintiff went to a friend's home to help her move. He left his friend's home and turned left onto Copperhead Drive, travelling north. He was about two and a half blocks from his friend's residence when the accident occurred.

**4**  The defendant, a university student, left work after having completed his shift. He was driving his mother's sports utility vehicle ("SUV") and was going home, where he lived with his parents. Just before the accident, the defendant was travelling west on Hugh Allan Drive. The route the defendant took that evening was a route that he drove daily, to and from work, or to Thompson Rivers University.

**5**  Copperhead Drive is a through road with two lanes, one northbound and the other southbound. Hugh Allan Drive has two lanes, one travelling west and the other travelling east. Hugh Allan Drive is governed in both directions by a stop sign on both sides of the intersection.

**6**  The accident occurred at about 10:30 p.m. The roads were dry. It was dark. It is not disputed that the intersection of Hugh Allan Drive and Copperhead Drive was well-lit at the time of the accident. The motorcycle had its lights on, as did the SUV. The lighting that evening played no role in the accident.

**7**  Just before the accident, the plaintiff estimated his speed as between 50 and 60 kilometres per hour ("kph"). The speed limit is 50 kph. Just before entering the intersection, the plaintiff slowed down by "throttling" his motorcycle down.

**8**  As the defendant drove westbound, he stopped at the intersection's stop sign. He looked left and right and then left again. He observed no traffic on Copperhead Drive. He could see down Copperhead Drive to his right and, to his left, there was a parking area where three or four cars were parked. This prevented him from seeing up Copperhead Drive.

**9**  The plaintiff, just before entering the intersection, observed lights that shone through the spaces between the lane where the parked cars were located. He could not tell whether the lights were from a moving vehicle or a vehicle that was stopped.

**10**  The defendant testified that after he looked left, right and then left again, and determined that there was nothing there, he caught sight of something in his peripheral vision, starting with a light from the side. He did not know what it was. He hit his brakes and estimated that he advanced one car length. The next thing he saw was sparks flying and a motorcycle sliding.

**11**  The plaintiff testified that after he slowed down his motorcycle, he observed the SUV in his lane of traffic and it was moving. He applied his brakes within two car lengths of the SUV. He then turned his motorcycle to the left, passing in front of the SUV, to avoid T-boning it. He then braked and cranked his motorcycle to the right so he would be in the northbound lane of Copperhead Drive. He testified that he braked and swerved to avoid hitting the SUV. In turning to the right, the motorcycle came out from under him and he tumbled onto the road. The motorcycle was on its side and then travelled through the intersection and came to a rest on Copperhead Drive, north of the intersection.

**12**  Constable Zaharia investigated the accident. His investigation consisted of speaking to both the plaintiff and defendant and drawing a sketch of the scene of the accident. The sketch was not to scale. The sketch shows the location of the stop sign on Hugh Allan Drive, where the defendant would have stopped before entering the intersection, and the crosswalk area in front of the stop sign. The sketch places skid marks which depict where the plaintiff turned left in front of the SUV to avoid the collision. After the skid marks, the sketch shows the broken line skid marks identified by the constable as where the motorcycle was hopping along the road. The defendant identified the sketch and confirmed it as accurate.

**13**  The plaintiff presented photographs of the accident scene. These photographs were taken on September 3, 2010 in daylight conditions. The photographs were a re-enactment of the scene of the accident, using a black truck to represent the defendant's SUV. The plaintiff and the defendant identified these photographs as depicting the accident scene.

**14**  The plaintiff identified a photograph showing the position of the black truck just before the accident in the intersection. The defendant did not agree that the black truck's position in the intersection was the same as the location of his SUV at the time of the accident.

**15**  The defendant attended an Examination for Discovery on April 11, 2016. At the Examination for Discovery, the defendant identified some photographs, in particular VI.2, picture 21 (the photograph described above). He was asked the following questions and gave the following answers:

Q Okay. Go to picture 21. VI.2, Picture 21, there's a black truck nosed out into the intersection westbound, really in the same direction you were going that night?

A Yes.

Q Does that truck, is it in a position equivalent to where you were when you stopped, roughly?

A Roughly.

Q Okay. Because you can see there, there's room for the bike to swerve and get around the front of that truck, isn't there?

A Yes.

Q And still be in its own northbound lane?

A Yeah.

Q Right. Yeah. So, give or take, you think this is an adequate, accurate representation of where you stopped -- the position you stopped in the night of the accident on June 10, 2010 -- June 6, 2010?

A Yes.

Q I'll amend that to say June 30th, 2010, okay?

A Yes.

Q Okay. I mean, we could play with it, and there's some of the pictures here, but as far as you're concerned today, I can go away saying that's about where Mr. -- I can go away saying that's about where Mr. Michaels stopped that night to allow the bike to get around?

A Yes.

...

Q He'd swerved before he passed you?

A Yes.

Q And you could tell he braked and swerved?

A Yes.

**16**  At the Examination for Discovery, the defendant swore that he looked left before pulling into the intersection. He stated that the cars parked to his left blocked his vision as to anyone coming northbound. He swore that when he was at the stop sign he could not see anyone coming from the north. The defendant swore that, when he pulled into the intersection and looked left again, it was then that he saw the headlights of the plaintiff's motorcycle.

**17**  In response to questions at the Examination for Discovery, the defendant gave these answers:

Q And at that point, you saw the headlight?

A Yes.

Q Did you stop right away?

A Yes.

Q So the front -- you're saying the front end of your vehicle would be in the northbound lane for Copperhead?

A Yes.

Q And the front end of your vehicle would be -- when you stopped -- when you saw the motorbike and stopped, the front end of your vehicle was into the southbound -- into the northbound lane of Copperhead?

A Yes.

Q Okay. So your vehicle would be partially blocking the northbound Copperhead lane to some extent?

A Yes.

Q I've given you the police diagram. We'll just go I guess the way the bike -- where is it -- the way the bike's travelling. He got there and said -- the police marked -- did this diagram, and I'm placing it in front of you as Document LI.6 [Constable Zaharia's diagram]. The diagram's attached, and I'm not so interested in the police report as I am the diagram attached. It will be detached if the case ever gets to trial. I'll just show you the diagram, and you'll recognize it, won't you?

A Yes.

Q The police had skid marks there. Did you see him apply his brakes at some point and veer to the left?

A Yes.

Q Okay. And when he applied his brakes -- when he, the plaintiff, my client Belos, applied his brakes and veered to the left, that was at a point where you were stopped or still rolling forward a bit?

A I was stopped.

Q You think you were stopped?

A (NO VERBAL RESPONSE)

Q Could've you still been moving forward a little bit when he -- when you first saw him? Before you got stopped and when he braked, could've you still been moving forward?

A Yes.

**18**  The plaintiff testified that upon falling from his motorcycle, he observed his motorcycle slide past him and northbound on Copperhead Drive.

**19**  The plaintiff stated that he remembers sliding on his back and landing on his head, then tumbling and rolling. He testified that he was conscious; he got up and looked at his hands; he could see blood dripping from them. The plaintiff saw the defendant and he pointed at the stop sign as if to say "you are supposed to stop".

**20**  Paramedics attended the scene of the accident. The plaintiff was taken to hospital, treated and released.

**LIABILITY**

**Positions**

***The Plaintiff***

**21**  The plaintiff argues that he had the right-of-way as he was on a through street (Copperhead Drive) and the defendant was required to yield to him as he was travelling on a street governed by a stop sign at the intersection.

**22**  The plaintiff argues that the skid marks depicted in the police officer's sketch occur almost at the intersection of Copperhead Drive and Hugh Allan Drive, showing that the plaintiff was a hazard to the defendant.

**23**  Further, the plaintiff argues that the plaintiff did not see the defendant until he was in the intersection.

***The Defendant***

**24**  The defendant argues that he was not an immediate hazard when he was in the intersection. Instead, he argues that the plaintiff created an immediate hazard by the manoeuver he took, and so he was responsible for the accident.

**25**  Alternatively, the defendant argues that, should liability or a portion of liability fall on him, the plaintiff was contributorily negligent for violating statutory and common law obligations by driving without due care and attention at a speed that was in excess relative to the conditions.

**THE LAW**

**26**  A driver can proceed on the assumption that other vehicles will do their duty and obey traffic regulations: *Horsman v. McGarvey* [*(1983), 43 B.C.L.R. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-226C-00000-00&context=) (C.A.) and *Walker v. Brownlee and Harmon*, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (Man. C.A.) at p. 450.

**27**  In *Neufeld v. Landry* [*(1974), 55 D.L.R. (3d) 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-JFKM-64FV-00000-00&context=) (Man. C.A.), the Court said at pp. 298-299 that a driver, by his conduct, who takes evasive action to avoid a collision, is assessed as follows:

The conduct of the plaintiff driver must be assessed in light of the crisis that was looming up before her. If in the "agony" of the moment" the evasive action she took may not have been as good as some other course of action she might have taken - a doubtful matter at best - we would not characterize her conduct as amounting to contributory ***negligence***. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he had imperilled by his ***negligence***.

**28**  The duty of a driver, having a statutory right-of-way, was commented upon in *Walker* at p. 460:

The duty of a driver having the statutory right-of-way has been discussed in many cases. In my opinion it is stated briefly and accurately in the following passage in the judgment of Aylesworth J., concurred by Robertson C.J.O., in *Woodward v. Harris*, [*[1951] O.W.N. 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JN14-G258-00000-00&context=) at p. 223: "Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his doing so will be a collision which he reasonably should have foreseen and avoided.

**29**  In *Walker*, Cartwright J. set out such an example at p. 461:

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

**30**  In *Rollins v. Lovely*, [*[2007] B.C.J. No. 2595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21X8-00000-00&context=), Madam Justice Dickson, as she then was, said at para. 38:

Where a dominant driver poses an immediate hazard, the burden of proof on the servient driver to cast a portion of the blame on the dominant driver is significant.

**31**  She then quotes the remarks of Cartwright J. cited above.

**32**  When a driver has the right-of-way, and there is no immediate hazard, but he later creates one, that driver will be responsible or will contribute to the cause of the accident.

**33**  An immediate hazard was defined in *Neufeld v. McCrae*, [*2008 BCSC 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2FT-00000-00&context=) at paras. 38-39:

[38] The leading authority as to when an approaching vehicle constitutes an "immediate hazard" is *Raie v. Thorpe* (1963), 43 W.W.R. 405, a left turn case. In *Raie*, Tysoe J.A. stated at p. 410:

I do not propose to attempt an exhaustive definition of "immediate hazard". For the purposes of this appeal it is sufficient for me to say that, in my opinion, if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of section 164.

[39] The question of immediate hazard and right of way is to be assessed in the moment before the driver proposing to make the manoeuvre at issue commences to make it: *Raie*, pp. 413-414.

**34**  It goes without saying that the defendant owed the plaintiff a duty of care.

**ANALYSIS**

**35**  The plaintiff estimated that his speed was between 50 and 60 kph. Just before he entered the intersection, the plaintiff throttled down his motorcycle. I conclude that speed was not a factor in this accident. The defendant has not presented any evidence, or for that matter, any argument, that speed caused or contributed to this accident.

**36**  The defendant, in alleging that the plaintiff was contributorily negligent, referred to the plaintiff's common law duty and statutory obligation, pursuant to s. 144 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*MVA*], that the plaintiff was not driving with due care and attention, breaching this obligation. The defendant did not point to any evidence which would show or lead me to believe that the plaintiff was in breach of this obligation.

**37**  The common law and ss. 175 and 186 of the *MVA* govern the situation the plaintiff and defendant found themselves in on June 30, 2010:

**Entering through highway**

**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.

...

**Stopping at intersections**

**186** Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

1. at the marked stop line, if any,
2. before entering the marked crosswalk on the near side of the intersection, or
3. when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

**38**  These sections require the defendant to yield to the plaintiff because the plaintiff was travelling on a through highway, or posing an immediate hazard. It is only then, after having yielded the right-of-way and there being no immediate hazard, that the driver, in this case the defendant, can proceed through the intersection cautiously.

**39**  The next thing that occurred is that the defendant saw something in his peripheral vision, he then hit his brakes and he saw sparks from a motorcycle and the motorcycle sliding in the intersection.

**40**  The plaintiff and the defendant testified as to how fast events happened in this accident. The plaintiff stated that the accident happened immediately after he saw the defendant. He testified that as soon as he saw the defendant, he braked and swerved. The defendant testified that from the time he saw the motorcycle in the northbound lane until he saw it sliding with sparks coming off of it, was two seconds.

**41**  The defendant's testimony at trial and his testimony at the Examination for Discovery conflict as to where the SUV was when the plaintiff entered the intersection. The defendant's answers at the Examination for Discovery place the SUV in the path of the motorcycle. The defendant's testimony at the Examination for Discovery confirms the plaintiff's testimony as to how the accident happened.

**42**  I find that the defendant was aware, or should have been aware, of an approaching hazard. I find that the plaintiff, when entering the intersection, was slowing down. I find that when the defendant first saw the plaintiff, his SUV was moving forward and only stopped when the defendant observed the plaintiff. The plaintiff then took the only evasive action he could reasonably take, which was to avoid T-boning the SUV; this was swerving and braking so as to go around the SUV, at which time it is likely the SUV was stopped. The defendant then cranked his vehicle back into his northbound lane. This latter manoeuver caused the motorcycle to come out from under the plaintiff, with the plaintiff landing on the road. The motorcycle then skidded through the intersection, finally resting where Constable Zaharia places it in his diagram.

**43**  The defendant was negligent when he entered the intersection of Copperhead Drive and Hugh Allan Drive, as he could not see the traffic proceeding north on Copperhead Drive.

**44**  I find the defendant entirely liable for the accident. I find no contributory ***negligence*** on the part of the plaintiff.

**DAMAGES**

**Issues**

1. What are the plaintiff's injuries?
2. What is the extent of the plaintiff's injures?
3. What is the effect of the plaintiff's injuries on his personal life and his employment? and
4. Has the plaintiff properly mitigated his loss?

**45**  The plaintiff seeks the following amounts under the following head of damages:

1. Non-pecuniary damages - $130,000.00;
2. Past wage loss - $17,500.00;
3. Loss of future earning capacity - $250,000.00;
4. Cost of future care - $20,000.00; and
5. Special damages - $20,521.93.

**PLAINTIFF'S BACKGROUND**

**46**  The plaintiff, at the time of trial, was 37 years old. He is a Red Seal electrician and operates his own incorporated company called A.E.B. Electric Inc. ("AEB"). He has been married and divorced. He has a daughter who lives with her mother. Towards the end of the trial, the plaintiff left so as to marry Cindy Schwanebeck who testified at this trial.

**47**  The plaintiff was born and grew up in North Vancouver in a Greek family. His father was an electrician and his mother worked in a hospital. He has an older brother.

**48**  As a young person, the plaintiff went out on jobs with his father. He had part-time jobs growing up.

**49**  At age 18, he was six feet and weighed 320 pounds. He testified that he subsequently lost 90 pounds and grew four more inches. He is now six feet four inches and 235 pounds. Since losing the weight described, he has maintained physical fitness by regularly working out in a gym.

**50**  The plaintiff testified that, while attending school, he was bullied, which he attributes, in part, to his size.

**51**  The plaintiff started his electrical apprenticeship program in 2004. He and his wife moved to Kamloops in October 2004. The plaintiff completed his apprenticeship in 2008 when he was awarded his Red Seal electrician designation.

**52**  After receiving his Red Seal designation, he worked in Revelstoke, Red Deer, Vancouver and Fort McMurray.

**53**  In April 2010, the plaintiff started to work at Domtar in Kamloops as an electrician. At the time of the accident, he was working for them. The plaintiff testified that he stopped working for them in July or August 2011. Confusion arises as to the accuracy of this date because the plaintiff wrote a letter in December 2011 resigning his position there. I find it unlikely that he quit work at Domtar in July or August, as in Dr. Kip's clinical records, he reports on October 5, 2011 "thinks he will resign his job at the mill" and on November 8, 2011, Dr. Kip notes "he has not been back to work since he last saw me and previously advised me that he was resigning from his job there??" In any event, the specific date is not particularly important

**PLAINTIFF'S INJURIES**

**54**  The plaintiff suffered bruises and abrasions, the latter being aptly described as road rash and soft tissue injuries.

**55**  In the plaintiff's Amended Notice of Civil Claim, he alleges the following injuries:

1. The Plaintiff, Andreas Belos, has sustained personal injuries, and in particular sustained:
2. soft tissue injury to spine;
3. soft tissue injury to thoracic spine between the shoulder blades;
4. injury to SI joint and left hip;
5. road rash to various areas of his body, primarily his elbows, knees and left forearm;
6. road rash on his hands;
7. lack of grip strength;
8. pain, weakness and numbness in the left knee and the right knee;
9. pain and cramping in the left hand; and
10. other such injuries as they become known;
11. chronic pain disorder/chronic pain syndrome with central sensitization (primarily all his spinal and gluteal areas);
12. somatic symptom disorder;
13. increased risk of Major Depressive Disorder or depressive disorder.

**56**  At the time of the accident, the plaintiff was dressed in appropriate motorcycle gear, including footwear. The vest he wore was equipped with an armour plate that could be taken out.

**57**  As the photographs depict (taken on July 2, 2010), the plaintiff had severe road rash and cuts particularly on his left forearm. These were sufficient to have erased part of his tattoo. This particular injury required dressing at an outpatient facility.

**58**  The other areas of road rash were his left calf, left and right knee caps, left thigh and hip and right elbow. His hands had road rash.

**59**  Further photographs of his road rash (described above) were taken on July 10, 2010. It is apparent that the healing process was underway. However, the left forearm and the left elbow depict the forming of a scar. In the photographs, the bruising of the left hip, as well as scarring on the right knee, are apparent.

**60**  The plaintiff testified that his hands healed. Scars remain on his forearm and on his hip.

**61**  The plaintiff feels pain in his neck and shoulder blade and in his left hip; the pain moves towards his left knee. He feels pain in his knees; more in the left than the right. He described the pain, which is on the outside of his knee, as a sharp pain. He still suffered from this pain at the time of the trial.

**62**  After the accident, the plaintiff periodically used a cane on various social and family outings. He last used a cane in 2014, when he travelled by air to Phoenix and then on to Las Vegas.

**MEDICAL TREATMENT AFTER THE ACCIDENT**

**63**  The plaintiff received medical treatment from family doctors Mahmood and Kip. He received treatment from physiotherapists, massage therapists, a rolfer and chiropractor. The plaintiff was referred to a number of doctors for investigative procedures.

**64**  In 2016, he attended counselling with Michael Koehn, which Mr. Koehn described as cognitive behavioural therapy ("CBT") to address the plaintiff's chronic pain.

**MEDICAL EVIDENCE**

**65**  As a result of the plaintiff's medical treatment after the accident, the plaintiff was put through a number of investigative procedures, such as x-rays and MRIs, which showed no abnormalities. An x-ray of the spine was taken. Other than age related observations, there were no abnormalities.

**Family Doctors**

**66**  The plaintiff first saw Dr. Mahmood on July 19, 2010. The plaintiff was a new patient to the clinic. On that date, Dr. Mahmood took a history from the plaintiff and asked him to return the next day for a medical examination. Dr. Mahmood did not give expert evidence at the trial. He was called to describe the injuries that he observed on July 20, 2010. They were, as I already described, except for a lump he noted on the plaintiff's head. This is supported by the plaintiff, who testified to hitting his head during the accident. Dr. Mahmood testified that the plaintiff complained of pain and he saw the pain himself. In addition, Dr. Mahmood saw swelling in the left leg and thigh and that the plaintiff's elbow suffered pain on movement.

**67**  At the trial, Dr. Mahmood was shown pictures of the plaintiff's injuries, which I have referred to earlier. He said that they matched up with what he saw. He stated that the laceration on the left forearm was in the process of healing in the second set of pictures. Dr. Mahmood testified that the plaintiff complained particularly about pain in the back of his neck. After Dr. Mahmood's initial examination, the plaintiff saw Dr. Mahmood for the rest of 2010 and part of 2011. Dr. Mahmood testified that he saw the plaintiff a total of 16 times - of those appointments, five related to the injuries that occurred in the accident of June 30, 2010.

**68**  Dr. Mahmood was able, in cross-examination, to identify the appointments relating to the accident and those not related to it.

**69**  He stated that he referred the plaintiff to physiotherapy and another doctor in the clinic referred him to massage therapy.

**70**  Dr. Mahmood testified that on each of his visits for the motor vehicle accident injuries, the plaintiff complained of pain.

**71**  Dr. Sven Kip became the plaintiff's family doctor on June 16, 2011 and he first saw the plaintiff on that date. Dr. Kip testified and provided his opinion in a report dated October 10, 2014. Dr. Kip saw the plaintiff 29 times; 12 of those visits with the plaintiff "related to complaints of musculoskeletal symptoms to the accident and the injury suffered at that time".

**72**  In his report, Dr. Kip stated that Dr. Mahmood's records document the following injuries:

1. Abrasions to the left forearm and elbow
2. An abrasion and laceration to the right elbow
3. Abrasions to both knees
4. Swelling of the lateral aspect of the left thigh
5. swelling of the left leg

**73**  As it relates to his treatment of the plaintiff, Dr. Kip writes:

In the 12 visits that I have seen Mr. Below in consultation with regard to musculoskeletal complaints, he complained of:

1. Right elbow pain
2. paresthesia to the lateral aspects of both knees
3. Lumbar back pain with spread into the thighs and knees on both sides
4. Left hip pain
5. Mid and upper back pain
6. Progression of lumbar back pain with pain into the left buttock and leg, down to his foot

**74**  Dr. Kip further writes:

Most recently, Mr. Belos was reviewed on October 8, 2014. He continues to complain of widespread pain that he rates at 10+/10. He feels pain from his pelvis all the way up to his neck; although, he does feel that his left hip area is most bothersome. He is currently taking Gabapentin 300mg, 2 tabs tid but does not feel that this has helped him much, if at all. Cymbalta 60mg daily was added at his most recent visit.

**75**  Dr. Kip describes the plaintiff's pain as "being myofascial in nature." Dr. Kip states:

...it would be fair to assume that Mr. Belos will be left with some degree of pain/discomfort possibly forever. The prognosis for a complete recovery would not be likely. Mr. Belos is likely to experience exacerbations, especially in times of stress or fatigue, and may also experience more pain after he exerts himself more than what he is accustomed to at the time. Despite this, Mr. Belos would not be disabled or unable to work but would have to work around or with his varying degrees of discomfort in order to function.

**76**  Dr. Kip confirmed that he relied on the plaintiff's information as to his pain. He acknowledged that the plaintiff suffered some depression and anxiety partially related to a custody dispute.

**77**  Dr. Kip prescribed the plaintiff medication for his sleep and anxiety issues.

**Dr. Navraj Heran**

**78**  The plaintiff was examined by Dr. Heran, a neurosurgeon, on June 9, 2014. On the same date, Dr. Heran wrote an expert report. When Dr. Heran examined the plaintiff, he observed the scars left on his forearm and "multiple other scattered scars and abrasions". As a result of this physical examination, Dr. Heran stated:

He is tender only in his low back in the paralumbar region bilaterally, right side more prominent than the left, and this is in the musculature itself. ... He has some mild tenderness over his paracervical region to the trapezii bilaterally...The range of motion in his neck is about 80 to 90% of normal in all spheres. There are no particular limitations. There is no aggravation of his symptoms when doing so. On lumbar range of motion, forward flexion is limited to approximately 30 cm from the floor with his fingertips with his legs straight because of aggravation of his low back pain. He has normal extension and lateral flexion.

Dr. Heran found that the plaintiff was not tender in the sacroiliac joints.

**79**  Dr. Heran reviewed the clinical records of Drs. Kip and Mahmood and the physiotherapy records of Halston Place Physiotherapy, Kamloops Physiotherapy and recommendations made by Drs. Collier and Zwimpfer.

**80**  Dr. Heran concluded that the plaintiff suffered from multiple soft tissue injuries. His diagnosis is as follows:

1. Myofascial and soft tissue injuries at multiple sites;
2. Probable peripheral nerve injury, lower extremities, not yet diagnosed;
3. Pain behaviour.

**81**  He also concluded after reviewing the records, that the motor vehicle accident caused the soft tissue injuries and that "as a consequence of these soft tissue injuries in the setting of incomplete remediation, he [the plaintiff] has developed significant pain behaviour amplifying his chronic pain."

**82**  Dr. Heran made the following recommendations:

Psychological evaluation and management would be pertinent for someone with areas and debility from pain in a setting where structural remediation has not yet been found and not likely going to be found.

**83**  Further, he found that the plaintiff "would benefit from optimization of medications" and "an Active Rehabilitation Program once the first two criteria have been met". He concludes that "Only after these have been integrated into his care would a meaningful assessment of any disability and long-term incapacity be allowed for." Dr. Heran concluded that the plaintiff is not permanently disabled at this point in time and that the plaintiff's limitations in terms of "vocation, recreation and domestic existence have been reasonable." Dr. Heran recommended a comprehensive pain clinic or management program.

**84**  In his examination-in-chief, Dr. Heran defined myofascial pain as:

Myofascial pain refers to pain that's arising from the muscles, which is *myo. Fascial* is the supporting structures of muscles, so that refers to the collagen tissue that are overtop of muscles as well as the ligaments that attach the muscles to underlying bones and joints. So there's pain originating from those soft tissue structures.

**85**  Dr. Heran was then asked to explain diagnosis number two, which was probable peripheral nerve injury, lower extremities, not yet diagnosed. Dr. Heran said the following:

That -- that's exactly it. So his distribution of pain at the level of the knees and distally is very much in keeping with at least the superficial peroneal nerve distribution. He's had nerve conduction studies done early, not definitively diagnosed any source of abnormalities. Essentially, they showed no clear abnormalities. You can still have pain sensory phenomena symptoms arising from -- absent nerve conduction study abnormalities.

...

So the reason why I say not yet diagnosed is I really don't have a definitive method of making that diagnosis other than just on clinical terms. There's no further imaging that can be done. There's no other tests that could be done to stamp the, basically, seal of approval on a finalized diagnosis.

**86**  Dr. Heran was asked by counsel for the plaintiff, whether he did a pin prick for numbness. He stated:

He had reduction in -- he had reduction in -- in that sensory modality in the distribution from his knee down to his ankle, in the shin and the side of his calf.

**87**  Dr. Heran was then asked what nerve he was referencing. His answer was that it was the sensory distribution of the superficial peroneal nerve. Dr. Heran explained that a peripheral nerve injury means outside both the brain and the central nervous system.

**88**  In examination-in-chief, counsel sought from Dr. Heran a description of a peripheral nerve "in terms of an outline of a Christmas tree". He said the following:

So with that seasonal analogy, the trunk of the tree, the base of the tree, would be your central nervous system, so your brain and your spinal cord, and then the branches would be the large peripheral nerves and then the smaller branches coming off the bigger branches would be more distal peripheral nerves.

**89**  Dr. Heran was asked whether a peripheral nerve injury can be transitory and disappear early or be chronic. He stated:

Yes, usually after somebody's had symptoms for about a year as a nervous -- nervous distribution, somebody where you have -- chronic pain remaining or reneurogenic changes remaining are expected. That's not in everybody. The longer a person has symptoms the more likely that they're going to remain. If he's had symptoms already for six years it's unlikely that he's ever going to have complete remediation whatsoever.

**90**  Dr. Heran was asked whether there were any objective findings with peripheral nerve damage. He said that there were no objective findings for peripheral nerve injury. Specifically, he noted:

... sensory assessment is still subjective, and that was the -- essentially the only finding that was identified on this examination concordant with my -- my area of concern. The -- the distribution that he describes is very hard to -- to just create volitionally. It's -- it's essentially an anatomic finding and is consistent with the mechanisms that he has. So although that sensory reduction is still subjective, the whole context of everything makes it as close to an objective finding as possible.

**91**  In cross-examination, Dr. Heran stated that the tenderness that he elicited comes from the patient.

**92**  In cross-examination, Dr. Heran described incomplete remediation as follows:

So *incomplete remediation* means that his soft tissue injuries have not resolved. So the majority of patients or individuals who will have a traumatic event will have resolution of the soft tissue injuries. A minority of patients will have persistent symptoms lasting beyond the period of time of presumed healing, which varies anywhere from a day or two, usually a few months or so, up to around two years. After two years, if a patient has had persistent symptoms, again in a soft tissue type of fascia, it is unlikely -- unlikely that the person is ever going to have complete remedy. You can drag that out to up to even three years on some occasions.

...there is two paths that these people can follow. One is they live with it, they deal with it, their life goes on and they know what their issues are and for the most part they understand that they're not going to be harmed necessarily by being sore or being achy doing activities, resuming back to the normal course of life, work, et cetera; and in the second category, which is the minority of patients fortunately, are those that become essentially victims of their pain and can develop psychiatric issues as a consequence, pain behaviours of a psychological nature that tend for them to focus on their actual symptoms as opposed to going forward and living life, and that is the type of category that it appeared to me that he [the plaintiff] was already in or had strongly entered.

**93**  Dr. Heran was cross-examined on the following statement, which is contained in his report:

He's not using any medications at present and I would not expect somebody who is declaring as being in as much pain as he is, to be not taking such medications.

It was suggested to him that a person could be exaggerating. Dr. Heran said that this was possible, but that there are other explanations also. That is, a person might be adamantly against medications. This third category of patients, he explained, may have difficulty tolerating the side effects of medications and just deal with the pain. The fourth category refers to those who he noted lack proper guidance in using medications to address their pain.

**Dr. Rajiv N. Reebye**

**94**  The defendant sought an independent medical examination of the plaintiff from Dr. Reebye. Dr. Reebye saw the plaintiff on April 9, 2014. He prepared a report dated January 13, 2015. His opinion at the time he examined the plaintiff was that the plaintiff sustained soft tissue injuries to his low back, upper neck, right forearm and left hip region from the motor vehicle accident.

**95**  Upon palpitation, Dr. Reebye determined that the plaintiff had pain in the upper neck muscles. Moreover, he found pain in the lower lumbar paraspinal muscles at the L5-S1, the right greater than the left side and in keeping with soft tissue injuries, as well as resultant myofascial pain symptoms. He determined that the plaintiff had pain on internal rotation of his left hip. To rule out a labral tear in the plaintiff's left hip, a MRI was conducted on the plaintiff. It was determined that there was no labral tear. Dr. Reebye determined that the plaintiff experienced pain and forward flexion which pointed to the left lower L5-S1 paraspinal and upper buttock regions. He determined that the plaintiff had pain in the abduction of his left leg. Dr. Reebye concluded that the hip was normal, however, the "clinical examination was in keeping with likely soft tissue injury to ligaments or tendinous insertion and myofascial pain around the left hip contributing to his chronic hip/groin pain symptoms."

**96**  Dr. Reebye concluded that the plaintiff, when he saw him, was "deconditioned, as he is fearful to increase his activity level for fear of increasing his pain symptoms." He stated:

I am of the opinion that Mr. Andreas Belos is partially disabled with regards to his chronic myofascial pain symptoms involving his upper neck, low back and right arm, affecting his ability to work full time at this time. However, I feel that with strategies to increase his activity level, he would have better pain control and learn to better cope with his pain and possibly even increase his hours at work and improve his quality of life.

**97**  Dr. Reebye concluded that it was reasonable, given the extent of the plaintiff's injuries, that he be off work for three months after the injury. As to a recovery date, Dr. Reebye stated that the road rash burn pain was asymptomatic, that the plaintiff had improvement in his left back and leg symptoms and was no longer using a cane on a regular basis when walking. However, he found that the plaintiff had a limp on his left side, which was perhaps caused by "a combination of left lower lumbar myofascial pain symptoms but also a possibility of groin pathology from the left hip soft tissue injuries." Dr. Reebye was of the opinion that the plaintiff would be partially disabled in regard to having to live with an element of chronic pain, which is defined as a pain condition greater than three months, pointing out that the plaintiff's pain had persisted for four years.

**98**  In a letter directed to Dr. Reebye, he was asked "Your opinion as to whether there will be any permanent disability, and if not, your estimate of the length of any temporary disability." Dr. Reebye stated:

I am of the opinion that Mr. Andreas Belos is partially disabled with regards to his pain symptoms in the upper neck, low back and right arm, as well as subjective knee pain symptoms with a neuropathic nerve pain element on the outside of the knees.

**99**  Dr. Reebye was asked for recommendations with respect to future treatment. He responded that the plaintiff would benefit from water-based activities, and could be supervised by a physiotherapist or kinesiologist for three sessions. He was of the opinion that the plaintiff could then do his own water-based exercise program. He also recommended that the plaintiff would "benefit from seeing a physical medicine rehabilitation physician to help direct his recovery and increase his overall activity and exercise level and to also help with his chronic pain management."

**100**  He suggested a topical cream to be applied to his left and right lower paraspinal and buttock region to assist in lowering his pain symptoms. He further recommended that the plaintiff encourage his activity level as he is "significantly deconditioned", noting that the plaintiff is afraid to increase his activity level for fear of triggering his pain symptoms. He also recommended that the plaintiff see a clinical psychologist to help him overcome his fears as to increasing his exercise level, accompanied by biofeedback and cognitive behavioural therapy.

**Dr. Prathap Raghavan**

**101**  The plaintiff was treated by Dr. Raghavan, a specialist in physical medicine and rehabilitation, who provided an opinion to the Court.

**102**  Dr. Raghavan first saw the plaintiff on October 23, 2014, with follow-up appointments on February 16 and April 9, 2015. He prepared reports dated September 18, 2015 and October 26, 2016.

**103**  Dr. Raghavan examined the plaintiff on February 16, 2015. His examination of the plaintiff included palpations on various parts of the plaintiff's body (detailed in his report), discussions with the plaintiff, aided by various reports of doctors and physiotherapists. Dr. Raghavan concluded that, as a result of the motor vehicle accident, the plaintiff suffered soft tissue injuries involving his spinal areas and extremities, particularly in his spine and gluteal areas. Dr. Raghavan stated that the plaintiff developed "numbness in the knees and more pronounced to the left side". Dr. Raghavan accepted that Dr. Collier (who did not provide evidence to the court) diagnosed the plaintiff "with an injury to infra-patellar branch of femoral nerve, which is a small nerve around the knee joint."

**104**  Dr. Raghavan recommended that the plaintiff be screened for anxiety, depression and post-traumatic stress disorder ("PTSD"), as these conditions can cause chronic pain. He stated:

It is also well known that comorbid psychopathology and psychological factors contribute to a significant degree of disability in patients with posttraumatic musculoskeletal problems.

**105**  Dr. Raghavan opined that the soft tissue injuries are a result of the motor vehicle accident, including the chronic pain. Dr. Raghavan commented that the plaintiff's symptoms tend to move around, which he perceived as:

...clinical indicators which were suggestive of fear of pain and fear-avoidance behaviour. Examination findings were mainly soft tissue and muscular tenderness, which indicates presence of phenomenon called central sensitization...

**106**  This phenomenon is described in Dr. Raghavan's report at Appendix E:

**Central sensitization**

Central sensitization is a state of heightened excitability of pain pathways which carry pain information within the central nervous system. This may lead normal sensory inputs like touch or pressure being perceived by the brain as painful.

The increased excitability is typically triggered by a burst of activity in pain receptors in our body such as that evoked by a tissue damage from an accident or injury, which alter the strength of connections between the pain receptors in the area of injury and the neurons of the spinal cord. Once this neuronal hyper excitability develops, it can become autonomous and continue without any further triggering from the peripheral pain receptors. In other words, this hyper excitability can persist even after the local tissue injury has settled or healed.

In this scenario, receptor and nerve fibers activated by non-painful stimuli like very light touch of the skin, for example, would begin to activate neurons in the central nervous ...system that normally only respond to painful stimuli. As a result, an input that would normally evoke an innocuous sensation of touch would now produce pain. Although the pain feels as if it originates in the periphery, it is actually a manifestation of abnormal sensory processing within the central nervous system.

Central sensitization is responsible spread of pain hypersensitivity beyond an area of tissue damage so that adjacent non-damaged tissue is tender.

**107**  Dr. Raghavan stated in his report that the plaintiff, after the accident, had significant pain in his hip, but as these symptoms gradually improved, he returned to work and that there was some improvement of his physical symptoms. However, in April 2011, the plaintiff started to notice an increase in the progression of his symptoms and developed pain in the upper part of his spine, including his neck areas. Over time, these symptoms worsened.

**108**  The plaintiff told Dr. Raghavan that in August 2015, due to his increased activity levels and being forced to work without the assistance of other employees, he had noticed some improvement to his physical pain. He noted that he continued to experience extensive musculoskeletal pain particularly around the spine. Dr. Raghavan recommended a pain counsellor on a regular and consistent basis, an exercise program with a kinesiologist focusing on regular cardiovascular exercise, yoga and meditation.

**109**  In a letter dated October 26, 2016, Dr. Raghavan noted that, although the plaintiff has worked with a counsellor who specializes in the management of chronic pain and, despite lengthy treatment, there has not been any significant improvement with regard to his pain. Dr. Raghavan did not believe that there will be any further improvement. He finalized his letter with:

I had observed that there may be some fear-avoidance behaviour, which was considered to be a potential factor contributing to persistence of the symptoms.

**Dr. John Lawrence**

**110**  The plaintiff sought an assessment from Dr. Lawrence. He is a registered psychologist. He assessed the plaintiff on January 25, 2016 and his report is dated February 12, 2016. He testified at trial.

**111**  Dr. Lawrence conducted psychological testing of the plaintiff. He ruled out the possibility that the plaintiff was suffering from PTSD. As a result of tests he administered on the plaintiff, Dr. Lawrence diagnosed the following:

...His score on the Negative Impression Management scale was in the normal range, which indicates that he was not over reporting symptoms. His score on Positive Impression Management was in the normal range which indicates that he was not defensive or under reporting symptoms. On the clinical content scales, his profile was significantly elevated on the Somatic symptoms scale (T-78). Mr. Belos likely shows an unusual degree of concern about physical functioning, health matters, and impairment arising from somatic symptoms. He likely believes that his health problems are complex and difficult to treat. His physical complaints are likely to focus on symptoms of distress in neurological and musculoskeletal systems and may involve conversion disorders such as unusual sensory or motor dysfunction. His social interactions and self-image may be largely influenced by a belief that he is handicapped by his poor health. His profile was elevated on the Physiological subscale of the Depression scale, which indicates some depressive symptoms related to fatigue and lack of energy. His score was elevated on a Negative Relationships subscale of the Borderline scale which suggests that he has a history of intense and volatile relationships in which he may be preoccupied by fears of rejection.

**112**  Dr. Lawrence diagnosed the plaintiff with Somatic Symptom Disorder, which he stated "was likely predominantly caused by the claim accident. If the accident had not occurred he would probably not have suffered Somatic Symptom Disorder". He also stated that there are other factors which contributed to the disorder:

...such as his pre-existing personality - particularly regarding physical functioning, and psychosocial stressors such as work and relationship issues. Those factors were present before and after the injury. They likely played a mild to moderate role in the onset and continuation of the Somatic Symptom Disorder, but were not the major cause.

**113**  In his report, Dr. Lawrence stated that the plaintiff meets the criteria in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) for Somatic Symptom Disorders. He described his symptoms as:

...distressing or result in significant disruption of daily life. He has excessive thoughts, feelings or behaviours related to the somatic symptoms including disproportionate and persistent thoughts about the seriousness of his symptoms, and excessive time and energy devoted to these symptoms and health concerns. His symptomatic state has persisted for more than six months. His Somatic Symptom Disorder is specified With predominant pain, and as Persistent (more than six months), and as generally of mild to moderate severity, with three areas of daily living being in the moderate to severe range (as reported by Mr. Belos on the WHODAS-2).

**114**  Dr. Lawrence noted that, because these symptoms have persisted over five years, they have become chronic. He agreed with Dr. Raghavan that the two potential outcomes are as follows:

The first outcome is that if Mr. Belos has no treatable psychosocial problems and the activation treatment fails to improve his physical functioning, then he "will be left with significant musculoskeletal pain, which will impact adversely his ability to remain employed on a full-time basis" and he would be subject to periodic unpredictable flare-ups.

The second outcome would occur if Mr. Belos' "symptoms improve from the above-mentioned [activation treatment] programs, his functional capacity is likely to improve, and he will be able to maintain his ability to do full-time employment ...However, Mr. Belos has a chronic condition for which no definitive curative treatment is available. Therefore he remains at lifelong risk of recurrence of these symptoms, which are often triggered by physical or psychological trauma."

**115**  Dr. Lawrence concluded:

The pain associated with Somatic Symptom Disorder fluctuates with stressors and he would need to reduce work stress. He would not be able to earn the same income as if he was not impaired. His cognitive impairment from a moderate Somatic Symptom Disorder could be expected to compromise his work capacity to between one half to two-thirds of the work hours that he could have performed without the disorder. He would probably continue with something approximating his current general pattern of social and adaptive functioning.

**116**  Dr. Lawrence suggested that an alternate program would be a residential treatment program of 6 to 12 weeks. This is offered in Vancouver, Victoria and Canmore, Alberta. However, he recognized that the plaintiff has to work and endorsed a compromise, a treatment in Kamloops, described by Dr. Raghavan and Mr. Koehn involving counselling and a physical activation program.

**NON-PECUNIARY DAMAGES**

**Case Law**

**117**  The plaintiff has presented case law with awards for non-pecuniary damages. These are outlined below.

**118**  In *Fontaine v. Van Kampen*, [*2013 BCSC 1702*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-2395-00000-00&context=), the award for the plaintiff was $75,000.00. In *Fontaine*, the plaintiff had back pain. This was caused by the accident, which had provoked a previous asymptomatic degenerative disease condition. This led to fluctuating chronic back pain which "compromised her overall endurance and reduced her tolerance for her social and leisure activities".

**119**  In *Anderson v. Merritt (City)*, [*2006 BCSC 901*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1NF-00000-00&context=), the amount awarded was $60,000.00. Mrs. Anderson was struck by a lawn mower which led to injuries in her neck and resultant chronic pain. The chronic pain impacted her leisure activities. The medical evidence indicated that Ms. Anderson was in the category of persons who do not get better.

**120**  In *Tarzwell v. Ewashina*, [*2011 BCSC 1464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-2299-00000-00&context=), the award was $60,000.00. The plaintiff suffered back and neck soft tissue injury, accompanied by headaches. The plaintiff was a university student.

**121**  In *McLeod v. Goodman*, [*2014 BCSC 839*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2JK-00000-00&context=), the award was $130,000.00. Mrs. McLeod developed chronic pain syndrome in her neck, shoulders, face and jaw. She also experienced sciatic pain in her right leg impacting functionality. The pain in her lower back descended into her tail bone, spanned her back and extended into her groin area. Her hip was described as "numb", while also burning with sharp pain. She has minimal sensation in order to void her bladder. The plaintiff took injections for her temporary pain relief. She was unable to maintain her home, garden and her relationship with her husband was negatively affected. She was incapable of working.

**122**  In *Cornish v. Khunkhun*, [*2015 BCSC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G3H-VVF1-JSRM-62N9-00000-00&context=), the award was $160,000.00. Ms. Cornish was age 58 at the time of the accident. At the time of trial, she was 63. At paras. 131-132, the Court found:

[131] The evidence of Ms. Cornish's condition was largely uncontradicted. I find that she suffers from a Major Depressive Disorder, as found by Dr. Riley, as well as a Somatic Symptom Disorder which results in her experiencing chronic pain. I also find that she experiences confusion and memory loss which Dr. Riley notes is consistent with her depressive disorder.

[132] I also find that Ms. Cornish's injuries have had a significant impact on her enjoyment of life. Her own evidence, and that of her supporting witnesses, paints a compelling before and after picture of a once vibrant woman who, as Ms. Fraser-Biscoe said, is now a different person.

**123**  In *Guthrie v. Narayan*, [*2012 BCSC 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3S1-00000-00&context=), the award was $65,000.00. Ms. Guthrie was 26. She sustained soft tissue injuries to her neck and back which led to chronic neck and shoulder pain. The Court found that it was unlikely that there would be any significant change in her condition in the foreseeable future.

**124**  The defendant relies on the following cases and awards for non-pecuniary damages.

**125**  In *Carreon-Rivera v. Zhang*, [*2014 BCSC 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2B3-00000-00&context=), the award was $80,000.00. The plaintiff's injuries were soft tissue injuries in the neck, right shoulder and back which resulted in chronic pain. She was diagnosed with a Somatic Symptom Disorder with predominate pain and Major Depressive Disorder.

**126**  In *Gleizer v. Insurance Corporation of British Columbia*, [*2014 BCSC 1037*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2XD-00000-00&context=), the plaintiff was awarded $90,000.00. When the accident occurred, he was not wearing a seatbelt. In the motor vehicle collision he hit his head on the dashboard. He suffered soft tissue injuries and a mild brain injury resulting in headaches, back and neck pain, depression, anxiety, chronic pain and sleep disturbance. His daily living activities were reduced.

**127**  In *Koltai v. Wang*, [*2015 BCSC 1346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GNX-HSK1-FG12-625S-00000-00&context=), non-pecuniary damages were assessed at $85,000.00. The Court concluded that Mr. Koltai suffered soft tissue injuries that became chronic in several areas of his body. He had difficulties with pain, sleep and headaches, migraines, dizziness, neck pain, arm pain and low back pain that was caused by the accident. Not all of Mr. Koltai's evidence was accepted by the Court. The Court found that Mr. Koltai was "obsessed with his pain and has developed an inability to cope with the pain" having an impact on him. The Court found that the soft tissue injuries had become chronic in several areas of his body.

**128**  In *Matias v. Lou*, [*2015 BCSC 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60N3-00000-00&context=), non-pecuniary damages were assessed at $50,000.00. Mrs. Matias was 57 years old at trial. The Court concluded that Mrs. Matias suffered soft tissue injuries to the left shoulder and lower back, a minor aggravation to a disc protrusion in her back and a minimal soft tissue injury to the right shoulder. Other injuries were complained about. The Court concluded that Mrs. Matias had Somatic Symptom Disorder and a driving phobia as a result of the accident. At trial, the Court found that her left shoulder injury was minimal and that there was no evidence of any lingering issue with her right shoulder, finding "the objective evidence for these conditions is significantly less than the plaintiff's subjective descriptions." The plaintiff had a frozen shoulder which the Court found was not caused by the accident.

**129**  In *Mohan v. Khan*, [*2012 BCSC 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62F0-00000-00&context=), the Court awarded the plaintiff non-pecuniary damages of $100,000.00 after finding that the plaintiff failed to mitigate her damages and had exaggerated her symptoms. The Court found that Ms. Mohan suffered soft tissue injuries from the accident. Justice Bowden observed that if those injuries had taken three or four months to resolve, the litigation would not have taken place. However, the plaintiff alleged that she suffered from what is described as chronic pain disorder long after her physical injuries were resolved. Justice Bowden observed that chronic pain disorder is largely subjective in nature and that the expert evidence before him demonstrated that it could not be objectively confirmed. Justice Bowden went through a number of cases in which the courts have dealt with psychological problems arising from injuries. Mr. Justice Bowden went on to find that Ms. Mohan's pain was real. He did not find that she was dishonest but found that she had exaggerated her symptoms. He accepted that the plaintiff suffered from chronic pain disorder.

**130**  In *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=), the Court awarded $60,000.00 in damages to the plaintiff. This involved the assessment of two motor vehicle accidents. The plaintiff was a student. The Court found that she suffered soft tissue injuries to her neck, back, jaw and left arm and was diagnosed with chronic myofascial pain. The Court found that the plaintiff did not mitigate her damages and so the award was reduced by 40%.

**131**  *Strilec v. Leila*, [*2015 BCSC 1515*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-N221-JW5H-X0MT-00000-00&context=) involved the assessment of damages in two motor vehicle accidents in which the plaintiff was injured. The judge awarded $7,500.00 in non-pecuniary damages in the first accident and found that the plaintiff suffered more serious and long lasting injuries in the second accident, for which he was awarded $75,000.00. The plaintiff suffered injuries in the back and "left sacroiliac joint dysfunction" which became permanent and chronic.

**132**  In *Zaluski v. Verth*, [*2015 BCSC 1902*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H84-1CC1-F4GK-M4NB-00000-00&context=), the plaintiff had neck, shoulder and low back pain. Ms. Zaluski's credibility was a significant issue in the case. The Court accepted that the plaintiff suffered mild soft tissue injuries to her neck that affected her shoulders and back. The Court also accepted, as a result of the motor vehicle accident, that the plaintiff suffered a Somatic Symptom Disorder as well as anxiety and depression. The Court did not accept that the plaintiff was disabled for a lengthy period of time from employment as a result of the injuries. The Court assessed the plaintiff's non-pecuniary damages at $50,000.00.

**Discussion**

**133**  The plaintiff must prove on a balance of probabilities that the injuries he suffered were caused by the accident. In other words, "but for" the accident, the plaintiff would not have suffered the injuries he claims to have suffered.

**134**  The only pre-accident health condition that the plaintiff had was mild sleep apnea.

**135**  The plaintiff stated that his sleep is interrupted by pain, making it impossible to re-position so as to go back to sleep, resulting in him going to sleep on the couch. This leaves him tired as a result of a lack of sleep and pain preventing him from pursuing activities outside his work, which include longer walks with his dog, gym activities and other physical and sport-related activities that he enjoyed. This evidence is supported by the plaintiff's wife, Ms. Schwanebeck.

**136**  After the accident, the plaintiff resided with Tara Hildebrand. She testified that the plaintiff had no difficulty sleeping. However, Ms. Hildebrand's evidence may not be credible or reliable. She accused the plaintiff of cheating on her, but could not identify the other women. In addition, there was a dispute over a vehicle, which was in her name, but the plaintiff made all the vehicle's payments. Despite the breakdown of their relationship, Ms. Hildebrand was spending a lot of time with the plaintiff's daughter when the plaintiff could not.

**137**  Drs. Heran, Raghavan and Reebye all agree that the injuries the plaintiff suffered, as described by him, were caused by the motor vehicle accident. Dr. Lawrence has concluded that, as a result of the chronic pain which itself resulted from the motor vehicle accident, the respondent developed Somatic Symptom Disorder.

**138**  I will deal with two of the defendant's arguments, firstly, that the plaintiff is an inaccurate historian and is not credible and, secondly, that the plaintiff's injuries, as diagnosed, are based on self-report.

**139**  I conclude that the plaintiff could not remember dates, such as when he left Domtar. The defendant interprets this as demonstrating a lack of credibility.

**140**  This action came to trial seven years after the accident. Since the accident, the plaintiff received numerous physiotherapy and other passive treatments. He has had a number of diagnostic investigations; he has seen specialists, some of whose evidence is not before this Court. Simply put, the plaintiff does not remember each appointment he had and the discussions that took place. The plaintiff did not disagree with the accuracy of some of the dates when certain events happened. This does not make the plaintiff unreliable, nor can I find that the plaintiff was not credible.

**141**  Secondly, the defendant argues that the doctors based their diagnoses solely on the plaintiff's self-reporting. This is not unusual. Except for severe road rash, bruises and gashes, none of the diagnostic tools available to doctors can see soft tissue injuries, nor can they see the pain a patient feels.

**142**  Soon after the accident, Dr. Mahmood saw swelling in the areas of injuries and said that he could see the plaintiff's pain. Dr. Raghavan, in his examination, noted that after the plaintiff was asked to walk, he noticed the plaintiff limping. He noted that the plaintiff avoided taking too much weight on the left side of his body. Dr. Heron testified that there were close to objective findings that he could make, which I refer to in para. 90 of these reasons.

**143**  The defendant alleges that intervening acts or events involving the plaintiff resulted in incomplete medical information being provided to the medical experts. The defendant states it is the obligation of the plaintiff to prove that "but for" the ***negligence*** of the defendant, the injury would not have occurred: *Athey v. Leonati*, [*[1996] 3 S.CR. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The defendant states that there must be a substantial connection between the injuries suffered by the plaintiff and the defendant's conduct, so a defendant will not be responsible for the plaintiff's injuries which are not connected to the defendant's conduct: *Thiessen v. Kover*, [*2008 BCSC 1445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3W5-00000-00&context=).

**144**  The intervening acts the defendant alleges are that the plaintiff took mental health counselling regarding access to his daughter; harassment or bullying at Domtar; and financial stresses, both personally and with AEB.

**145**  Dr. Kip, in his clinical records on October 5, 2011, stated: "Review anxiety. Stress remains regarding daughter and ex-wife". The plaintiff and his wife separated in 2008. It was not a new event in his life. After the accident, the plaintiff took counselling from Viviane Wingerak, who recommended that the plaintiff see a psychiatrist.

**146**  The plaintiff saw Dr. Griffiths, who diagnosed him with ADHD and prescribed medication which he took. Dr. Raghavan testified that ADHD does not cause chronic pain. There is no evidence that the plaintiff's injuries from the accident, in particular, chronic pain and the resultant diagnosis of Somatic Symptom Disorder, was impacted by any anxiety that the plaintiff had in trying to see his daughter. In Dr. Lawrence's report, Dr. Lawrence was aware of the difficulties that the plaintiff had seeing his daughter.

**147**  The defendant points to a comment in Dr. Kip's clinical records which noted that the plaintiff experienced harassment at work. Close examination of Dr. Kip's clinical records suggest it related to a specific incident which is not described. Dr. Kip's clinical records show that the plaintiff was equivocal about whether he would quit working at Domtar. The plaintiff testified that he quit Domtar because he did not fit in and found the work unfulfilling

**148**  The plaintiff was stuck paying an electrical bill of a tenant in his garage. The tenant had operated a medical marihuana grow operation. Further, the defendant points out that the plaintiff made a bad business deal with a man by the name of Mr. Moffat. This particular business deal did not get off the ground and it became annoying to the plaintiff because Mr. Moffat continued to operate a web page for his company which stated that AEB continued to be in association with Mr. Moffat's company by continuing to display AEB's telephone number. The concern for the plaintiff was that he may not be receiving all customer inquiries.

**149**  There is no evidence that these events caused the plaintiff chronic pain and Somatic Symptom Disorder. I conclude that these events are not intervening events. Events such as these occur in everyone's life. They occurred during a six to seven-year period. Therefore, I reject the defendant's argument on this point.

**150**  The road rash and bruises eventually healed, leaving some scars. But for the plaintiff's evasive action, his injuries could have been more severe.

**151**  The purpose of non-pecuniary damages is to ameliorate the plaintiff's condition given his particular circumstances. Any award must be fair to both sides. Such an award is not dependent upon the seriousness of the injury: it is the plaintiff's loss that must guide the award.

**152**  I consider the factors in *Stapely 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 they relate to the plaintiff.

**153**  The plaintiff was 37, and enjoyed a variety of physical activities to which I have referred. His injuries included road rash, bruises and lacerations that eventually resolved, leaving some scars. However, the plaintiff was left with soft tissue injuries which turned into chronic pain. The plaintiff was diagnosed with Somatic Symptom Disorder. The pain that the plaintiff felt was real and interfered with many aspects of his life. He had difficulty getting a full night's sleep. He lost much of his fitness. He had just enough energy to work during the day. This leaves him no energy for continuing with recreational or family activities that he participated in before the accident. These activities included taking his dog on long walks, participating in gym workouts, hiking, squash and other activities. His pain is now chronic and interferes with these activities.

**154**  The fact that other witnesses that the plaintiff did business with and had employed did not notice anything wrong, and were not told about the motor vehicle accident, is not a determination of the plaintiff's chronic pain or his injuries. None of them knew him prior to the motor vehicle accident.

**155**  After the accident, and only when he worked at Domtar, did the plaintiff take time off work. After the incorporation of his company, the defendant successfully bid on a project, supervised seven employees, and completed the job. He contracted for, and performed installation of, electrical work for new residential projects. He now works on his own. There is no evidence before me that, as a result of the plaintiff's chronic pain, he has turned down work or has been unable to work.

**156**  When the plaintiff first saw Dr. Raghavan, he believed that the pain he experienced was physical in nature and, only after speaking to Dr. Raghavan, did he start to understand that it had a psychological aspect. Dr. Raghavan described the plaintiff in the following terms:

... he was more willing to address his pain in a more comprehensive fashion. I explained that there may peripheral sources of the pain in most patients with chronic spinal pain, which in this case I felt was coming from the soft tissues, particularly myofascial trigger points, and also a central component of the pain, where the perceived pain is from a phenomenon called central sensitization.

**157**  I assess the plaintiff's non-pecuniary damages at $75,000.00.

**MITIGATION OF DAMAGES**

**158**  The defendant alleges that the plaintiff has failed to mitigate his damages. He alleges that the plaintiff failed to pursue a rehabilitation program and seek a psychological assessment.

**The Law**

**159**  The burden lies with the defendant to prove that the plaintiff could have avoided some of his loss by pursuing recommended medical treatment. The defendant must prove that it was unreasonable not to pursue certain treatment and that the plaintiff's damages would have been reduced as a result: *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=).

**160**  The defendant was critical of the plaintiff for not taking more physiotherapy and other passive therapies. As an example, Ms. Fraser recommended that Mr. Belos see a kinesiologist. The defendant provided no evidence that these passive modules would have improved the plaintiff's health. The evidence is to the contrary. The plaintiff testified as to receiving short-term relief from these therapies and that the taking of medication was of no assistance.

**161**  The defendant is critical of the plaintiff for not involving himself in a rehabilitation program that he should have taken with Ms. Natalie Saari. The plaintiff claims that he could not find times when Ms. Saari was available. I accept this explanation.

**162**  The plaintiff's priority has been employment and his electrical business. He has had ongoing financial obligations such as child support, as well as the aforementioned hydro bill from his previous tenant.

**163**  The plaintiff accepted Dr. Raghavan's advice. Up until the time he saw Dr. Raghavan, his treatment mainly involved the various passive therapies directed to his soft tissue injuries.

**164**  Dr. Lawrence outlined the plaintiff's position as follows:

Mr. Belos said that he has participated in multiple types of treatment over the past five and half years or so. He described chiropractic treatments, massage, and intermittent physiotherapy. He said that he had been prescribed several different medications. He felt that the chiropractic and massage treatments provided some temporary pain relief. He said that the medications for nerve related pain, such as gabapentin, did not help him. He said he had tried at least two anti-depressant medications which were also supposed to help with pain (Cipralex, Cymbalta), but the medications did not relieve the pain so he discontinued them. He said he had some difficulty accepting Dr. Raghavan's assessment of his pain condition because he feels that the pain is real, and the limitations on his activities are real. He felt that the physiotherapy and yoga consultations he had in the spring and summer of 2015 were intermittent and were not coordinated into an overall treatment program so were not as effective as they could have been. He said that coincidentally, about the same time, he became more active at work and his pain symptoms became less intrusive.

**165**  I am sympathetic to the plaintiff's position as described by Dr. Lawrence. The treatment prescribed by the doctors; that is, physiotherapy, massage, chiropractic care and medication, were directed at physical pain caused by soft tissue injuries.

**166**  The plaintiff did not refuse to take a psychosocial assessment. Unfortunately for the plaintiff, he was being sent to various treatments for his physical injuries. It was not until about four years after the accident that it was suggested to him that his injuries related to some psychological factors.

**167**  Only after meeting Dr. Raghavan did the plaintiff start to understand that physiotherapy, massage therapy, other passive therapies and medication were not going to resolve his problems. It is perfectly understandable that the plaintiff could not accept or understand how the real physical pain he felt had psychological components to it. The plaintiff did have soft tissue injuries which were physical in nature.

**168**  The defendant has not proved that the plaintiff's injuries would have lessened had he taken the therapy recommended by Dr. Raghavan and Dr. Lawrence earlier. I find that the plaintiff did not fail to mitigate his damages.

**PAST WAGE LOSS OR PAST LOSS OF EARNING CAPACITY**

**169**  The plaintiff claims a past wage loss of $17,500.00 (rounded). The loss is not disputed by the defendant, except for the amount sought. The defendant states that a paid wage loss is a past loss of earning capacity. In his written submissions at paragraph 28, the defendant states:

A claim for past loss of earnings is for the loss of earning capacity of the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury.

*Matias v. Lou*, [*2015 BCSC 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60N3-00000-00&context=) at para. 83 citing *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.

**170**  The doctors who examined the plaintiff expressed an opinion that they thought it was reasonable for him to take time off work, which he did from the date of the accident to July 26, 2010, at which time he returned to work with accommodated duties. The plaintiff stated that, when he went back to work, he went back too early, and was off work a second time from August 4 to September 7, 2010, when he again returned to work with accommodated duties. He returned to full-time duties at Domtar on October 27, 2010.

**171**  In *Matias*, the Court stated that the loss of earning capacity can be measured by the loss of income. That is a manner in which both the plaintiff and the defendant have measured this head of damages.

**172**  The defendant disagrees with the plaintiff's method of calculation. The difference comes down to whether the plaintiff, when he came back to work with reduced duties, worked 50% of the time or full-time. There is not a significant difference in the calculations. Both the plaintiff and the defendant's calculations were based on net pay after all deductions, which include income tax.

**173**  But for the accident, the plaintiff would have earned $16,500.00 more and I award the plaintiff that sum for loss of earning capacity, plus court ordered interest.

**SPECIAL DAMAGES**

**174**  The plaintiff seeks $20,521.93 in special damages. Of that amount, $6,560.00 is a subrogated amount due to Manulife who paid the plaintiff this amount after the accident as a short-term disability benefit during the period when the plaintiff was employed by Domtar and off work.

**175**  The defendant specifically disputes the subrogated claim of $6,560.00 and the $418.48 cost of travel to and from Dr. Heran's medical appointment. This, the defendant says, is a matter for costs. The plaintiff agrees. I will deal with the subrogated claim separately.

**176**  I award the plaintiff $13,553.45 in special damages.

**MANULIFE SUBROGATED CLAIM**

**177**  The plaintiff received weekly indemnity benefits from Manulife as a result of the motor vehicle accident. That is not in dispute. They are described as short-term disability benefits from July 1 to September 5, 2010.

**178**  The plaintiff has proved that he contributed to the cost of this insurance with Manulife, which is shown as a deduction on his pay stubs from Domtar.

**179**  The law is settled in *Cunningham v. Wheeler*, [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=) (SCC). The amount of $6,560.00 is not deductible from the wage loss that I have awarded. The plaintiff is entitled to judgment in the amount of $6,560.00 against the defendant so as to meet his subrogated obligations to Manulife.

**COST OF FUTURE CARE**

**180**  The plaintiff was assessed by Ms. Saari, who practices in Kamloops as a kinesiologist and physiotherapist. The cost of the assessment was $1,202.25. This amount is part of the special costs which I awarded. The plaintiff could not start the recommended program because he could not coordinate Ms. Saari's availability with his work commitments. It is proposed that the plaintiff enter into a rehabilitation program with Ms. Saari at a cost of $3,558.66 and cognitive behavioural therapy with Mr. Koehn at $16,380.00 for a total of $19,938.66.

**181**  These costs are supported by the plaintiff's medical providers, in particular, Dr. Raghavan, Dr. Lawrence and Dr. Heran.

**182**  I also conclude that the plaintiff will most likely pursue the counselling and the rehabilitation services. He has already started counselling with Mr. Koehn and pursued an assessment with Ms. Saari.

**183**  I award the plaintiff $19,938.60 for future care.

**LOSS OF FUTURE EARNING CAPACITY**

**184**  In order to assess this head of damages, the plaintiff has provided the expert opinion of Darren Benning, an economist. The defendant provided expert opinions from Williams & Partners, who describe themselves as investigative accountants.

**Plaintiff's Position**

**185**  The plaintiff seeks an award of $250,000.00. The plaintiff's position assumes that the plaintiff will work to age 67, at which time he will retire.

**Defendant's Position**

**186**  It is the defendant's position that, in the absence of a functional capacity report and "where evidence is unreliable in terms of the impact of the injuries on the plaintiff's vocational abilities, the medical evidence does not support a real and substantial possibility of an inability to work in the future." The defendant submits that one year's wage is sufficient to address any loss of future earning capacity from any "flare ups of injury."

**187**  I will address the defendant's criticism of the failure of the plaintiff to provide this Court with a functional capacity report. It is my view that a functional capacity report is not necessary because the plaintiff himself has described his limitations when performing his electrician duties.

**188**  A functional capacity report attempts to assess an injured person's limitations for the court. Without knowing the plaintiff's capabilities and requirements for his employment at the time of the accident, the assessor assumes that the person being tested can perform all aspects of his or her employment.

**189**  A functional capacity report will, as an example, test the strength of grip, as well as positions, such as squatting, walking, sitting, climbing etc. At the time of the accident, the plaintiff was employed by Domtar. He described how when he went back to work on October 27, 2010 he performed all of his duties. After coming back to work full-time, there was no evidence that he was not able to perform all the duties expected of him.

**190**  In this case, the plaintiff described to this Court the physical requirements for both his job at Domtar, before and after the accident, and any physical deficits he had in performing electricians' duties in working for his company, AEB.

**191**  The plaintiff worked shift work and relief at Domtar. At Domtar, his duties were mainly maintenance, lightbulb changing, waiting for an emergency and sitting at a desk a "doing nothing".

**192**  The plaintiff testified that he did not fit in at Domtar, so in 2011 he opted to incorporate his own company as its sole shareholder. This company provided electrical services to the public.

**193**  The plaintiff's company bid on, and received, a commercial job which was completed with seven employees. AEB performed a residential wiring job, an outdoor wiring for a patio. He had a crew who did most of the work and he acted in the role of supervisor. Mr. Meers of DM Contracting said that AEB did a great job. Mr. Meers was not aware of the motor vehicle accident and observed no injury. At the same time, the defendant called a witness for a contractor, for whom AEB performed work, where the contractor was dissatisfied with the work.

**194**  Randy Sherman, an electrical apprentice, was an employee of AEB. He stated that he worked with the plaintiff side-by-side during a job on the Village Hotel. Mr. Sherman was unaware of the motor vehicle accident.

**195**  Shawn Toplak hired AEB to wire four new residences during August, September and October 2012. Mr. Toplak saw the plaintiff working on this particular project with a crew. Mr. Toplak said he was not on the job daily and would just walk through, leaving him no opportunity to make observations of the plaintiff.

**196**  The plaintiff now works independently, still for AEB, but does all the work himself.

**197**  The plaintiff can perform his electrician duties and, if he is required to pull cable, others on the site often help. He is not required to dig ditches as that is the contractor's job. He works with knee pads and has lightened up his electrician's service belt.

**198**  The plaintiff, by working without a crew, can make his hours in accordance with his needs and those of his customers. A functional capacity report would not be of any assistance to me.

**199**  In order to be successful for an award of loss of future earning capacity, the plaintiff must prove "that there is a real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32.

**200**  Loss of earning capacity is an assessment based on actual calculated losses, as was the case for Mr. Benning's evidence. 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=), Madam Justice Huddart for the Court stated at para. 8:

...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 ...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.

**201**  Madam Justice Huddart set out the burden of proof for these awards at para. 9:

...must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities... Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

**202**  In determining whether the plaintiff has established an impaired earning capacity, the following criteria was established in *Brown v. Golaiy*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=):

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.

**203**  Mr. Benning's report is dated March 15, 2016. He bases his report on the plaintiff's T4 earnings from 2006 to 2017. He converts those earnings to 2016 dollars. The 2015 income of the plaintiff was an estimate, as the plaintiff's earnings were not known at the time Mr. Benning did his report. This was later corrected by Mr. Benning when the plaintiff's earnings were known.

**204**  Mr. Benning determined that the loss of earnings, after working 15 years from the date of trial, and then the reduction of his earnings by 50% up to age 67, would be $348,113.00. Similarly, after 15 years and then working only 66% of the time, the loss would be $216,139.00, and the loss of earnings by re-training would be $130,500.00. Mr. Benning, in coming to these calculations, took into consideration risks that he outlined on pages 6-8 of his report. These risks were not controversial or disputed by the defendant.

**205**  Mr. Benning stated that the lump sum present value of future employment income:

...has been derived on the assumption that the nominal rate of return on investment exceeds average wage inflation by 1.50 per cent per year. This is the real (or net-of-inflation) discount rate required in British Columbia for these types of calculations, pursuant to regulations issued under The Law & Equity Act.

**206**  The Williams & Partners' report authored by Mr. Graff and dated April 21, 2016, pointed out that the exclusion of the years 2013 and 2014 has not been explained. They emphasized that the inclusion of the 2013 and 2014 financial information is essential to the income loss calculation because these are periods that the plaintiff was operating his own company versus working as an employee. Further, they note that by excluding 2013 and 2014, a more favourable estimate results for the plaintiff.

**207**  Mr. Graff is critical of Mr. Benning for using income earned from wages versus income from operating a business. He argues that this is akin to comparing "apples to oranges".

**208**  Mr. Graff points out that the plaintiff would be entitled to certain overtime and other benefits which, as a business owner, is not available to him.

**209**  I will not refer to everything Mr. Graff said, but it appears that because he does not have the information that he thinks he needs, he raised criticisms that would be answered one way or another if he had the necessary documents.

**210**  Mr. Graff wrote a supplemental response directed to the three scenarios that Mr. Benning cited. That is, 50% of full-time employment after 15 years, 66% of full-time employment after 15 years and retraining. Mr. Graff pointed out that these assumptions should be deferred to the appropriate medical experts.

**211**  Between the first report and the second report, Mr. Graff received financial statements, pointing out that AEB had significant revenue growth in the second year of operations. He noted:

In 2014, revenues decreased from 2013 and were on a decreasing in trend in 2015. However, the Adjusted Net Income shows that A.E.B. Electric was profitable in each fiscal year except 2013, and in fact, is on an *increasing* trend from 2014 to 2015.

**212**  Mr. Graff observed that it would appear that AEB is operating more efficiently as its profitability rose despite a decrease in revenues. Mr. Graff referred to bad business decisions, but cannot comment because he does not know the nature of those decisions and whether they have in fact affected profitability.

**213**  Mr. Benning provided a response report. I will not go through all of its details. However, he raised some other alternatives for the plaintiff's future income. He suggests that the plaintiff could return to paid employment or do a combination of paid employment and self-employment.

**214**  I have looked at the arguments of Mr. Benning and Mr. Graff. As an electrician, the plaintiff, who is now working for his own company, has in the past worked for others and has travelled to various areas such as Fort McMurray, Red Deer and Revelstoke to work on projects. At those projects, he was paid wages.

**215**  The plaintiff likes working as an electrician. There is no evidence before me that he intends to stop being an electrician to pursue other kinds of employment. In the plaintiff's submissions he stated that he is unlikely to retrain. The suggestion that, after 15 years of work from the date of trial, he would then only work 50% of the time or 66% of the time, is speculation. This speculation comes from Dr. Lawrence's report and has no foundation, other than Dr. Raghavan's opinion contained in his written report of October 26, 2016, which says:

I have not seen any significant improvement from musculoskeletal point of view although as noted above, he has worked consistently with a counsellor, with a clinical focus on attempting to address potential psychological factors.

**216**  There was no evidence before me that, after returning to work at Domtar and then working for his own company, the plaintiff could not go to work due to the injuries he suffered in the motor vehicle accident.

**217**  As a result, any loss of earning capacity that the plaintiff probably will face will come about as a result of any stressors in his life that may or may not trigger pain and interfere with the respondent's earning capacity.

**218**  I have concluded that the plaintiff has suffered a loss of earning capacity. However, in assessing that loss, I reject Mr. Benning's method of assessment. The plaintiff's loss of earning capacity is best assessed on the *Brown* factors, which is the capital loss approach. I conclude that the plaintiff will have flare-ups, but that these flare-ups are likely to be of a short duration and dependent upon any stressors in his life that may or may not affect him. I award the plaintiff $100,000.00 for loss of earning capacity.

**SUMMARY**

**219**  In summary, I have awarded the following amounts under the following heads of damages:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary damages: | $ 75,000.00 |  |
| Past wage loss or loss of earning capacity: | $ 16,500.00 |  |
| Subrogated claim: | $ 6,560.00 |  |
| Special damages: | $ 13,553.45 |  |
| Cost of future care: | $ 19,938.66 |  |
| Loss of future earning capacity | $100,000.00 |  |
| **TOTAL:** | **$231,552.11** |  |

**COSTS**

**220**  The plaintiff shall have his costs and disbursements in accordance with Appendix B, Scale B of the*Supreme Court Civil Rules*, *B.C. Reg. 168/2009*.

**221**  If there are other matters that need to be addressed as it relates to costs, either party should, within 30 days, arrange a date for such submissions.

H. HYSLOP J.

**End of Document**

[***Chevalier v. Gray, [2018] B.C.J. No. 3450***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TK6-B461-JPP5-207J-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

R.S. Tindale J.

Heard: January 15-19, February 14-15, April 20, 2018.

Judgment: October 22, 2018.

Docket: M1547346

Registry: Prince George

**[2018] B.C.J. No. 3450** | 2018 BCSC 1833

Between Marie Elizabeth Chevalier, Plaintiff, and Cody Thomas Gray, Defendant

(300 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Headaches — Seizures — Fibromyalgia or chronic pain — Psychological injuries — Depression — Considerations impacting on award — Pre-existing injury — Action by 51-year-old plaintiff for damages for personal injuries suffered in motor vehicle accident in 2014 allowed — Plaintiff suffered conversion disorder with seizures and major depressive disorder as well as aggravation of pre-existing chronic complaints of neck and back pain, migraines and depression — Plaintiff was awarded $105,000 in non-pecuniary damages, $50,000 for past income loss, $150,000 for loss of income earning capacity, $45,000 for costs of future care, $5,000 for loss of domestic capacity, and $7,651 for special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Employment income — Expenses and expenditures — Non-pecuniary loss — Action by 51-year-old plaintiff for damages for personal injuries suffered in motor vehicle accident in 2014 allowed — Plaintiff suffered conversion disorder with seizures and major depressive disorder as well as aggravation of pre-existing chronic complaints of neck and back pain, migraines and depression — Plaintiff was awarded $105,000 in non-pecuniary damages, $50,000 for past income loss, $150,000 for loss of income earning capacity, $45,000 for costs of future care, $5,000 for loss of domestic capacity, and $7,651 for special damages.**

|  |
| --- |
| Action by the 51-year-old plaintiff for damages for personal injuries suffered in a motor vehicle accident in 2014. The defendant admitted liability for the T-bone collision. The plaintiff had pre-existing migraines, neck and back pain and depression. She had been in a previous accident in 2012. After the accident, the plaintiff experienced increased pain in her neck, back, shoulder and wrist as well as increased anxiety. She began experiencing seizures seven months after the accident and began cutting herself to release anxiety. Her income before the accident had been approximately $25,000, although she was on stress leave at the time of the accident. She did not return to work after the accident. The plaintiff's mother, who had been injured in the accident, died several months after the accident, as did the plaintiff's horse. The plaintiff cared for her elderly father without her siblings' support. Her doctors opined that the accident had caused her conversion disorder and major depressive disorder. The defence expert opined that the accident had aggravated pre-existing pain on a short-term basis.  HELD: Action allowed.  The accident was a material contributing cause to the plaintiff's physical and psychological injuries. But for the accident, the plaintiff would not have developed a major depressive disorder and a conversion disorder with seizures. Taking into account the plaintiff's condition prior to the accident, her injuries and poor prognosis, the effects her psychological injuries had had on her personal and work life, and the case law, an appropriate award for non-pecuniary damages was $105,000. Taking into account the plaintiff would have taken time off when her mother died, she was awarded past income loss of $50,000. The plaintiff was unlikely to ever return to full-time employment. She was awarded $150,000 for her loss of earning capacity. She was awarded $45,000 for costs of future care, being mainly medications, $5,000 for loss of domestic capacity, and $7,651 for special damages. The plaintiff did not require job training expenses. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules,

**Counsel**

Counsel for plaintiff: J.L.W. Haines.

Counsel for defendant: D.A. McLauchlan.

**Reasons for Judgment**

|  |
| --- |
| **R.S. TINDALE J.** |

**1**   The plaintiff claims for non-pecuniary damages, past loss of earning capacity, future loss of earning capacity, loss of domestic capacity, future care costs and special damages as a result of a motor vehicle accident that she was involved in on February 14, 2014 ("MVA").

**2**  The MVA can be described as a T-bone type of accident where the defendant's vehicle turned into the path of the plaintiff's vehicle. The MVA occurred on Carney Street in the City of Prince George, Province of British Columbia.

**3**  The plaintiff's ailing elderly mother was in the passenger seat and received significant physical injuries as a result of the MVA.

**4**  The defendant has admitted liability for the MVA.

**Evidence**

**Plaintiff**

**Marie Elizabeth Chevalier**

**5**  The plaintiff Marie Elizabeth Chevalier is 51 years of age having been born on September 24, 1967. She is married and has resided in the City of Prince George since 1971.

**6**  The plaintiff received her GED in 1999 and has taken courses in office administration. The plaintiff has a first-aid ticket as well as a flagging ticket for traffic control.

**7**  The plaintiff through her employment has used various computer software programs such as WordPerfect and Simply Accounting.

**8**  The plaintiff was in the military for a brief period of time and has held a number of different jobs over the years.

**9**  The plaintiff worked in the past as a receptionist at Royal LePage. The plaintiff also worked as a receptionist at a radio station in Prince George.

**10**  In February 2012 the plaintiff was hired by her friend Karen Moore to work at her travel agency Carlson Wagonlit. The plaintiff was training to be a travel agent. She also cleaned the office, put books away and helped Ms. Moore and the other travel agents. The plaintiff volunteered to be laid off in the summer months at which time she would work as a flag person with Guardian Angels Traffic Control Ltd.

**11**  The plaintiff also worked approximately four times a year for Ritchie Brothers auctioneers moving equipment.

**12**  The plaintiff describes herself as a perfectionist at work. The plaintiff would typically collect Employment Insurance benefits in the summer.

**13**  The plaintiff took a leave of absence from work in the winter of 2013 until January 2014 because of stress. Her mother had injured herself and she was taking care of her elderly parents.

**14**  The plaintiff has three brothers who did not help care for her parents. The plaintiff took care of all the day-to-day needs of her parents.

**15**  The plaintiff testified that caring for her mother caused her a lot of anxiety.

**16**  The plaintiff testified that the MVA occurred on February 14, 2014. The plaintiff testified that her vehicle was damaged so severely that it was written off. The airbags deployed during the accident. The plaintiff explained that she had just finished work and one of her brothers was supposed to pick up her mother from the hospital. Her brother did not do that so she went to pick her mother up from the hospital.

**17**  The plaintiff testified that she was driving the vehicle at the time of the MVA. Her son was in the back passenger seat and her mother was in the front passenger seat. Her mother had an oxygen tank sitting between her legs when the MVA occurred.

**18**  The plaintiff testified that she was driving on Carney Street when a truck turned right in front of her and T-boned her vehicle. The plaintiff said when the airbags went off there was smoke in the cabin of her vehicle and she thought the car was on fire. An ambulance attended and took her mother to the hospital who was injured.

**19**  The plaintiff testified that she started to have a stiff neck while she was in her car. She sprained her wrist and neck. The plaintiff's shoulder began to hurt.

**20**  The plaintiff testified she had bruising where the seatbelt was across her chest.

**21**  The plaintiff testified that she felt responsible for her mother's injuries. The plaintiff's mother eventually died in May 2014 and the plaintiff testified that she blamed herself for her mother's death.

**22**  The plaintiff testified that she attended at the hospital to see her mother shortly before she died. Her mother was lucid. The plaintiff called her three brothers and told them that they should come and see their mother and that she needed to be relieved from staying at the hospital. The plaintiff ultimately left the hospital to take a break and at that time her mother passed away.

**23**  The plaintiff testified that when she was 13 years of age her older sister died in a motor vehicle accident. The plaintiff blamed herself for her sister's death because she was mad at her sister and had wished her dead.

**24**  The plaintiff testified that she had headaches right after the MVA. The plaintiff also indicated that she has had migraines since she was approximately six years of age. Since the MVA the plaintiff has a bad headache every month. These headaches have not changed since the MVA.

**25**  The plaintiff testified that she had neck pain after the MVA. She continues to have neck pain to this day and sometimes it becomes really bad. The plaintiff is candid in admitting that prior to the MVA she had neck pain however it is worse now.

**26**  The plaintiff testified that she had pain in her left shoulder and it bothers her all the time. The plaintiff testified that three or four years before the MVA she had torn her right rotator cuff which required surgery. The plaintiff noted that after the MVA her right shoulder was a bit stiffer than usual.

**27**  The plaintiff testified that she sprained her right wrist in the MVA. The plaintiff testified that she continues to have wrist pain and she grew a ganglion which had to be surgically removed.

**28**  The plaintiff testified that she experienced low back pain which she noticed on the day of the MVA. She continues to have this pain and attends at physiotherapy every once in a while for relief. The plaintiff also does home exercises to alleviate this pain. The plaintiff testified that prior to the MVA she did have low back pain. Since the MVA the low back pain has been continuous.

**29**  The plaintiff testified that prior to the MVA her legs would sometimes twitch at night when she went to bed however after the MVA her legs began twitching frequently. The plaintiff was not sure when the weakness and pain in her legs started however she testified it was not long after the MVA.

**30**  The plaintiff testified that after the MVA she began to have seizures. She did not have seizures prior to the MVA.

**31**  The plaintiff testified that after the MVA she has had difficulty sleeping because of her anxiety. She only sleeps approximately three hours per night. Prior to the MVA she also had difficulty sleeping however she said that she would normally sleep six hours per night.

**32**  The plaintiff has lost her appetite and she has low energy levels since the MVA.

**33**  The plaintiff also testified that she has had a change in her mood since the MVA. She said that she felt sad and guilty about her mother's death. The plaintiff testified that prior to the MVA she did have thoughts of suicide however after the MVA these thoughts became more frequent. The plaintiff has been taking antidepressants continually since the MVA.

**34**  The plaintiff has also noticed since the MVA that she has difficulties concentrating and focusing on tasks before her.

**35**  The plaintiff testified that she has had panic attacks since the MVA. She has seizures every day and she can have five seizures in a row. The plaintiff testified that she had seizures regularly for approximately three or four months. That slowed down to one time a week and then one time a month which is the frequency that she still has the seizures.

**36**  The seizures began in September 2014. She notes that they seem to be related to her anxiety. The plaintiff has been attending Dialectical Behavioural Therapy ("DBT") for her anxiety.

**37**  The plaintiff testified that she does not have any issues with driving since the MVA.

**38**  The plaintiff in August 2015 was admitted into the psychiatric ward of the hospital because she began cutting herself to release anxiety. The plaintiff testified that she had cut herself approximately seven times prior to that incident. She began cutting herself after the seizures began.

**39**  The plaintiff testified that she cuts herself on her arms, legs, stomach, breasts and face.

**40**  The plaintiff testified that in 2012 she had a prior motor vehicle accident where she hit a tree. She attended at a chiropractor for whiplash as a result of that accident.

**41**  The plaintiff has also testified that she has fallen on a number of occasions in the past and injured herself.

**42**  The plaintiff confirmed that the documents in Exhibit 6 are her income and employment documents.

**43**  The plaintiff declared the following income for the years 2010 - 2016:

2010: Total Income - $21,357 (Employment Income $10,593 and Employment Insurance benefits $10,764).

2011: Total Income - $22,770 (Employment Income $11,303 and Employment Insurance benefits $11,467).

2012: Total Income - $21,518 (Employment Income $19,679 and Employment Insurance benefits $1,839).

2013: Total Income - $25,798 (Employment Income $19,167 and Employment Insurance benefits $6,631).

2014: Total Income - $16,427 (Employment Income $7,519 and Employment Insurance benefits $8,908).

2015: Total Income - $1,291 Employment Income.

2016: Total Income - $8,912 (Canada Pension Plan benefits $8,912).

**44**  Exhibit 6 Tab 8 are payment slips from October 31, 2014 until July 2015 from Carlson Wagonlit. The plaintiff testified that she worked on and off during that period of time for the travel agency.

**45**  The plaintiff testified that she applied for and received Canada Pension Plan disability benefits.

**46**  The plaintiff testified that she did work after the MVA at Carlson Wagonlit, Ritchie Brothers, Royal LePage and Guardian Angels.

**47**  The plaintiff also testified that she volunteered for the Co-op and was paid $20 a month. She would attend one or two times a week at the Co-op.

**48**  The plaintiff testified that her relationship with her husband has changed because she stays in her room all the time. The plaintiff testified that she does not have any sexual relations with her husband. She is embarrassed by her seizures and they upset her.

**49**  The plaintiff testified that she was previously married. Her previous husband was abusive towards her. She testified that her previous husband raped her.

**50**  The plaintiff also testified that she was sexually assaulted at age 16.

**51**  The plaintiff testified that she used to attend at Cross Fit two times per week. She said that she stopped going before the MVA however she is not able to go back now because of her injuries.

**52**  The plaintiff also testified that prior to the MVA she used to be able to do all of her household chores. Now she is really sore if she does any household chores.

**53**  The plaintiff testified that her husband now cooks most of the time. Her daughter helps out once in a while. The plaintiff testified that her husband currently does approximately 90% of the housework.

**54**  The plaintiff testified that prior to the MVA she would shovel her driveway. Now she can barely shovel her walkway. She also used to do some haying prior to the MVA which she cannot do now. Her husband cares for their animals.

**55**  The plaintiff testified that she sees Dr. Udamaga one time per month and she takes her DBT classes.

**56**  The plaintiff testified that Exhibit 4 is her claim for special damages. These include prescriptions for the period January 1, 2014 to November 21, 2017 in the amount of $5,175.39 and Sun Life Financial extended health care claims for the period February 14, 2014 to December 8, 2017.

**57**  The plaintiff testified in cross-examination that she had a difficult time growing up at home. Her father beat her mother. The plaintiff testified that the teachers at her elementary school let her sister pick on her at school. She did not have a lot of friends at school.

**58**  The plaintiff testified that she changed schools when she was in grade 7 however the bullying and teasing continued. The plaintiff left high school after grade 10 when she was 16 years of age.

**59**  The plaintiff confirmed on cross-examination that she was sexually assaulted when she was 16 and she tried to commit suicide at that time. She had to attend at the emergency department of the hospital and have her stomach pumped.

**60**  The plaintiff testified that she enlisted in 1986 in the Canadian Arm Forces. She was unable to complete her basic training as she had Achilles tendinitis and was unable to swallow the pills that she was given for pain.

**61**  The plaintiff testified on cross-examination in 1987 she married her first husband. He was verbally abusive and sexually assaulted her in 1997.

**62**  The plaintiff confirmed on cross-examination that she received Employment Insurance sickness benefits from May 2001 until April 21, 2002.

**63**  The plaintiff confirmed on cross-examination that she married Mr. Chevalier in 2007 and they reside at 9609 Old Summit Lake Road. They moved there in 2009.

**64**  The plaintiff confirmed that she worked at a real estate firm called Team Powerhouse from March 22, 2010 until June 15, 2010. She testified that she left that employment because they could not keep her busy and she denied that she quit. She agreed that changes in employment cause her stress.

**65**  The plaintiff confirmed that she attended 10 sessions of counselling through her husband's employment in 2010.

**66**  Exhibit 2B Tab 26 is a copy of the counselling session at Walmsley Counselling. The note for September 14, 2010 indicates that the plaintiff was having panic attacks at night. The plaintiff denied that they were panic attacks but rather said they were bad dreams. On September 30, 2010 there is a note that the plaintiff was suffering from chronic pain. The plaintiff explained that this pain was related to her rotator cuff problems.

**67**  The plaintiff agreed on cross-examination that she had recurrent pain in her knee in 2009.

**68**  The plaintiff agreed on cross-examination that if she was not working it would create a great deal of stress for her. She said there would be conflict about money with her husband.

**69**  The plaintiff agreed that the death of her horse in December 2014 caused her distress.

**70**  The plaintiff confirmed that on December 31, 2013 she went on stress leave from her employment at Carlson Wagonlit.

**71**  The plaintiff confirmed that in April 2014 she did some work flagging and worked for Ritchie Brothers auctioneers.

**72**  The plaintiff agreed on cross-examination that she knew she was not going back to work at Carlson Wagonlit in January 2014 because there would not be any work for her.

**73**  The plaintiff confirmed that her mother died on May 14, 2014. She remembers her brothers telling her to apply for Employment Insurance grievance benefits but she does not remember exactly what she did.

**74**  The plaintiff confirmed that she did return to work from October 2014 until May 2015 at Carlson Wagonlit.

**75**  The plaintiff confirmed that in June 2015 her husband remortgaged their house to pay off approximately $40,000 in debt.

**76**  The plaintiff agreed on cross-examination that the twitching in her legs began prior to the MVA though it was not as serious as it was after the MVA.

**77**  The plaintiff agreed on cross-examination that prior to the MVA there may have been instances that she lost strength in her arms.

**78**  The plaintiff agreed on cross-examination that prior to the MVA she had injuries to her lower back. She also agreed that she had problems with her left hip, and headaches prior to the MVA.

**79**  The plaintiff agreed on cross-examination that she was referred to Dr. Buchanan a rheumatologist because she was concerned about arthritis. She agreed she felt pain in all of her joints including her wrists, shoulders, hips and knees.

**80**  The plaintiff agreed that she was overwhelmed by her mother's failing health. She agreed that she would wake up with violent dreams. She testified that she did not receive any support from her siblings with regard to caring for her parents.

**81**  The plaintiff agreed that on January 9, 2014 she attended with Dr. Stephanie Crompton at the Blue Pine Primary Health Care Clinic complaining of a migraine headache which she described the pain as being 10 out of 10. The plaintiff agreed this headache became worse over time.

**82**  The plaintiff agreed that in the summer of 2015 she travelled with her daughter and one of her daughter's friends to the Calgary Stampede for a couple of days.

**83**  The plaintiff disagreed that she wished her parents were dead but rather she just wanted her dad to die because of the way he treated her mother. The plaintiff confirmed on cross-examination that she feels she killed her mother because of her driving.

**84**  The plaintiff said in cross-examination that she was a burden to her family. She does not feel like she exists to them.

**85**  The plaintiff agreed on cross-examination that she contacted Ms. Moore about going back to work after the MVA and she said yes but the plaintiff said that she was not able to do the work.

**86**  The plaintiff disagreed that when she went on a trip to Mexico with her husband that all of her symptoms went away. She said that she had twitching in her legs.

**87**  The plaintiff agreed that she had an epidural in January and that she reported to a medical treater that there was something wrong with the epidural site. She also agreed that she queried whether or not this could be causing her seizures.

**88**  The plaintiff agreed on cross-examination that she told Dr. Laidlow that her shoulder pain went away. The plaintiff said that it would depend on what activities she was doing as to whether or not she had pain in her shoulder.

**89**  The plaintiff attended a Dr. Booth on March 10, 2014 and told the doctor that her pain was improving. She also told the doctor that she found a care home for her parents. The plaintiff agreed that this improved her mood because her mother was doing better however she said that she was not in fact getting better. She just told the doctor what she thought he wanted to hear.

**Lay Witnesses**

**Ken Chevalier**

**90**  Ken Chevalier is the plaintiff's husband. They have been in a relationship for approximately 20 years. He testified prior to the MVA he did not witness the plaintiff cutting herself.

**91**  Mr. Chevalier also testified that prior to the MVA the plaintiff would have some twitching in her legs at bedtime but he did not notice any twitching in any other areas of her body. After the MVA he noticed that she was having twitching in her legs all the time and she would get very tired. After the MVA the twitching in the plaintiff's legs would last for 10 - 15 minutes. Mr. Chevalier also noted that the plaintiff would shiver as if she was cold.

**92**  Mr. Chevalier testified that prior to the plaintiff's mother's death he noticed twitching in the plaintiff's legs.

**93**  Mr. Chevalier testified that the plaintiff was a "trooper" and he often could not keep up with her in terms of doing yard work or other household activities prior to the MVA.

**94**  Mr. Chevalier testified that now the plaintiff is exhausted by the end of the day. He testified that the plaintiff slowed down after the MVA and now he notices that after she completes a task at home she sits on the couch because she is so tired.

**95**  Mr. Chevalier testified that after the MVA, but prior to the plaintiff's mother's death she became withdrawn and very quiet. The plaintiff would stay in her bedroom a lot of the time.

**96**  Mr. Chevalier first saw the plaintiff having a seizure in September 2014. She was having a hard time breathing and he phoned 911. Mr. Chevalier testified that his brother growing up suffered from epilepsy and he is familiar with people who have seizures.

**97**  Mr. Chevalier confirmed that the plaintiff was hospitalized in August 2015. He had taken her to the hospital and she had a deep cut on her right arm. Mr. Chevalier confirmed that the plaintiff was admitted to the psychiatric ward.

**98**  Mr. Chevalier testified that the plaintiff does not have any debt. He testified that the plaintiff was concerned about making car payments so he took it upon himself to pay her car loan.

**99**  Mr. Chevalier testified that he does most of the driving. Mr. Chevalier testified that he does approximately 80% of the cooking and most of the dishes now.

**100**  Mr. Chevalier testified that his sexual relationship with the plaintiff has been negatively impacted by the MVA.

**101**  Mr. Chevalier testified on cross-examination that he was aware the plaintiff's sister passed away but they have never really spoke about it. He agreed that the litigation has been stressful on both the plaintiff and himself.

**102**  Mr. Chevalier testified that the only time they both had any relief from their stress was when they went to Mexico for a week. He said he was nervous when they were on the plane that the plaintiff might have a seizure. Mr. Chevalier agreed that the plaintiff did much better while she was in Mexico.

**103**  Mr. Chevalier confirmed that it was important to the plaintiff to pay her own way. He also confirmed that he paid off her student loans which were approximately $10,000.

**104**  Mr. Chevalier disagreed of that the plaintiff was depressed her entire life

**Karen Moore**

**105**  Karen Moore is the owner of Carson Wagonlit. She currently has three employees and herself. Ms. Moore confirmed that Exhibit 6 Tab 7 is a letter that she wrote with regard to the plaintiff's employment history with her business.

**106**  Ms. Moore testified that she expected the plaintiff to return to work between the months of September and May. The plaintiff took a leave of absence prior to the MVA however Ms. Moore expected her to return to work after that leave of absence.

**107**  Ms. Moore confirmed that she met the plaintiff when they were both working at Royal LePage sometime in the 1990s.

**108**  Ms. Moore confirmed that Exhibit 6 Tab 8 are pay stubs for casual labour that the plaintiff performed for her business. She also confirmed that these pay stubs accurately reflect the wages that the plaintiff made between October 31, 2014 and July 15, 2015.

**109**  Ms. Moore confirmed that in her view when the plaintiff was working at Royal LePage her work was good. She does not remember the plaintiff being absent from work, being late, having issues with coworkers or having issues in terms of her job performance.

**110**  Ms. Moore testified that in her view the plaintiff had the attributes to become a travel agent prior to the MVA. Ms. Moore testified that the plaintiff did not have any issues with co-workers or client complaints when she was working for her.

**111**  Ms. Moore testified that after the MVA the plaintiff was a lot quieter and less social.

**112**  Ms. Moore testified that after the MVA the plaintiff was not as focused on her work and she was often distracted. The plaintiff was also not able to multitask.

**113**  On cross-examination Ms. Moore testified that there was an expectation that the plaintiff would have full-time hours. She disagreed that she suggested to the plaintiff that she seek a summer job but rather she was aware that the plaintiff did traffic control work in the summers.

**114**  Ms. Moore agreed on cross-examination that the plaintiff was working less prior to going on stress leave in 2013.

**115**  Ms. Moore agreed on cross-examination that after the MVA the plaintiff's ability to work was an issue.

**116**  Ms. Moore testified on cross-examination that she did not provide the plaintiff with a Record of Employment for the period September through December 2013 because she was a casual labourer.

**Expert Witnesses**

**Dr. Todd Tomita**

**117**  Dr. Tomita was qualified as an expert medical doctor with a specialty in psychiatric medicine. Dr. Tomita saw the plaintiff for an Independent Medical Examination on March 12, 2015. Dr. Tomita provided a medical legal report dated August 10, 2015 which can be found in Exhibit 3 at Tab 1.

**118**  Dr. Tomita also provided an additional report dated February 29, 2016 which can be found in Exhibit 3 at Tab 3.

**119**  Dr. Tomita gave the following opinion with regard to the plaintiff's injuries being caused or contributed to by the MVA at paras. 19 - 26 of his report dated August 10, 2015:

[19] Mrs. Chevalier developed a conversion disorder with attacks or seizures that were associated with psychological stressors including her mother's injuries and death, continuing to care for her elderly father, continuing to fee[l] aggrieved that her brothers were not taking on enough responsibility for caring for their parents, the loss of her 34-year-old horse, and physical symptoms after the accident.

[20] Her conversion disorder started after the accident. There are indications that symptoms of conversion disorder were developing before a full-blown presentation when she was admitted to the University Hospital of Northern British Colombia in September 2014, based on Mrs. Chevalier's husband reporting that he observed abnormal limb movements occurring for 7 or 8 months before this but the seizures that led to her hospitalization was the point that a diagnosis of conversion disorder was firmly established, as there were clear incompatibility with neurological disease established.

[21] Mrs. Chevalier also developed a major depressive disorder, which appears to have evolved from bereavement following her mother's death in May 2014.

[22] Mrs. Chevalier was already on stress leave at the time the index MVA occurred. She had a number of pre-existing vulnerabilities to developing psychiatric disorders in the aftermath of the index MVA. These included traumatic life experience, including being the victim of two sexual assaults, the death of her sister when she was 13 years old, and stress that she perceived flowed from the fact that the care needs of her elderly parents fell to her and not her 3 brothers. Based on these considerations, absent the index MVA, it appears most likely that Mrs. Chevalier would have continued to have adjustment disorder issues that fluctuated with the stress caused by the level of care needs her mother and father required and the continuing conflicts with her brothers.

[23] It is likely that her adjustment disorder would have continued to produce symptoms of anxiety, panic attacks, and depressed mood that required treatment. I note that she needed to start taking an antidepressant medication, Celexa, in October 2013 and it is likely she would have needed to continue this as long as the stress related to her parents was occurring.

[24] It appears unlikely that her adjustment disorder would have progressed to a conversion disorder absent the accident. The aftermath of the accident marks a departure from the pattern of understandable adjustment issues flowing from the stress produced by family dynamics with her brothers and the care needs of her parents. She was on stress leave before the index MVA and seemed to improve with the demands of work removed and she had only her parents to contend with. It appears that it was the number of stressors and demands that produced psychiatric symptoms including a vulnerability if she faced additional stressors.

[25] Conversion disorder onset may be associated with stress or trauma that is either psychological or physical in nature. Following the accident, she had more stresses to contend with as compared to before the accident including neck and back pain, from the accident, sleep problems, a decline in her mother's health and her death in May 2014, continuing to look after her father and contend with the fact she perceived her brothers being unwilling to help, and returning to work out of financial necessity.

[26] Bereavement following her mother's death and the fact she felt guilty and responsible for her mother's death was a key stressor as it led to problems with clinical depression. Her mother's death appears to have activated Mrs. Chevalier's feelings of guilt and responsibility for her mother's demise. This fact is reflected in the clinical treatment records. The death of her mother in May 2014 marked the onset of an increase in her guilt about her mother and, in the aftermath of her death, Mrs. Chevalier's bereavement evolved into a major depression and then the onset of conversion disorder. The exact onset of her depression is difficult to locate, as she was experiencing ongoing adjustment disorder problems with anxiety, depressed mood and panic attacks already. As noted, her conversion disorder symptoms may have started earlier than September 2014, given the information on file from her husband who reports that she had been having abnormal limb movements for 7 or 8 months before the hospitalization. The accident appears to have been a preponderant cause of her conversion disorder based on the facts of this constellation of stressors would not have occurred absent the accident.

**120**  Dr. Tomita further opined that the plaintiff's ability to manage part-time work is durable and there is a fair prognosis for further improvement in her work capacity if her depression symptoms can be reduced.

**121**  Dr. Tomita testified that the plaintiff's adjustment disorder would not have progressed to a conversion disorder absent the MVA.

**122**  Dr. Tomita agreed on cross-examination that the plaintiff's depression developed out of her bereavement for the death of her mother.

**123**  Dr. Tomita agreed on cross-examination that the plaintiff's alexithymia was a risk factor for developing depression.

**124**  Dr. Tomita agreed that if the plaintiff had suffered migraines and loss of sight when she was younger which was incompatible with a physical explanation for the vision loss then he would consider a diagnosis of conversion disorder.

**125**  Dr. Tomita after reviewing additional documentation including an Independent Medical Examination report from Dr. Duncan M. Laidlaw dated January 12, 2016 produced his report of February 29, 2016. In that report Dr. Tomita opined that the plaintiff's conversion disorder with seizures and major depression remained unchanged. It was his opinion that the MVA was a preponderant cause of both her conversion disorder and major depression.

**126**  Dr. Tomita further opined that the plaintiff's prognosis for a substantial response to further treatment targeting her major depression is poor.

**Dr. Ejike Udumaga**

**127**  Dr. Udumaga was qualified as an expert medical doctor with a specialty in psychiatric medicine. Dr. Udumaga produced a medical legal report which can be found at Exhibit 3 Tab 7 dated October 28, 2017.

**128**  Dr. Udumaga first saw the plaintiff in November 2014. He noted that the plaintiff had a seizure in his office caused by psychological stress.

**129**  Dr. Udumaga in his medical legal report dated October 28, 2017 opined that the plaintiff meets the criteria for diagnosis of conversion disorder which is a condition characterized by one or more symptoms of altered motor or sensory function with clinical findings incompatible between the symptom and a recognized medical condition.

**130**  Dr. Udumaga also opined that the plaintiff meets the criteria for Major Depressive Disorder with anxious distress.

**131**  Dr. Udumaga noted that the plaintiff has been attending her psychiatric appointments on a regular basis and has been taking her medications as prescribed. He also noted in addition to that she also attends Advanced Dialectical Behavioural Therapy as part of her care plan.

**132**  Dr. Udumaga opined to the following at p. 17 of his medical legal report dated October 28, 2017:

Although Ms. Chevalier has some vulnerabilities prior to the index motor vehicle accident, I do believe that the index motor vehicle accident was a predominant factor that precipitated acute-on-chronic decline in her mental health with significant functional impairment leading to the diagnosis of Conversion Disorder, worsening of major depressive disorder with anxious distress.

She had no prior conversion disorder diagnosis before the index MVA, even though she was under a lot of stress just before the index MVA she did not display any Functional Neurological symptom like pseudoseizure.

**133**  Dr. Udumaga further opined that the plaintiff suffers from alexithymia which is a condition characterized by the inability to describe one's subjective emotional experience verbally. He noted that this condition is not uncommon in patients with conversion disorder.

**134**  Dr. Udumaga is not optimistic that the plaintiff will return to full-time employment.

**135**  On cross-examination Dr. Udumaga disagreed with a previous diagnosis that the plaintiff had schizophrenia.

**136**  Dr. Udumaga disagreed on cross-examination that absent the MVA the plaintiff would have developed conversion disorder after her mother died.

**137**  Dr. Udumaga opined on cross-examination that there were a constellation of factors that played a role in the plaintiff's development of symptoms which included the MVA.

**Additional Expert Reports**

**Dr. Duncan Laidlow**

**138**  Exhibit 3 Tab 2 is a medical legal report dated January 12, 2016 prepared by Dr. Duncan Laidlow. This report was prepared after an Independent Medical Examination of the plaintiff on November 23, 2015 by Dr. Laidlow.

**139**  Dr. Laidlow opined to the following at p. 20 of his report dated January 12, 2016 in regard to the plaintiff's neck pain and headaches:

I do feel that there is evidence that Elizabeth likely did sustain a musculoligamentous strain to the cervical spine with the motor vehicle accident of February 14, 2014 and that this has been associated with some mild traumatic headaches. Both of these problems are superimposed on a long and chronic history of neck problems and tendency to myofascial pain, plus one additional motor vehicle accident, in December 2012, where she hurt her neck and an accident, in January 2014, where she fell forward onto a wheelbarrow and injured her face and neck.

...

My impression is that the majority of the neck pain and headaches that she has now relates to the situation prior to the accident and is greatly aggravated by her level of anxiety that is currently present and has been present before the accident. I do feel that the musculoligamentous strain caused an aggravation of the background symptoms but I do not feel that it is the primary cause of her troubles.

**140**  Dr. Laidlow opined to the following with regard to the plaintiff's mid back pain at p. 21 of his report dated January 12, 2016:

I feel that Elizabeth likely did have a mild muscular strain of the thoracic area related to the motor vehicle accident of February 2014, but the great majority the pain that she has in this area relates to previous tendency toward generalized myofascial pain and is significantly aggravated by her level of anxiety and tension.

**141**  Dr. Laidlow opined to the following with regard to the plaintiff's low back pain at p. 21 of his report dated January 12, 2016:

I feel that Elizabeth did have a muscular strain of the lumbar spine with the accident of February 2014, but that the great majority of her pain now relates to her pre-existing tendency toward mechanical low back pain and the generalized muscular tension related to her anxiety.

**142**  Dr. Laidlow opined to the following with regard to the plaintiff bilateral shoulder pain at p. 22 of his report dated January 12, 2016:

I feel that the there is no history in keeping with a significant shoulder injury during the course of this motor vehicle accident. The shoulder pain relates to her pre-existing problems tendency toward myofascial pain and is aggravated by her level of anxiety.

**143**  Dr. Laidlow in giving a prognosis for the plaintiff opined to the following at p. 24 of his report dated January 12, 2016:

I feel that Elizabeth has had a long history of being prone to myofascial pain in the past and will continue to have this in the future. I do think that the accident likely aggravated her symptoms on a short-term basis but I feel that the biggest problem that she has at the present time is her mental health and in particular, her level of anxiety. I think that this makes her very prone to ongoing muscle tension and affects her ability to cope with her discomfort. I do not think that there is a structural change in any of her joints or spine that would result in further problems for her down the road.

**Niall A. Trainor, Vocational Rehabilitation Consultant**

**144**  Niall Trainor who is a Vocational Rehabilitation Consultant provided a Vocational Rehabilitation Assessment Report for the plaintiff dated September 13, 2017. This report has been marked as Exhibit 3 Tab 4 on this trial.

**145**  Mr. Trainor opined to the following in regard to the plaintiff's post accident employment potential at pps. 9 - 10 of his report dated September 13, 2017:

She has not worked since February 2015, i.e., in more than 2.5 years. In my opinion, a hiatus from employment of that duration, in the presence of chronic neck and back pain, functional impairment (i.e. difficulty with prolonged static postures and repetitive dynamic activity), cognitive impairment (i.e., problems with memory and concentration), depressed mood, anxiety and panic attacks, pseudo-seizures, and self harming behaviours prefigures a poor vocational prognosis. In other words, in my opinion, it is possible but not probable that Ms. Chevalier will be able to return to employment at some point in the future. This will depend significantly on her response to treatment of her mental health disorders. It will also likely depend on her ability to find a sympathetic employer who would be willing to hire her notwithstanding her lack of recent employment and possible need for ongoing accommodation for residual physical and mental health problems.

At this juncture, Ms. Chevalier is not ready to attempt to return to work in any capacity and, given her symptoms, I do not believe that vocational rehabilitation has anything to offer. I would recommend that she pursue volunteer work as a form of work conditioning and confidence building. In that regard I would note that she has a love of animals which implies to me that a volunteer position with the SPCA, or at a vet clinic, or other animal shelter would be a meaningful experience for her. In addition to the ability to care for animals she does have administrative skills that would be valuable to these organizations. At present she is isolating herself from other people and has no confidence in herself, which suggests to me that a customer service role would not be appropriate at least initially. However, I think that introducing a volunteer customer service role eventually may have some therapeutic value from a vocational rehabilitation perspective, if it could help to bolster her self-confidence.

Ms. Chevalier should try to keep a regular schedule and, over time she should endeavor to increase her hours of volunteer work with a view to mirroring a part-time employment schedule, e.g., four hours a day, three days a week. In time, if she demonstrates the ability to cope with the rigours of regular volunteer work she may be able to contemplate a return to the workforce. At that time I would anticipate that she would require the services of a Vocational Case Manager to assist with developing and implementing a plan for achievement of vocational goals. At that time an effort would likely be made to try to capitalize on her prior training and experience in administrative work, which would likely involve computer skills. I would anticipate that at that time Ms. Chevalier would likely benefit from computer skills refresher training, preferably with credentialing in Microsoft Office software, which I expect will continue to be the leading industry standard for clerical work. In my estimation, a reasonable budget for professional vocational services, based on contemporary fees, would be in the range of $3000 to $3500. Computer skills training is estimated to cost between $500 and $1000. She would also likely require computer equipment and updated software, which I would estimate the cost in the range of $3000 to $3500.

**Christiane Clark, Economist**

**146**  Christiane Clark is an economist and partner with Associated Economic Consultants Ltd. Ms. Clark prepared three reports that have been admitted into evidence on this trial.

**147**  Ms. Clark prepared a report dated September 15 2017 in which she provided estimates of losses of past and future earnings. This report has been marked as Exhibit 3 Tab 5. Ms. Clark calculated that the plaintiff's past loss of earnings to the date of the trial was $80,820. Ms. Clark also calculated the plaintiff's total past loss of earnings net of taxes and EI premiums to be $70,934.

**148**  Ms. Clark also provides a number of examples for calculating the plaintiff's future loss of earnings to age 70.

**149**  Ms. Clark prepared a report dated September 15, 2017 which outlined the cost of future care multipliers.

**150**  Ms. Clark prepared a supplemental report dated November 28, 2017 in which she recalculated the plaintiff's loss of past earnings taking into account income that the plaintiff earned from her employer Carlson Wagonlit between October 2014 and July 15, 2015. The plaintiff earned $2,424 in 2014 and $3,456 in 2015 from this employment.

**151**  Ms. Clark recalculated the plaintiff's total past loss of earnings to be $74,940. The plaintiff's total past loss of earnings net of taxes and EI premiums were estimated to be $65,538.

**152**  That was the case for the plaintiff.

**Defendant**

**153**  The defendant did not call any evidence on this trial however the defendant argued that the Independent Medical Examination of the plaintiff by Dr. Harish Neelakant should be marked as an exhibit on this trial.

**154**  The defendant made it clear that they were not relying on the opinions of Dr. Neelakant nor did they call Dr. Neelakant. The defendant argued that Dr. Udemaga referred to Dr. Neelakant's report and it should be marked because it is similar to a clinical record.

**155**  The defendant argued that the plaintiff for instance told Dr. Neelakant that she saw people that were not there however she denied that on cross-examination.

**156**  The plaintiff is opposed to this report being marked as an exhibit other than an exhibit for identification. Dr. Udemaga did not rely on the report of Dr. Neelakant other than disagreeing with his findings.

**157**  In my view it is not appropriate to mark the report of Dr. Neelakant and his notes of the examination as exhibits on this trial. The defendant chose not to rely on the opinions of Dr. Neelakant or call him as a witness.

**158**  The report of Dr. Neelakant dated August 29, 2017 was marked as Exhibit A for identification and his notes were marked as Exhibit B for identification.

**159**  Dr. Neelakant did not treat the plaintiff. The defendant is not relying on his opinion. In my view allowing his report to become an exhibit proper on this trial would circumvent the *Supreme Court Civil Rules* as they relate to expert evidence.

**160**  The report of Dr. Neelakant will not be marked as an exhibit proper on this trial.

**Position of the Parties**

**Plaintiff**

**161**  The plaintiff argues that her evidence was overall credible and reliable. The plaintiff concedes she had some difficulties expressing herself. Dr. Udemaga noted however that the plaintiff suffered from alexithymia which is a condition where a person is unable to describe their own subjective emotional experiences verbally.

**162**  The plaintiff acknowledges that she had a number of physical injuries and complaints prior to the MVA however she was able to function with these ailments prior to the MVA. In terms of problems with her mood the plaintiff argues that these were short lived and resolved prior to the MVA.

**163**  The plaintiff argues that her ongoing seizures have had a significant negative impact on her life. They leave her emotionally and physically drained. Since the MVA the plaintiff struggles with thoughts of suicide.

**164**  The plaintiff argues that there is no evidence that she has feigned or exaggerated her symptoms of illness. In particular the plaintiff argues that she was never confronted by the defendant that she feigned or exaggerated her injuries from the MVA. The plaintiff also argues that there is no medical evidence suggesting an unconscious pursuit of secondary gain.

**165**  The plaintiff argues that Dr. Udemaga testified during cross-examination that if he had any suggestion that the plaintiff was motivated by secondary gain he would have diagnosed her with malingering.

**166**  The plaintiff argues that the fact that she could not remember many of the notations in her clinical records should not affect her credibility. The defendant chose not to call any evidence from treating medical professionals in support of their interpretation of the clinical notes and records. The plaintiff argues that contradictions and inconsistencies are common in personal injury actions given the numerous sources of records and the passage of time before the trial.

**167**  The plaintiff argues that there is no evidence or medical basis to suggest that her seizures were caused by something other than the MVA such as the epidural procedure that she had. Dr. Udemaga rejected that suggestion that the seizures may been caused by the epidural procedure.

**168**  The plaintiff also argues that her evidence and the evidence of Ken Chevalier was clear that she did not engage in self harm activities prior to the MVA.

**169**  The plaintiff argues that the fact that she did not declare post-MVA income from her employment at Carlson Wagonlit should not impugn her credibility. The plaintiff informed Dr. Tomita about her post-MVA employment history. When she applied for Canada Pension Plan disability benefits the plaintiff noted this income on the application form.

**170**  The plaintiff argues that her most serious injuries are psychological in nature. Dr. Tomita and Dr. Udemaga are in agreement that she has developed a conversion disorder which includes symptoms of pseudoseizures. She also meets the criteria for a Major Depressive Disorder.

**171**  The plaintiff argues that the defendant's position that Dr. Tomita's and Dr. Udemaga's opinions are wrong is not supported by any expert evidence.

**172**  The plaintiff argues that the evidence of Ken Chevalier and Karen Moore was straightforward and believable.

**173**  The plaintiff argues that the defendant's ***negligence*** in the MVA caused or materially contributed to her injuries.

**174**  The plaintiff argues that the law does not distinguish between physical and psychological injuries. A tortfeasor has the same responsibility to a person who suffers psychological harm for the defendant's wrongful act as does a person who suffers physical harm.

**175**  The plaintiff argues that where an injury is indivisible the defendant will be 100% liable subject to defences based on a future risk of injuries arising in any event.

**176**  The plaintiff argues that the medical evidence is clear that she suffered a musculoligamentous strain of the cervical spine with associated mild traumatic headaches, mild muscular strain of the thoracic area, and a muscular strain of the lumbar spine. The plaintiff also sustained a wrist injury and bruises and contusions in the MVA.

**177**  The plaintiff argues that the causation of the aggravation of her pain symptoms is linked to her mental injuries.

**178**  The plaintiff argues that the defendant owes a duty of care to her to take reasonable care to avoid causing mental injury. The plaintiff says that she has met the burden of proving a serious and prolonged disturbance to her mental health arising from the MVA as required in *Saadati v. Moorhead*, [*2017 SCC 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVF-9W91-JP4G-63P6-00000-00&context=).

**179**  Dr. Tomita testified that the MVA was a preponderant cause of both the plaintiff's conversion disorder with seizures and her major depression.

**180**  The plaintiff agrees that she had some psychological vulnerabilities and pre-existing physical conditions prior to the MVA however the MVA was dramatic and the plaintiff's physical and mental conditions have not resolved to her pre-MVA status.

**181**  The plaintiff argues that Dr. Udemaga who was her treating psychiatrist testified that it was unlikely that the plaintiff would have developed depression and conversion disorder absent the MVA if only her mother had died.

**182**  The plaintiff argues that she was the driver of vehicle which her mother was a passenger. Her mother was injured and she assisted in removing her mother from the damaged vehicle which she thought was going to catch on fire. The plaintiff attended to her mother throughout her mother's hospitalization. The plaintiff argues in the circumstances the temporal, geographic and relational considerations justify a finding that it is reasonably foreseeable that mental injury would result from the defendant's ***negligence***.

**183**  The plaintiff argues that the expert evidence is uncontroverted that her psychiatric injuries are consequential to her physical injuries. The defendant is responsible for those injuries.

**184**  The plaintiff argues that there is insufficient evidence to suggest that absent the MVA her psychological condition would have caused her to become disabled in the future.

**185**  The plaintiff argues that the onus is on the defendant to establish that the claimant could have avoided some or all of her loss. The evidence is that the plaintiff has followed diligently the recommendations of her medical treaters.

**186**  The plaintiff argues that the appropriate quantum range for nonpecuniary damages is between $130,000 and $155,000. This is after a deduction of 10% to 15% because of the plaintiff's vulnerabilities which existed in any event of the MVA.

**187**  The plaintiff argues that based on the reports Christiane Clark dated September 15, 2017 and November 28, 2017 the plaintiff's estimated total past loss of earnings is $74,940 and her total past loss of earnings net of taxes and Employment Insurance premiums is $65,538.

**188**  The plaintiff argues that if the court determines that a reduction of the past income loss award is appropriate to account for negative contingencies this deduction should be small. The plaintiff argues that the appropriate range for past income loss is between $55,000 and $65,000.

**189**  The plaintiff argues that she has established a real and substantial possibility of future income loss. The plaintiff argues that the medical and vocational opinions suggest that her diminished functional capacity post-MVA is likely to be permanent. Her future prognosis is guarded.

**190**  The plaintiff submits that a calculation of future wage loss on the basis of an earnings approach is appropriate given the evidential anchors which are available.

**191**  The plaintiff argues that based on the evidence available an award in the range of $260,000 - $300,000 for loss of future earning capacity is reasonable. Such an award would also take into account deductions in the range of 10% to 20% for contingencies that the plaintiff may not have worked continuously to age 65.

**192**  The plaintiff argues that she should receive job-training expenses in the range of $3,000 - $3,500 as suggested by Mr. Trainor.

**193**  The plaintiff argues that she should receive $7,651.37 in special damages for prescriptions and physical treatments post-MVA as found in Exhibit 4.

**194**  The plaintiff argues that future care costs are intended to compensate her for expenses that are reasonably necessary for her medical care. The plaintiff notes that prior to the MVA during a period of approximately four years she purchased 12 prescriptions for antidepressants. Since the MVA she has been prescribed antidepressants and sleep aids on 97 occasions.

**195**  The plaintiff argues given her poor prognosis she will require medication over the long-term. The plaintiff argues that based on a review of her expenses for drug purchases and her extended health care claims between January 1, 2014 and December 2017 her expenses have been approximately $2,640 a year.

**196**  The plaintiff argues that her life expectancy is for another 35.6 years. The plaintiff argues that given her life expectancy the present day value of medication is $65,928.72. Taking into account a 10% deduction as recognition of a potential for future isolated flare-ups of her medical conditions an award for $60,000 is appropriate for future care.

**197**  The plaintiff argues that she is entitled to an award for loss of domestic capacity. The plaintiff claims a loss of past and future housekeeping capacity based on the evidence. The plaintiff submits that an appropriate award under this head of damages for domestic capacity to date is $10,000 and an award of $20,000 for compensation for future loss of domestic capacity. The plaintiff claims $30,000 in total under this head of damage.

**Defendant**

**198**  The defendant admits that the plaintiff suffers from conversion disorder and major depressive disorder. The defendant also admits that the MVA caused an aggravation of her pre-existing chronic physical complaints.

**199**  The defendant argues that there is no nexus between the aggravation of the plaintiff's pre-existing chronic physical complaints and the onset of either the conversion disorder or the depressive disorder.

**200**  The defendant argues that the plaintiff suffered from chronic pain, conversion disorder and major depressive disorder with elements of anxiety pre-MVA. These disorders may have waxed and waned over time but never entirely remitted.

**201**  The defendant notes that the plaintiff suffers from alexithymia. The plaintiff's upbringing included witnessing and suffering family abuse. She also endured the death of her sister when she was 13 years of age, bullying in school and a suicide attempt at age 16.

**202**  The defendant argues that the plaintiff was in a number of previous motor vehicle accidents and suffered abuse and sexual assault at the hands of her ex-husband.

**203**  The defendant argues that the plaintiff reported symptoms consistent with conversion disorder prior to the MVA which included migraines from age 6, temporary blindness, loss of voice, difficulty swallowing, and various stress related flare-ups or symptoms that are consistent with a somatic disposition to express mental disorder through physical complaints.

**204**  The defendant argues that the plaintiff has been depressed most of her life. The plaintiff suffered from panic attacks and depression in 2010 following the loss of her employment.

**205**  The defendant argues that the clinical records show that the plaintiff had significant stress related physical complaints prior to the MVA.

**206**  The defendant argues that the experts who opined on the plaintiff's condition prior to the MVA and after the MVA did not have the evidence that is now before the court.

**207**  The defendant argues that the evidence supports a finding that it is more likely than not that the plaintiff suffered from both conversion and major depressive disorders prior to the MVA. The plaintiff was vulnerable to developing psychiatric disorders and she experienced a number of traumas that would likely result in the development of psychiatric disorders throughout her life.

**208**  The defendant argues alternatively that if the plaintiff does establish that the conversion disorder and major depressive disorders did not pre-exist the MVA then the MVA did not cause them solely or in part.

**209**  The plaintiff's conversion disorder in the form of the pseudoseizures occurred on September 29, 2014. That was 7.5 months post MVA and 4.5 months after the death of her mother.

**210**  The defendant argues that the onset of the conversion disorder is too remote in time to be attributable to the MVA.

**211**  The defendant argues that the plaintiff's complaints post-MVA are virtually indistinguishable from her complaints pre-MVA. The defendant also notes that the plaintiff returned to work at Ritchie Brothers and Guarding Angels two months after the MVA and her function was no more impaired than it had been.

**212**  The defendant argues that the plaintiff's guilt surrounding her mother's death did not originate from the MVA but from her "magical thinking" that she caused her mother's death.

**213**  The defendant argues that plaintiff's grieving with regard to her mother's death is not attributable to the MVA.

**214**  The defendant argues there is no evidence in the clinical records to accurately determine when the plaintiff began experiencing tremors or limb jerking. The plaintiff regularly went to the doctors and one would expect to see a notation of this prior to September 29, 2014.

**215**  The defendant argues that the plaintiff herself attributed the epidural as a potential cause of the seizures.

**216**  The defendant argues that when the plaintiff had a crisis in her employment situation she would suffer from mood disorders.

**217**  The defendant argues that while Dr. Tomita and Dr. Udamaga both opined that the MVA was a sufficiently traumatic event to cause or contribute to the onset of a major depressive disorder so were her changes with employment at Carlson Wagonlit, her migraine headaches, the epidural and her caregiver burnout.

**218**  The defendant argues that the psychological impact of the MVA on the plaintiff prior to the death of her mother is equivocal. The defendant argues that any shift in the plaintiff's mood occurred after the death of her mother and is indistinguishable from grief. The defendant notes that there is no evidence that the MVA caused the plaintiff's mother's death.

**219**  The defendant argues if the court finds that "but for" the MVA the plaintiff would not have developed pseudoseizures and a major depressive disorder the defendant says that there was a pronounced and substantial risk that the plaintiff would have developed these disorders regardless of the MVA.

**220**  The defendant argues that there is evidence that the plaintiff did experience significant aggravation of her pre-existing chronic pain symptoms during the period from January 2014 to May 2014 regardless of the MVA. The clinical records show a number of complaints of chronic severe pain beginning in July of 2013.

**221**  The defendant argues that there is evidence to support a finding that the plaintiff would likely have suffered from a major depressive disorder regardless of the MVA.

**222**  The defendant argues that both Dr. Tomita and Dr. Udemaga failed to appreciate that the plaintiff generally believes that she caused her mother's death by wishing for it. The defendant says that it is the subjective connection the plaintiff experienced through her "magical thinking" which is the reason why she developed a major depression and then from there went to develop a conversion disorder.

**223**  The defendant argues that the law should not impose liability on the defendant because such "magical thinking" on behalf of the plaintiff and its consequences fall below the "reasonable fortitude and robustness of its citizens" standard which was established by the Supreme Court of Canada in *Mustapha v. Cullen of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=) (CanLII), [2008] 2 S.C.R. In *Mustapha* Chief Justice McLachlan, explained remoteness at paras. 12-14:

[12] The remoteness inquiry asked whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Linden* and *Feldthusen*, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tank ship (U.K.) Ltd. v Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).

[13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raised the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in The Wagon Mound (No. 2) as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan [t]... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.c. 617 (P.C.), at p. 643).

[14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held-albeit within the duty of care analysis-that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.): *Devji v. Burnaby (District)* [*(1999), 180 D.L.R. (4th) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1PY-00000-00&context=), [*1999 BCCA 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1PY-00000-00&context=) (CanLII): *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

**224**  The defendant argues that the plaintiff's evidence should be approached with caution. The plaintiff for instance became an independent contractor in September 2013 however she did not tell anyone about this including any medical treaters or experts.

**225**  The defendant says the plaintiff will tailor evidence to receive benefits. For instance in her application for CPP benefits the plaintiff states that her conversion disorder prevented her from driving which the defendant says is untrue.

**226**  The defendant agrees that he caused an aggravation in the plaintiff's chronic pain as a result of the MVA. The defendant argues that $40,000 is a fair amount for non-pecuniary damages.

**227**  The defendant argues that the MVA did not cause the plaintiff any new psychological injury. The defendant denies that the MVA diminish the plaintiff's capacity to earn income either past or future.

**228**  The defendant argues alternatively that if the court finds that the MVA caused or contributed to the onset of her major depressive disorder or to her conversion disorder than then nonpecuniary damages are in the $130,000 range.

**229**  The defendant argues that there is a pronounced and substantial risk that the plaintiff would have developed these disorders regardless of the MVA. The defendant says the plaintiff's non-pecuniary damages should be reduced by 50% to 70%.

**230**  The defendant argues that a fair award for the plaintiff's loss of domestic capacity would be $20,000.

**231**  The defendant argues that with regard to future care any award for medications should be reduced by 1/3 because the plaintiff will require medication in any event.

**232**  The defendant argues that with respect to past and future loss of earning capacity that there is no loss. The plaintiff has failed to establish that the MVA caused any such loss. The plaintiff's earning capacity had already been reduced prior to the MVA.

**233**  Alternatively the defendant argues if the plaintiff did suffer a loss of earning capacity attributable to the MVA any loss must be assessed on the capital asset approach and quantified by reference to annual earnings. The defendant argues that this assessment should be for a loss of $15,000 a year for a period of no more than 4 years.

**234**  The defendant argues that there should be no award for job-training expenses as they are not required.

**Decision**

**235**  There is no question that the plaintiff suffered from an aggravation of pre-existing injuries as a result of the MVA. The defendant does not dispute this.

**236**  The evidence also establishes that the plaintiff suffers from a major depressive disorder and conversion disorder with pseudoseizures.

**237**  The issue on this trial is primarily the causation of the plaintiff's psychological injuries. This is complicated by the fact that the plaintiff has had depression in the past and a number of physical maladies. The plaintiff throughout her life has been subjected to a number of emotionally traumatic events beginning in her childhood and continuing into her early adult years.

**238**  The plaintiff has also been in a number of motor vehicle accidents in the past. The plaintiff has injured herself in other accidents in the pas as well.

**239**  The plaintiff had some difficulties in expressing herself while giving her evidence and she did not remember many of the clinical record entries that she was directed to primarily on cross-examination.

**240**  There were a number of expert reports tendered in this trial on behalf of the plaintiff. There was also the evidence of Mr. Chevalier and Ms. Moore who supplemented the plaintiff's evidence. The evidence provides a comprehensive description of the plaintiff's pre-MVA and post MVA health and life.

**241**  The plaintiff suffered from a number of physical complaints prior to the MVA and for periods of time had issues with her mood. The evidence, however, establishes that the plaintiff prior to the MVA worked outside the home, performed a significant number of tasks in her home, cared for her ailing parents as well as her own family.

**242**  After the MVA the plaintiff explained that her mood deteriorated quickly and the seizures that she began experiencing had a significant negative impact on her life.

**243**  Mr. Chevalier confirmed this decline in the plaintiff's mental health after the MVA. He also confirmed that the plaintiff began shortly after the MVA having significant bouts of twitching in her leg and shivering as if she was cold. Mr. Chevalier was a straightforward and in my view reliable witness. I accept his evidence in its entirety.

**244**  Ms. Moore also confirmed that prior to the MVA she not only worked with the plaintiff at Royal LePage, she hired the plaintiff to work at her travel agency. Ms. Moore described the plaintiff as a capable, hard-working and good employee. After the MVA the plaintiff had difficulty focusing on tasks. I accept Ms. Moore's evidence in its entirety.

**245**  The plaintiff is clearly a person who prides herself in having a job and working hard. There was no evidence either from the plaintiff or from the experts that interviewed and treated her that would suggest that she is feigning or exaggerating any of her symptoms.

**246**  In my view while the plaintiff did have some challenges remembering and communicating her evidence it was reliable and forthright. Where she had some difficulties remembering or communicating those areas of her evidence in my view were supplemented by the evidence of Mr. Chevalier, Ms. Moore and the experts.

**247**  The plaintiff was never confronted with the suggestion that she was feigning or exaggerating her evidence. Dr. Udemaga who was the plaintiff's treating psychiatrist was specifically asked if he observed any indication that the plaintiff feigned or exaggerated her evidence and he did not.

**248**  I accept the plaintiff's description of her physical injuries after the MVA as well as the difficulties she had with regard to her mood, seizures, anxiety and thoughts of suicide.

**249**  With regard to the onset of the plaintiff's seizures there is no evidence that would suggest this occurred prior to the MVA. The defendant's theory that the epidural procedure that the plaintiff had may have caused the seizures and the conversion disorder is not supported by the medical evidence. It is clear from the clinical records relating to the epidural that the plaintiff was asking about a number of other possible causes for the seizures she was having.

**250**  With regard to the plaintiff's evidence relating to her cutting herself she was clear that she did not engage in this activity prior to the MVA. Mr. Chevalier also indicated that he did not notice this activity until after the MVA.

**251**  I do not accept the defendant's argument that since the plaintiff did not declare some of the income that she earned with Carlson Wagonlit after the MVA that this affects her credibility. The plaintiff disclosed that she worked there in 2014 and 2015 when she applied for her CPP disability benefits and in giving her employment history to Dr. Tomita. In my view this was an honest oversight on the part of the plaintiff.

**252**  I accept the evidence of the plaintiff as to her physical and psychological complaints including the seizures which began after the MVA.

**Causation**

**253**  The central issue on this trial is whether or not the MVA caused the plaintiff's major depressive disorder and conversion disorder with seizures.

**254**  In *Kallstrom v. Yip*, [*2016 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1JY-00000-00&context=), Mr. Justice Kent summarized the basic legal principles respecting causation at para. 318:

The basic legal principles respecting causation are found in the seminal case of *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=), repeated many times since, and which include:

1. the general but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the ***negligence*** of the defendant;
2. this causation test must not be applied to rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also help to produce the harm.

**255**  The Supreme Court of Canada in *Blackwater v. Pint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) in discussing causation and damages stated the following at para. 78:

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation considered generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.

**256**  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=) discussed the crumbling skull doctrine at paras. 34 and 35:

[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 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, supra*; *Malec v. J.C. Hutton Proprietary Ltd., 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.

**257**  The defendant concedes that he caused an aggravation of the plaintiff's pre-existing physical complaints however disagrees that he caused the plaintiff psychological injuries. In *Saadati* the court discussed the necessary elements that a plaintiff must establish to recover damages for mental injury at paras. 23 and 24:

[23] I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court's decision in *Mustapha* that Canadian ***negligence*** law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health - like a person's physical integrity or property, injury to which is also compensable in ***negligence*** law - is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252- 253). And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (Bouhill v. Young, [1943] A.C. 92 (H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (*Stevens*, at p. 55).

[24] It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently cause mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian*. Certainly, "temporal", "geographic" and "relational" considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the "close and direct" relationship which is a hallmark of the common law duty of care...

**258**  In this case the plaintiff suffered musculoligamentous strains of the cervical spine as well as mild headaches, a mild strain of the thoracic area and a muscular strain of the lumbar spine. She also sustained a wrist injury.

**259**  The defendant had a duty of care to the plaintiff to take reasonable care to avoid causing her physical and mental injuries.

**260**  The plaintiff certainly had pre-existing vulnerabilities to her mental health. Dr. Tomita however opined that the MVA was a predominant cause of both her conversion disorder and major depression. Dr. Udamaga opined that the MVA was a predominant factor that precipitated a decline in her mental health leading to a diagnosis of conversion disorder.

**261**  The evidence discloses that the plaintiff thought her vehicle was on fire when she was trying to extricate her elderly mother from the vehicle. She developed a sense of guilt about causing her mother's injuries and ultimate death even though she was not at fault for the MVA.

**262**  Both Dr. Tomita and Dr. Udamaga testified that it was unlikely that the plaintiff would have developed conversion disorder absent the MVA.

**263**  The evidence discloses that the effects of the mental injuries to the plaintiff have been pronounced, long-lasting and debilitating.

**264**  The evidence also discloses that symptoms of the conversion disorder in the form of the plaintiff's legs twitching regularly and for a prolonged period of time and as Mr. Chevalier described her shivering as if she was cold started shortly after the MVA. These symptoms became very pronounced in September 2014.

**265**  Taking into account all the evidence on this case the MVA was a material contributing cause to the plaintiff's physical injuries and to her psychological injuries. The plaintiff was involved in a serious motor vehicle accident where she was physically injured and witnessed her ailing mother being injured. It is reasonably foreseeable that the plaintiff would suffer psychological injury.

**266**  But for the MVA the plaintiff would not have received the physical injuries that she did as outlined by Dr. Laidlow and would not have developed a major depressive disorder and a conversion disorder with seizures.

**Non-Pecuniary Damages**

**267**  In *Stapley v. Hejlet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) the court set out an inexhaustive list of factors to take into account when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* that influence an award for 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=)).

**268**  The plaintiff did not have a pristine original position but rather had pre-existing pain as well as intermittent mood disorders. The plaintiff has however been significantly impacted in every aspect of her life by her injuries since the MVA. She has difficulties working and doing household chores. She has become withdrawn and anxious as a result of her seizures. Her marriage has been negatively impacted by her injuries.

**269**  The plaintiff relies on the following cases to establish the appropriate range for an award for non-pecuniary damages: *Domil v. Chang*, [*2017 BCSC 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MPH-JVD1-F27X-60KJ-00000-00&context=); *Redmond v. Kride*r, [*2015 BCSC 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0N2-00000-00&context=); *Zwinge v. Nolan*, [*2017 BCSC 1861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PT4-XH61-F7VM-S4X3-00000-00&context=); *Kim v. Lin*, [*2016 BCSC 2405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MJ7-NBJ1-F1WF-M26W-00000-00&context=); *Kallstrom v. Yip*, [*2016 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1JY-00000-00&context=); *Pololos v. Cinnamon-Lopez*, [*2016 BCSC 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J0C-MF51-JSXV-G2N2-00000-00&context=) and *Best v. Thomas*, [*2014 BCSC 1033*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2XB-00000-00&context=).

**270**  Taking into account the plaintiff's condition prior to the MVA, the plaintiff's injuries and poor prognosis, the effects that her psychological injuries have had on her personal and work life and the case authorities provided by the plaintiff an appropriate award for non-pecuniary damages is $105,000. This takes into account the real and substantive future possibilities, both positive and negative that could impact the plaintiff's life. In this case, it is primarily the negative possibilities caused by her pre-existing chronic pain and intermittent mood disorders that must be accounted for.

**Past Income Loss**

**271**  The plaintiff's income information has been submitted on this trial. The plaintiff's pre-MVA income levels largely reflect her original position. The plaintiff returned to work on October 7, 2014 with Carlson Wagonlit for a short period of time.

**272**  The evidence of Ms. Moore and the plaintiff establish that the plaintiff was unable to work as much as she previously had. Ms. Moore also testified that she had to hire another employee when the plaintiff was unable to work. Based on the evidence the plaintiff was unable to return to work at Carlson Wagonlit until October 2014.

**273**  Ms. Clark calculated the past wage loss of the plaintiff net of taxes and employment insurance premiums at $65,538. However during this time the plaintiff's mother passed away and there would have been a period of time that the plaintiff's work would have been interrupted because of that contingency.

**274**  Taking into account this negative contingency the appropriate amount for past income loss is $50,000.

**Loss of Future Employment Capacity**

**275**  The factors to consider in assessing a loss of earning capacity are found in *Brown v. Golaiy* [*(1985), 26 BCLR (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (SC) and can be summarized as follows:

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.

**276**  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=) in considering the loss of future employment capacity of the following at para. 32:

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

**277**  Dr. Tomita opined in his report of February 29, 2016 that the plaintiff's prognosis for a substantial response to further treatment targeting her depression is poor. Dr. Tomita had opined that if the plaintiff could manage her depression she would be able to work part-time. Dr. Udamaga was not optimistic that the plaintiff would return to full-time employment.

**278**  Mr. Trainor opined given the hiatus that the plaintiff has had from work and her physical and mental injuries the plaintiff had a poor vocational prognosis. Mr. Trainor opined that the plaintiff would have to find a sympathetic employer who was willing to hire her despite her ongoing physical and mental health problems.

**279**  The evidence discloses that the plaintiff has worked in a number of different jobs and has a number of different skills.

**280**  The plaintiff has proven that there is a real and substantial possibility of a future event leading to an income loss.

**281**  Ms. Clark in her report is September 15, 2017 gave a number of examples of calculating future loss of earnings on behalf of the plaintiff. For example Ms. Clark's report at Table 4 calculates the plaintiff present value of future earnings to age 65 if it was assumed that the plaintiff was making $25,372 per year to be $329,983. If the plaintiff did not return to work she would suffer a loss of $329,983. If the plaintiff suffered a 50% reduction in pre-MVA employment that would result in a loss of $164,992.

**282**  The plaintiff based on all of the evidence is unlikely to ever return to full-time employment and based on the expert evidence will have a difficult time returning to part-time employment. However given the plaintiff's personality and propensity towards working in my view she will return to part time work in time.

**283**  I do not accept the defendant's submission that any award under this heading should only be assessed for a four year period. That does not accord with the evidence.

**284**  The plaintiff did suffer from chronic pain prior to the MVA and has had intermittent disruptions in her mood prior to the MVA.

**285**  I have to consider both negative and positive contingencies when assessing an award for future loss of earning capacity. In my view it was likely absent the accident the plaintiff would have had disruptions in her employment because of her physical ailments and mental health in any event.

**286**  After considering all of the above an appropriate award for future wage loss is $150,000.

**Future Care**

**287**  The plaintiff's mental health conditions are considered to continue over the long term based on the opinions of Dr. Tomita and Dr. Udamaga. Dr. Udamaga testified as to the increased use by the plaintiff of antidepressants and sleep aids since the MVA.

**288**  Upon a review of Exhibit 4 the plaintiff made cash purchases in the amount of $5175.39 from the Heart Drug Mart IDA between January 25, 2014 and November 1, 2017. The plaintiff also made numerous claims to Sun Life Financial Extended Health Care claims over the period February 14, 2014 to December 8, 2017. The plaintiff was spending approximately $2,600 per month on antidepressants and sleep aids during this time.

**289**  The plaintiff argues that her life expectancy is approximately 35.6 years. Considering a $2,600 per month cost of care over the course of her lifetime and applying the Cost of Future Care Multipliers as provided by Ms. Clark the present value of the medication expenses is approximately $65,928.72. The plaintiff argues that a 10% reduction would be sufficient for the likelihood that the plaintiff would have needed some medications in the future in any event. The defendant argues that a 30% reduction should be applied.

**290**  Taking into account that the plaintiff may have needed medications in the future absent the MVA an appropriate award for costs of future care is $45,000.

**Loss of Domestic Capacity**

**291**  The plaintiff testified that she is unable to perform many of her household chores. The evidence also discloses that Mr. Chevalier has taken on many of the plaintiff's household duties.

**292**  I do not have any specific evidence estimating the annual cost of replacement homemaking. Appellant decisions have endorsed the notion that a two-thirds reduction should be made under this head of damage where a plaintiff and their spouse are able to reorganize domestic chores in such a way that there is no pecuniary loss: *Westboek v. Brizuela* [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=).

**293**  In this case the plaintiff and her husband have been able to reorganize their domestic chores in such a way as there is no pecuniary loss.

**294**  Based on all the above an appropriate award for loss of domestic capacity is $5,000.

**Special Damages**

**295**  The special damages as presented by the plaintiff are in the amount of $7,651.37. The evidence for the special damages can be found in Exhibit 4 Tab 3.

**296**  I understand that the defendant did not dispute this amount. I award the plaintiff $7,651.37 for special damages.

**Job Training Expenses**

**297**  The plaintiff seeks an award for job training expenses as recommended by Mr. Trainor. The plaintiff is not likely to return to full-time employment. The plaintiff based on the evidence is also not likely to change her vocation if she obtains a part-time job.

**298**  The plaintiff testified that she had skills in using a computer and various different types of software.

**299**  I am not satisfied that the plaintiff has established that she requires job training expenses in particular a computer and professional vocational services.

**Conclusion**

**300**  In summary I award the following amounts to the plaintiff in damages for the MVA:

|  |  |  |
| --- | --- | --- |
| (1) Non-pecuniary Damages: | $105,000 |  |
| (2) Past Wage Loss: | $ 50,000 |  |
| (3) Future Loss Earning Capacity: | $150,000 |  |
| (4) Future Care: | $ 45,000 |  |
| (5) Loss of Domestic Capacity: | $ 5,000 |  |
| (6) Special Damages: | $ 7,651.37 |  |
| **Total :** | **$362,651.37** |  |

R.S. TINDALE J.

**End of Document**

[***Fontaine v. Van Kampen, [2013] B.C.J. No. 2040***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-2395-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

S.K. Ballance J.

Heard: October 15-25, 2012.

Judgment: September 17, 2013.

Docket: 42421

Registry: Kamloops

**[2013] B.C.J. No. 2040** | 2013 BCSC 1702 | 2013 CarswellBC 2795

Between Lacey Jean Fontaine, Plaintiff, and Virginia Van Kampen and Serena Lynn Hazel, Defendants

(218 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Mitigation — Credibility — Action by plaintiff for damages for injuries sustained in motor vehicle accident allowed — Damages of $125,124 awarded — But for accident, plaintiff, in her early twenties at the time, would not have suffered low back and neck pain and headaches or substantial weight gain — Accident had negative impact on quality and enjoyment of plaintiff's life — It was unlikely plaintiff would recover to be symptom-free — Damages awarded included non-pecuniary ($75,000 minus five per cent for failure to mitigate), future care and loss of housekeeping capacity ($48,589) and special damages ($5,285).**

**Damages — Types of damages — For personal injuries — Considerations — Employment status — Extent of incapacity — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Miscellaneous — Expenses and expenditures — Medical — Therapy or rehabilitation — Housekeeping services — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action by plaintiff for damages for injuries sustained in motor vehicle accident allowed — Damages of $125,124 awarded — But for accident, plaintiff, in her early twenties at the time, would not have suffered low back and neck pain and headaches or substantial weight gain — Accident had negative impact on quality and enjoyment of plaintiff's life — It was unlikely plaintiff would recover to be symptom-free — Damages awarded included non-pecuniary ($75,000 minus five per cent for failure to mitigate), future care and loss of housekeeping capacity ($48,589) and special damages ($5,285).**

|  |
| --- |
| Action by the plaintiff for damages for injuries sustained in a motor vehicle accident. The plaintiff, who was in her early twenties at the time, asserted the accident had activated a previously asymptomatic degenerative disc condition, leading to chronic low back pain, which would cause her pain and functional limitations throughout the remainder of her life. The plaintiff claimed for special damages, non-pecuniary loss, future loss of earning capacity and future cost of care. Previous to the accident, the plaintiff had been a high level athlete and attended university. The plaintiff experienced pain in her back, neck and headaches after the accident. The plaintiff's injuries led to her employment termination. However, the plaintiff had been regularly employed since one month after the accident, and currently worked full-time 12 hour days. The plaintiff also asserted her poor performance at university was as a result of her injuries and that she was unable to partake in physical activities. The plaintiff gave evidence that she had received massage therapy, chiropractic care and physiotherapy for her ongoing back symptoms. The plaintiff testified her injuries led to significant weight gain and depression. The defendants submitted the plaintiff overstated the accident to the physicians who tendered expert opinion evidence on her behalf. The defendants submitted the experts' opinions were thus weakened and the plaintiff's credibility tainted.  HELD: Action allowed.  Damages of $125,124 awarded. The evidence indicated the plaintiff had misstated her post-accident treatments to several doctors and injury-related problems at university. This suggested the plaintiff overstated the severity of her symptoms, her diligence in addressing them, and their adverse impact. However, the plaintiff's testimonial deficiencies did not justify the conclusion that she was a discreditable witness. On the issue of causation, the evidence indicated the plaintiff did not have a low back problem, neck pain or headaches prior to the accident. But for the accident, the plaintiff would not have suffered the low back symptoms and or experienced the significant weight gain. The accident had a negative impact on the quality and enjoyment of the plaintiff's life. It was also unlikely the plaintiff would recover to her symptom-free former self, but there was a prospect for improvement. Non-pecuniary damages of $75,000 were awarded. Future care and loss of housekeeping capacity damages were awarded, including for physical therapy ($4,800), massage therapy ($1,680), homemaking services ($40,000) and other expenses ($2,109). On the claim for loss of future earning capacity, the plaintiff failed to prove a real and substantial possibility that the injuries caused by the accident would generate a pecuniary loss; no damages were awarded. Special damages of $4,445 were allowed for home gym equipment and other expenses for a total of $5,285. A five per cent downward adjustment was made to non-pecuniary damages as a result of the plaintiff's failure to mitigate. |

**Counsel**

Counsel for the Plaintiff: J.M. Hogg, Q.C.

Counsel for the Defendants: T.J. Decker.

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|  |
| --- |
| **S.K. BALLANCE J.** |

**INTRODUCTION**

**1**  This proceeding arises from a motor vehicle accident that occurred on September 2, 2007 in Kamloops, British Columbia (the "Accident"). Liability for the Accident has been admitted.

**2**  The plaintiff, Lacey Fontaine, asserts that, among other things, the Accident caused the activation of a previously asymptomatic degenerative disc condition that has led to chronic low back pain. She contends that she will likely be plagued by the pain and associated functional limitation throughout the remainder of her life which, given that she is only in her early 20s, could easily encompass several decades. Ms. Fontaine claims an award for special damages, non-pecuniary loss, future loss of earning capacity and future cost of care. The latter head of damages is the largest and most contentious.

**BACKGROUND**

\* **Early Passion for Hockey**

**3**  Ms. Fontaine was an all-round athlete in high school. She played many sports, excelling at ice hockey in particular.

**4**  Brian Silverstone coached Ms. Fontaine and gave her private lessons during the time she played hockey in Kamloops. He credibly spoke to her talent as a hockey player and her commitment to skill development. He appreciated her positive "gung-ho" attitude and described her as a natural leader, often acting as team captain or assistant captain.

**5**  In his coaching role, Mr. Silverstone would scrutinize the players' movements and how they transferred their weight while on the ice. He was confident that he could detect the presence of an injury or pain in his players "100% of the time". As Ms. Fontaine's private coach, he challenged her in every aspect of the game. Throughout their association, he saw no indication of her having a low back problem or, indeed, any type of injury or physical limitation.

\* **Hockey Schools**

**6**  Impressed by the intensive hockey program offered by Warner Hockey School ("Warner") in Lethbridge, Alberta, Ms. Fontaine tried out for and was accepted for grades 11 and 12. There she met Kayla Savich, a student and sister hockey player. Ms. Fontaine and Ms. Savich both convincingly testified that while attending Warner, Ms. Savich would drive members of their team, including Ms. Fontaine, to Lethbridge every Thursday evening to receive adjustments from a local chiropractor. I find that the sessions were encouraged by their coach with the objective of keeping the players limber and thereby improving their game performance, and not to treat an injury *per se*. The girls would go into the treatment room together and, in an assembly line-like fashion, the chiropractor would spend approximately five minutes adjusting each of them. Ms. Fontaine's evidence, supported by Ms. Savich's testimony, was that she did not sustain an injury to her back while at Warner, nor did she have those chiropractic treatments in order to address back problems of any kind. I find that while attending Warner Ms. Fontaine underwent chiropractic adjustments as a matter of routine to enhance her athletic performance and not to address a particular injury or any ongoing spinal symptoms.

**7**  Ms. Fontaine's father, Eugene Fontaine, himself a veteran hockey player, drove his daughter to the Kamloops rink five days a week and, when she attended Warner, often travelled to Lethbridge to watch her play. He credibly supported the testimony of his daughter and Mr. Silverstone to the effect that before the Accident, Ms. Fontaine experienced no problems or restrictions with respect to her back or any other part of her body.

**8**  Ms. Fontaine completed high school at Warner in June 2006. Her grades in physical education and some courses related to career studies were solid but she otherwise achieved about a C letter grade average. When she returned to Kamloops after graduation, she was hired by Mr. Silverstone for a period of time to assist him running hockey drills and instructing players.

**9**  While at Warner, Ms. Fontaine had been scouted by a hockey coach for the Robert Morris University ("RMU") in Chicago, Illinois. She was offered a "full ride" college scholarship and enrolled in the fall of 2006. Her friend, Ms. Savich, pursued her hockey career at a different college.

**10**  Ms. Fontaine majored in business administration and achieved respectable grades in three of her classes but failed the fourth. She left RMU in December 2006, before completion of a full academic year. She explained that she had returned home early because the distance prevented her parents from visiting and she had become terribly homesick.

**11**  Mr. Fontaine elaborated that his daughter had lived away from home since age 15 and she had found the prolonged separation that fall to be especially wearing. Although she was prepared to stick out the spring semester, with her father's encouragement, she came home instead.

**12**  Ms. Fontaine was adamant that she had not left RMU because she had sustained an injury. There are no medical records or other cogent evidence to the contrary, and I accept Ms. Fontaine's testimony on that point, which was credibly corroborated by her father. I also accept her testimony that she received no chiropractic treatments while attending RMU, other than a possible adjustment by her aunt, who is a chiropractor.

\* **Return to Kamloops**

**13**  Having resettled in Kamloops, Ms. Fontaine began attending Thompson Rivers University ("TRU") in January 2007, working towards a bachelor degree in business administration.

**14**  Ms. Fontaine and Aaron Kaliszewski moved in the same peer group and periodically socialized while attending high school in Kamloops. They reconnected shortly after Ms. Fontaine returned to Kamloops and eventually began dating in the spring of 2007. The couple led an athletic and active lifestyle before the Accident. They routinely took Ms. Fontaine's dog on long walks and runs, swam, played team sports together and worked out regularly. Mr. Kaliszewski recalled how impressed he had been when Ms. Fontaine, who has a petite frame, demonstrated her ability to leg-press 575 to 600 pounds with no difficulty.

\* **Pre-Accident Medical Appointments**

**Dr. Gordon Besse**

**15**  When Ms. Fontaine was eleven years old, her mother took her to see Dr. Besse, a chiropractor in Kamloops. Between her first visit on September 20, 1999 and her last one on March 24, 2003, she had 17 chiropractic treatments from him. Ms. Fontaine had no independent recollection of attending those sessions or why she did so.

**16**  Dr. Besse's intake form shows that the reason given by Ms. Fontaine for her initial consult was her sore neck. He testified that until roughly mid-November 2001, the majority of Ms. Fontaine's symptoms related to headaches and her cervical and thoracic spine. An exception was on August 2, 2001, where he charted her complaint of a sharp pain in her low back that occurred when she got up off the ice in respect of which he assessed "flexion antalgia". At trial, he testified that the following day she was much better and her low back pain with antalgia did not return. During Ms. Fontaine's final five sessions, Dr. Besse treated mostly her hip and full spine.

**17**  Dr. Besse explained that it was his practice to check a patient's entire spine and to adjust it when it felt tight as a preventative measure even though it may be otherwise symptom-free. He confirmed that he would frequently manipulate Ms. Fontaine's spine in areas where she had not complained of any symptoms and record those spinal adjustments in her chart.

**Dr. Isabel Barnard**

**18**  Dr. Barnard assumed the role of Ms. Fontaine's family doctor in March 2003. Between then and the Accident, she saw her approximately 20 times. At none of those appointments, including the complete physical examination she performed on August 4, 2004, did Ms. Fontaine complain of neck or back problems. The entries in Dr. Barnard's chart are consistent with Ms. Fontaine's evidence that before the Accident, she experienced no headaches or spinal problems that required medical attention.

**Northshore Treatment Center**

**19**  Ms. Fontaine was also seen twice by physicians at a local walk-in clinic prior to the Accident. The first visit on March 18, 2007 was for a sinus problem and the second time (July 3, 2007) she complained of a sore throat and cough.

\* **The Accident - September 2, 2007**

**20**  According to Ms. Fontaine, while driving her car along a highway in Kamloops she noticed that the vehicle ahead was darting in and out of the two lanes of traffic and making "crazy manoeuvres". She claims that she pulled up directly behind the vehicle as they both turned onto and crossed the Halston Bridge and then continued northbound along Westsyde Road. Ms. Fontaine was very familiar with the route.

**21**  Ms. Fontaine drove at or near the posted speed in the outside lane along a straight stretch of Westsyde Road. The car she had noticed earlier was travelling in the inside lane. She testified that ahead of that car and directly in its path was a stopped vehicle with its left turn signal activated. She recalled wondering why the car in the inside lane did not appear to be slowing down given the presence of the stopped left-turning vehicle, and became worried that it might end up veering into her lane. Her fear was realized when that car driven by the defendant, Virginia Van Kampen, now approximately one car length behind the left turning driver, suddenly swung into Ms. Fontaine's lane.

**22**  Ms. Fontaine testified that she took evasive action but was unable to avoid the collision. The impact felt more like a hard jolt than a mild sideswipe to her. She stated that her car was pushed onto the outside curb of her lane. Her recollection was that the curb was approximately 1-1/2 to 2 inches in height.

**23**  Ms. Fontaine thought that all four tires of her vehicle climbed the curb. However, she candidly admitted that she could not be certain of that and allowed for the possibility that only one or two of her tires may have struck and mounted the curb. In any event, she testified that when her tire or tires contacted the curb, her car stopped briefly before she righted it and continued in the same direction along Westsyde Road. She noticed Ms. Van Kampen's vehicle, which was now in front of hers, turn left off Westsyde Road a very short distance from where the collision occurred, and proceed for a few meters before coming to a stop. Ms. Fontaine followed and did likewise.

**24**  Ms. Fontaine claimed that neither she nor Ms. Van Kampen or her passenger left their vehicles after pulling over. She recalled positioning the driver's side of her vehicle alongside the front passenger side of Ms. Van Kampen's car and exchanging pertinent information through their open windows, while remaining seated. The parties were able to drive away; however, Ms. Fontaine's car was ultimately written off.

**25**  Ms. Van Kampen recalled the pertinent events leading up to the Accident differently. She testified that she was driving her car along Westsyde Road with her female companion, Koby Hughes, in the front passenger seat on their way to a dirt bike park. It was raining and the roads were slick.

**26**  According to Ms. Van Kampen, as she proceeded along Westsyde Road the van directly ahead of her suddenly slammed on its brakes in the middle of an intersection and then unexpectedly executed a left turn. She would not agree that the van had been stopped in her lane of travel with its signal on, indicating an intention to turn left. Ms. Van Kampen stated that she applied her brakes in response to the van's abrupt stop, and that her passenger, Ms. Hughes surprised her by grabbing the steering wheel and jerking it hard to the right causing it to "bump" into Ms. Fontaine's vehicle. She says she quickly regained control of her car and pulled it back into her lane.

**27**  Ms. Van Kampen testified that after the sideswipe, her car ended up positioned ahead of Ms. Fontaine's, which she was able to see in her peripheral vision, and did not observe it striking the curb. Her evidence is that both she and Ms. Fontaine continued to drive for about one block and then turned left onto a side road. It was her recollection that they both parked and exited their vehicles to survey the damage and exchange their insurance papers.

**28**  Ms. Van Kampen denied speeding or driving in an erratic fashion. She also unconvincingly denied crossing the Halston Bridge prior to connecting to Westsyde Road. Ms. Fontaine's counsel drew her attention to the evidence she had given at her examination for discovery approximately five weeks earlier:

1. Ok. So, we're looking here at -- where had you come from?
2. I was coming from Kamloops.
3. Well, you were actually in Kamloops. Where had you come from? Had you come over the Halston Bridge?
4. Yes.

**29**  When confronted with the obvious inconsistency, Ms. Van Kampen professed that she must have "gotten mixed up" at her discovery. However, she went on to admit that there are only two main bridges in Kamloops: the Overlander and the Halston, which are separated by several kilometres and are easily distinguishable one from the other.

**30**  In cross-examination it was suggested to Ms. Van Kampen that she had been inattentive while travelling along Westsyde Road and that it was only after Ms. Hughes jerked the steering wheel to the right that she became aware of the dangerous situation ahead and jammed on her brakes. In refuting that suggestion, Ms. Van Kampen insisted that she had applied her brakes before Ms. Hughes took hold of the wheel. Attempting to explain Ms. Hughes's actions, she claimed that Ms. Hughes, acting like "a fool", had "just grabbed the wheel for no reason" and subsequently apologized "a hundred times" for doing so. Ms. Hughes did not testify. Ms. Van Kampen's testimony on this matter was highly implausible.

**31**  Although neither party was able to reliably recount all of the details of the Accident, Ms. Fontaine did not give implausible or internally inconsistent evidence, as had Ms. Van Kampen. In the end, I have greater confidence in the accuracy of Ms. Fontaine's version of the events and prefer it over Ms. Van Kampen's to the extent of any discrepancy. Specifically, I find that upon being sideswiped by Ms. Van Kampen's car, one or two of the tires of Ms. Fontaine's vehicle mounted the small curb that ran along the outside of her lane, causing her vehicle to pause momentarily before returning to its path of travel.

**32**  The defendants depict the Accident as a minor collision. In support of that characterization they tendered the expert opinion of Gerald Sdoutz, a mechanical engineer with expertise in investigating and reconstructing motor vehicle collisions. His analysis focused on the severity of the contact between the parties' vehicles and of Ms. Fontaine's impact against the curb. Mr. Sdoutz also testified at trial.

**33**  As a means of quantifying the nature of Ms. Fontaine's experience inside her car during the Accident, Mr. Sdoutz relied on a measurement known the "vibration dose value" ("VDV"), which is a calculation based on the acceleration time history of the event. Drawing on a comparison of photographs and descriptions of damage inflicted on test vehicles with the damage sustained to the vehicles in the Accident, and the findings of another study that measured the overall VDVs for a small car driving normally on city roads, he concluded that Ms. Fontaine's experience upon impact would have likely been similar to the typical jostling of an average car on a city street, and less like the kind of jostle produced by a tractor on a farm road.

**34**  In sum, Mr. Sdoutz's thinking was that the collision was minor and the sideswipe contact would not have been sufficient to re-direct Ms. Fontaine's vehicle. He therefore concluded that in order for her right side tires to have ridden up the curb, her vehicle must have been steered to the right, likely in an attempt to avoid a collision. I find this was the case. Mr. Sdoutz reasoned further that the right front wheel of Ms. Fontaine's car would have been turned toward the curb and, because the rims did not show signs of impact, whatever curb contact had occurred would likely have been absorbed by the front tires. He confirmed that the front to back impact experienced by Ms. Fontaine when her vehicle ran up on the curb would have caused a speed change of between two to four kilometres per hour. At trial, he elaborated that if the impact against the curb had caused Ms. Fontaine's vehicle to stop, which I find it had, at least momentarily, a higher speed change would have resulted. In cross-examination, Mr. Sdoutz agreed that the vertical movement experienced by Ms. Fontaine on impact with the curb could be a significant feature of the Accident, but that he had not taken that factor into account in formulating his opinion.

**35**  Permeating the tenor of much of the defendants' case was the supposition that where the structural damage to a vehicle and/or the force of the collision is classified as relatively minor from the perspective of an engineer, it follows that injury to the vehicle occupant must also be of small consequence. This Court has repeatedly observed that such a reasoning is dubious in the absence of cogent evidence that connects those core propositions: *Gordon v. Palmer* [*(1993), 78 B.C.L.R. (2d) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-230Y-00000-00&context=); *Sooch v. Snell*, [*2012 BCSC 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3V4-00000-00&context=); *Tarzwell v. Ewashina*, [*2011 BCSC 1464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-2299-00000-00&context=). As Dley J. instructively remarked in *Tarzwell* at para. 51:

... Even if one accepts the defendant's version of the collision, as being minor with no resulting physical damage to either car, that does not default to an assumption that injuries could not result or must be minor. The severity or extent of damage to a vehicle is not determinative of the consequences to the vehicle occupants.

**36**  There was no evidence that the force of the impact in this case could not have produced or is inconsistent with the physical symptoms complained of by Ms. Fontaine, whether or not her vehicle hit the curb.

**37**  In final submissions, defence counsel acknowledged that the simple fact that the Accident may have been minor, did not exclude the possibility that it caused injury to Ms. Fontaine. In fact, the defendants concede that the Accident *did* cause her a degree of soft tissue injury to her neck and back. They say that the relevance of Mr. Sdoutz's opinion is that it establishes that the collision was minor which they assert supports their contention that Ms. Fontaine overstated the nature and severity of the impact to the physicians who tendered expert opinion evidence on her behalf. Building on that premise, the defendants argue that her exaggerated recitation of the nature of the Accident weakens the opinions of those experts and taints Ms. Fontaine's credibility at large.

**38**  As will be seen, it is my conclusion that Ms. Fontaine did not misstate the nature of the collision to any physician and that this line of argument goes nowhere. In the end, while I found Mr. Sdoutz's report to be of general interest, it did not advance the defendants' case.

\* **Aftermath of the Accident**

**39**  Ms. Fontaine testified that she became progressively uncomfortable right after the Accident. Her regular family doctor, Dr. Barnard, was away and so, on September 4, 2007, she returned to the Northshore walk-in clinic where she was seen by Dr. Krista Bradley. She told Dr. Bradley that she had been "hit on the driver's side" and had no history of problems with her neck or back. Dr. Bradley charted Ms. Fontaine's complaints as left and right lower lumbar pain, moderate to severe headaches and "really sore" neck and shoulders, and assessed muscle strain and sprain in her back and neck. She recommended rest, gentle movements, heat and massage therapy and prescribed Tylenol 3 for pain, a muscle relaxant and an anti-inflammatory, and told to follow up at the clinic as necessary.

**40**  Ms. Fontaine was next seen by another physician at the Northshore clinic on September 11, 2007. The intake nurse recorded complaints of continuing pain in Ms. Fontaine's paraspinal area and her cervical and thoracic spine. The examining doctor noted muscle spasm and pain in the cervical and lumbar aspects of her spine. Rest, heat, and massage with continuing use of the prescribed medications were advised.

**41**  At the time of the Accident, Ms. Fontaine was in the probationary period of her recently acquired job as a customer service representative. Her position required her to answer incoming calls while seated at a desk. During the medical visit on September 11, 2007, the physician wrote a note to the effect that she was still suffering from lumbar pain and was unable to return to work until September 17. The doctor also wrote a separate referral for massage therapy to treat Ms. Fontaine's "muscle spasm, back and c-spine post MVA".

**42**  On September 17, 2007, Ms. Fontaine attended Halston Place Physiotherapy & Massage. On the file opening form, she described her injury as "got sideswiped by another car". When she met with the massage therapist, Melanie Roberts, Ms. Fontaine elaborated that the driver in the left lane had veered into her lane and pushed her car onto the sidewalk. In the initial consult, her signs and symptoms were recorded as low to mid-back and neck stiffness with headaches and poor sleep.

**43**  By September 18, Ms. Fontaine's back and neck symptoms had not improved, despite having received two massages. Dr. Bradley assessed upper back, low back and neck strain and authored a note stating that Ms. Fontaine would be off work for another month due to injury. Dr. Bradley recommended and demonstrated exercises and stretches to Ms. Fontaine to help minimize her pain and other symptoms. She also suggested that Ms. Fontaine add physiotherapy as a mode of treatment in conjunction with massage therapy. In the ensuing three weeks, Ms. Fontaine had five additional massage sessions that concentrated on her neck and thoracic and lumbar spine.

**44**  Ms. Fontaine testified that the cost of massage therapy was expensive and that her parents had paid for them because she had no extended benefit coverage. She agreed that they would have likely paid for her to attend physiotherapy, but that she did not ask them to do so and, consequently, she did not pursue Dr. Bradley's recommendation that she try physiotherapy.

**45**  The evidence establishes that Ms. Fontaine's injuries interfered with her job attendance and performance and eventually led to the termination of her employment in or around October 2007. Later that same month, she accepted a new job, working full-time as a cashier in a liquor store.

**46**  On October 29, 2007, Ms. Fontaine saw Dr. Barnard's locum. The clinical chart indicates she reported having been broad-sided in the Accident and subsequently fired from her job, "as unable to work". That was accurate. She complained of significant pain in her low back radiating down her left leg, and of sleep disturbance due to pain. Among other things, the locum noted tenderness to palpation of Ms. Fontaine's low back and sacroiliac joint and a slight winging at her scapula. The recorded impression was multiple soft tissue triggers, which Dr. Barnard clarified meant multiple sore points. A sleep medication was prescribed, and she was told to return in one week's time.

**47**  In follow up on November 5, the locum wrote a note "for ICBC" addressed "to whom it may concern". It stated that Ms. Fontaine had been unable to work due to injuries since the Accident, and was incapable of doing physical work or prolonged sitting.

**48**  Ms. Fontaine was seen by Dr. Barnard for the first time after the Accident on December 5, 2007. She reported that her neck was a lot better, but that her low back was not, and that she felt numbness in her right thigh. Dr. Barnard sent her for an x-ray of her sacroiliac joint and lumbar spine. The results of both were normal.

**49**  It would appear that Ms. Fontaine did not try out for the TRU or any other hockey team or play hockey at all in the eight months of 2007 preceding the Accident. Her testimony was that shortly after the Accident she had, on one occasion, skated with the local women's team, The Vibe, which played a significantly lower calibre of hockey than the elite level she was capable of. Ms. Fontaine persuasively testified that the pain in her lower back was so intense she was unable to bend over while skating or even push her legs, and that she was so discouraged she hung up her skates for good. Her father's recollection, which I accept as accurate, is that she came home that day distraught and in tears.

\* **Move to Alberta**

**50**  At the end of January or the beginning of February 2008, Ms. Fontaine and Mr. Kaliszewski moved to the small community of St. Paul in northern Alberta. Ms. Fontaine testified that her low back symptoms persisted and she continued to find it difficult to stand and sit for extended periods of time. She also testified that her neck pain and headaches lingered.

**51**  During the six months or so that the couple lived in St. Paul, Ms. Fontaine did not seek out a family doctor, physiotherapist or chiropractor. Although there was some discrepancy between her evidence at discovery and at trial, I conclude that while residing in St. Paul, Ms. Fontaine had massage therapy three or four times in the therapist's private home to address her symptoms, and within this timeline also had a massage while on a trip back to Kamloops.

**52**  While in St. Paul, Ms. Fontaine worked as a waitress at a pizza place and a Smitty's restaurant. Although her hours fluctuated, she agreed that her job at Smitty's was a full-time position. Mr. Kaliszewski was away working in camp about 60% of the time and was otherwise at home. When at home, he would do the lion's share of the household chores. Ms. Fontaine's sister, who lived nearby, would also regularly help out around the house.

**53**  In the late summer of 2008, Ms. Fontaine and Mr. Kaliszewski moved to Fort McMurray. Ms. Fontaine's parents had previously relocated there. According to Ms. Fontaine, her low back pain began to appreciably worsen around the time of or shortly after the move. Mr. Kaliszewski supported her evidence on that point.

**54**  Ms. Fontaine testified that soon after relocating to Fort McMurray, she began to receive hour-long massages on a monthly basis from a woman called Tammy, whose husband worked with Ms. Fontaine's mother. Those treatments provided her some symptomatic relief, but the positive results were not long-lasting. I believe her.

\* **Drs. Bernard Nwaka and Wilhelm Meerholz**

**55**  On May 20, 2009, Ms. Fontaine became a new patient of Dr. Nwaka. She had not seen a doctor about her Accident-related injuries since December, 2007, a period of close to 18 months. Dr. Nwaka provided an opinion as an expert in family medicine on Ms. Fontaine's behalf and testified at trial.

**56**  As noted earlier, one branch of the defence theory is that Ms. Fontaine misstated the nature of the impact of the collision to Dr. Nwaka. In his records and written opinion, he described Ms. Fontaine's vehicle as having been "T-boned" in the Accident. Ms. Fontaine denied portraying the Accident to him that way. At trial, Dr. Nwaka explained that he was aware that she had been sideswiped and not T-boned, and had inadvertently used the wrong descriptor in his report and chart. I accept his evidence.

**57**  Ms. Fontaine testified that, although her most bothersome symptom was her low back pain throughout the time she saw Dr. Nwaka, she also continued to experience residual neck pain and headaches. At the first appointment, Dr. Nwaka charted complaints of a history of persistent low back pain but made no notation of neck pain or headaches. Ms. Fontaine was not sure whether she had mentioned her neck pain to Dr. Nwaka, but believed she did report her headaches. Dr. Nwaka testified that it is his practice to record only the key problems relayed by the patient and that he might not make entries respecting all of the complaints that are raised during a particular appointment.

**58**  Dr. Nwaka did not have Ms. Fontaine's medical records or any treatment reports when she came under his care. She told him or left him with the distinct impression that she had tried chiropractic treatments before she saw him, and that despite those treatments and sessions of massage therapy, her low back pain had worsened over time. While I accept that Ms. Fontaine had received massage therapy in St. Paul and upon settling in Fort McMurray, she had not seen a chiropractor for many years and certainly not after the Accident. When confronted with that reality in cross-examination, Ms. Fontaine hinted that perhaps the problem lay with Dr. Nwaka in the sense that he had misunderstood her. Given my finding that she made the same erroneous representation to Dr. Meerholz (referred to below), I am not persuaded of that.

**59**  In any case, Dr. Nwaka referred Ms. Fontaine for an MRI of her lumbar spine, which was performed on July 23, 2009. It indicated the presence of significant disc desiccation at the L4-5 and L5-S1 levels, with a possible small posterior annular tear of the L4-5 disc. Upon receipt of the MRI imaging, Dr. Nwaka referred Ms. Fontaine to the Caleo Health Centre in Calgary for further assessment and management.

**60**  Within the foregoing time frame, Ms. Fontaine also occasionally consulted Dr. Nwaka about non-Accident related matters. She continued to see him between September 28, 2009 and October 21, 2010; some of those appointments were to address her ongoing low back symptoms and others were not.

**61**  Dr. Meerholz is a medical doctor who performs back and spine triage assessments for orthopedic surgeons and neurosurgeons at the Caleo Health Centre in Calgary. Ms. Fontaine was seen by him and other members of the spine team on October 2, 2009. As she had done with Dr. Nwaka, she represented to Dr. Meerholz that she had undergone a trial of chiropractic treatments following the Accident which provided her with temporary relief only. In cross-examination, Ms. Fontaine conceded that what she told Dr. Meerholz was not accurate. Indeed, it was plainly false.

**62**  Dr. Meerholz's view was that Ms. Fontaine may benefit from conservative measures of physiotherapy consisting of a specified strengthening program, with the objective of improving the mobility and stability of her spine and decreasing irritation. He also recommended that she complete core strengthening and receive facet joint injections and then follow up with the Caleo Health Centre in six to eight weeks.

**63**  Dr. Nwaka reviewed Dr. Meerholz's recommendations to implement a trial of physiotherapy with Ms. Fontaine. She explained that she was doing the home exercises that Dr. Meerholz had provided to her and did not pursue the suggested course of physiotherapy at that time.

**64**  Ms. Fontaine next saw Dr. Meerholz on April 1, 2010, nearly one year after her initial assessment, and again on May 12, 2010. She reported that while she had good and bad days with her symptoms, overall her continuous low back pain on both sides, which at times radiated from her groin down to her heel, had not improved. At the May 12th visit, Dr. Meerholz suggested that she return after she completed a spinal rehabilitation program. At trial, he clarified that such a program would encompass physiotherapy, massage therapy and exercise.

**65**  Ms. Fontaine did not enrol in a rehabilitation program and received no physiotherapy. However, she continued to receive massages from time to time and perform the recommended stretches and exercises at home. As well, in accordance with another of Dr. Meerholz's suggestions, she travelled to Calgary for cortisone injections on both sides of her facet joints. At trial, she testified that they gave her temporary relief only and so she decided not to repeat the procedure.

**66**  Ms. Fontaine saw Dr. Nwaka on two occasions in the fall of 2010 and visited a separate walk-in clinic on October 19, 2010 and February 26, 2011, all for matters unrelated to her spinal symptoms. She testified that she did not mention her low back pain to Dr. Nwaka when she was seeing him for unrelated ailments because he was already well aware of those difficulties. That explanation strikes me as plausible, and I accept it.

**67**  In January 2011, Dr. Meerholz ordered a second MRI which was carried out on March 16, 2011. It revealed the presence of additional degenerative disc disease at the L3-4 level of her spine.

**68**  Ms. Fontaine also had two chiropractic treatments in or around November and December 2010 and a third session in late 2011. Contrary to her statements to Dr. Nwaka and Dr. Meerholz, these were the only chiropractic treatments she received after the Accident.

\* **Physiotherapy Treatments at the Blackgold Clinic - 2012**

**69**  In mid-June 2012, Ms. Fontaine began an eight week program of rehabilitative physiotherapy at the Blackgold Physical Therapy clinic on referral from Dr. Nwaka. Mr. Kaliszewski's impression was those physiotherapy sessions have been of greater benefit to his wife than the massage therapy she has received. Ms. Fontaine explained that the two modalities have both helped her, although in somewhat different ways, but that the symptomatic relief they provided was only temporary. Her observation is consistent with Dr. Meerholz's testimony to the effect that those treatments can work well individually for lumbar pain and as complementary therapies. Ms. Fontaine made it clear that the physiotherapy sessions have not resolved her low back symptoms.

**70**  Mr. Kaliszewski believed that his wife had received physiotherapy at a different clinic long before she started with Blackgold in June 2012. However, the evidence establishes that her first physiotherapy treatment after the Accident was on June 19, 2012, at the Blackgold clinic. My view is that Mr. Kaliszewski was honestly mistaken on the point and was not attempting to deceive the Court.

**71**  The defendants suggest that Ms. Fontaine has not attended the number of physiotherapy sessions that Dr. Nwaka recommended she take at the Blackgold clinic. The evidence on that point was equivocal. I accept that she attended the appointments substantially in accordance with the medical recommendation, making allowances for the reality that her work schedule did not permit her to attend three times every week.

\* **Employment in Fort McMurray**

**72**  From the time she began work at the liquor store in Kamloops not long after the Accident, Ms. Fontaine has not missed any time from work due to her low back complaints or any other injuries sustained in the Accident. Since moving to Fort McMurray, she has held full-time employment with a variety of companies. Most of her positions have been clerical or administrative in nature and all of them have been largely sedentary.

**73**  At the time of trial, Ms. Fontaine was employed by Johnson Controls in an administrative type position as a scheduler. She had been there (or with the company that it had taken over or merged with) for approximately 14 months. She currently works 16 consecutive days, 12 hours per day, followed by 12 days off. She normally commutes to and from the job site on the company bus, and her daily travel time adds another two and sometimes three hours to her 12-hour shift. Her present salary is $120,000 per annum.

**74**  Ms. Fontaine testified that she encounters difficulties discharging her duties at work because of the pain and functional limitations, especially her intolerance for prolonged sitting caused by her low back injury in particular. She testified that she perseveres because "I have to".

\* **Wedding and New Home**

**75**  On May 10, 2012, Ms. Fontaine and Mr. Kaliszewski were married in Mexico, where they spent a week before departing for a two-week honeymoon in Italy.

**76**  The cost of living in Fort McMurray is extremely high. Around the time they married, the couple sold their modular home for approximately $540,000 and purchased a three-level house in Fort McMurray from Ms. Fontaine's father for approximately $960,000. The main and upper floor occupied by Ms. Fontaine and her husband is approximately 2,400 square feet. The basement area, which is tenanted, is about 700 square feet.

\* **Weight Gain**

**77**  During her teen years and continuing through adulthood, Ms. Fontaine has relied on regular cardiovascular exercise to keep physically fit and trim. As an active hockey player, she consumed "a lot" of calories, but was able to hold her weight at 150 pounds on account of her active lifestyle. I accept that when she returned to Kamloops from RMU in December 2006, she weighed her usual 150 pounds. Although she did not play competitive hockey while attending TRU or thereafter before the Accident, Ms. Fontaine joined a women's gym where she routinely worked out and maintained her extremely active lifestyle. It can be reasonably inferred from the evidence that during this period, namely from January 2007 until the time of the Accident, her weight remained stable at a 150 pounds. That changed after the Accident.

**78**  By the time of her first appointment with Dr. Nwaka in May 2009, Ms. Fontaine weighed 175 pounds. Within the ensuing four months, she gained an additional 19 pounds and by August 1, 2012, she was over 200 pounds. Ms. Fontaine testified that she had put on the majority of her weight after the move to Fort McMurray, although Mr. Kaliszewski seemed to think she had gained most of it before they relocated there. I find that Ms. Fontaine kept more accurate track of her ballooning weight problem than did her husband, and accept her evidence in preference to his.

**79**  Ms. Fontaine attributed her dramatic post-Accident weight gain to her inability to manage her weight through a regimen of intensive and regular cardiovascular activities the way she had done before the Accident. Mr. Kaliszewski supported his wife's credible testimony that her unwelcome weight gain came to undermine her self-confidence and self-esteem.

**80**  Since the Accident, Ms. Fontaine has consulted with a dietitian for advice and attempted many diets, which have resulted in only marginal and temporary success. Mr. Kaliszewski explained his wife's pattern of losing ten pounds or so and then gaining it back, despite the fact that she only eats two meals a day.

**81**  At the time of trial, Ms. Fontaine was enrolled in the Weight Watchers program. There was no cogent evidence as to her progress.

\* **Additional Evidence of Family Members**

**82**  Mr. Kaliszewski impressed me as a forthright and even earnest witness who did not embellish his testimony in a way aimed at advancing his wife's litigation interests. Her father also presented as a reliable and credible witness.

**83**  Both of them spoke with genuine emotion about Ms. Fontaine's dramatic decline in the aftermath of the Accident. They described her as a stoic young woman who prefers to endure pain and discomfort quietly and is not prone to complain. Even so, it has been obvious to them that she has been struggling and in pain since the Accident.

**84**  Mr. Kaliszewski supported his wife's testimony about the progression of her symptoms after the Accident and the worsening of her low back pain in particular, which he described as being present "24/7" around the time they relocated to Fort McMurray. Her low back symptoms occasionally implicate her hips with pain and/or numbness radiating down one or both of her legs. She has taken Advil and/or Tylenol nearly daily since the Accident and sometimes grimaces from the pain. Mr. Kaliszewski described her movements after the Accident as stiff and robotic-like and said she had developed a duck-like gait, shifting from side to side. Mr. Fontaine observed that his daughter's posture and movement was more frozen and much less fluid than it had been before the Accident. He has noticed tears welling up in her eyes on occasion because of her pain.

**85**  Mr. Kaliszewski detailed how his wife's injuries have prevented her from participating in most of the athletic and recreational pursuits that they enjoyed before the Accident, such as intense gym workouts, taking their dog on long runs, playing volleyball, camping and hiking. He testified that she finds bending forward exceptionally problematic.

**86**  They seldom go to a movie, which was an outing they frequently enjoyed before the Accident, because Ms. Fontaine cannot tolerate the prolonged sitting. They choose restaurants based on the kind of seating it offers and even then Ms. Fontaine typically fidgets in her chair as she tries to get comfortable during the meal. When they drive a long distance, for example to Edmonton to visit family, they have to take several breaks to accommodate Ms. Fontaine's need to get out of the car and move around as a means of coping with her symptoms. The couple still take an average of about two vacations a year, usually to a warmer climate. Ms. Fontaine finds the long flights difficult. She tosses and turns in her sleep due to her discomfort and rarely sleeps through the night. Her fitfulness occasionally awakens Mr. Kaliszewski although he noticed that her sleep seems to have improved recently with the purchase of a new mattress.

**87**  Before the Accident, the couple frequently danced at a club where Mr. Kaliszewski worked; after the Accident, Ms. Fontaine feels too much discomfort to enjoy that fun past time. They both testified that their physical intimacy has been very much compromised due to Ms. Fontaine's low back discomfort.

**88**  Mr. Kaliszewski has witnessed an obvious deterioration of his wife's mood and emotional well-being. Ms. Fontaine testified about her emotional decline, noting that she has been taking antidepressants "for a little while". I find her low mood is related to the pain and physical limitations imposed by her low back injury as well as her low self-esteem occasioned by the unwanted additional weight that she has been unable to shed.

**89**  According to Mr. Kaliszewski, his wife sometimes vacuums the wood floors, but is not able to manage the vacuuming of the carpets in the upstairs rooms, nor do any heavy lifting, scrubbing or hard cleaning. She needs to hold onto the bannister when she uses the stairs, making it impossible for her to carry a basket of laundry or other items that require her to use two hands while going up or down the stairs. Prior to the Accident, she regularly gardened and did yard maintenance at her parent's home. Now, she is not able to mow her lawn in summer or shovel snow in the winter. Ms. Fontaine's cousin and the basement tenant have pitched in this past summer to mow the lawn, and one of her sisters has visited from Edmonton periodically to lend a hand with the more demanding household chores.

**90**  Mr. Kaliszewski also performs many of the domestic chores. He typically works three day shifts followed by three night shifts, with the next six days off. He is occasionally required to work at a more demanding overtime pace during the shutdown of his workplace plant, but subject to that, is able to be home during the day every nine of twelve days.

**91**  Ms. Fontaine is able to prepare meals and clean surfaces in the kitchen and elsewhere, mop the floors and attend to her own personal grooming. She is also able to watch television, although not as much as she likes because she finds the prolonged sitting too tiring. She and her husband do the grocery shopping together. In about June 2012, they employed a housekeeper to perform the heavy cleaning chores once every three weeks or so.

**92**  Despite the high cost of living, Mr. Kaliszewski and his wife plan to remain in Fort McMurray for the duration of their working lives. They hope to have two or possibly three children together at some unspecified future time.

\* **Ms. Fontaine's Credibility**

**93**  Ms. Fontaine's credibility and the reliability of her evidence are pivotal in determining the causation of her injuries as well as her damages. They also have bearing on the weight to be given to the medical opinions to the extent that they are tied to her subjective reporting and recitation of her activities and condition before and after Accident.

**94**  As noted earlier, in January 2007 Ms. Fontaine had started as a full-time student at TRU. Of her four courses, she withdrew from one and failed the others. She did not enrol for the next semester. In her direct evidence, Ms. Fontaine explained her abysmal academic performance in some detail, stating that she had found it difficult to remain seated in the classroom on account of her injuries and was therefore absent from class a good deal of the time. She presented the Accident as the sole reason for failing her courses at TRU. When pressed in cross-examination, she reluctantly agreed that she had in fact attended TRU before the Accident. She then suggested that her courses in the January 2007 term may not have been the only ones she took at TRU, meekly implying that she had also taken classes after the Accident. When questioned further, however, Ms. Fontaine admitted that she had not attended TRU after the Accident, and ultimately acknowledged that her poor academic performance there had occurred before the Accident.

**95**  In her evidence in-chief, Ms. Fontaine gave evidence in broad strokes about having received massage therapy, chiropractic care and physiotherapy for her ongoing back symptoms, creating the erroneous impression that she had attempted all of those modalities after the Accident with limited symptomatic relief. As noted, she had similarly misstated her post-Accident chiropractic treatments to Drs. Nwaka and Meerholz. At trial, she was not able to offer a satisfactory explanation about why she had made those misrepresentations. In my view, her misreporting to those physicians and less than candid testimony at trial on that matter and groundless insistence that the Accident was to blame for her lackluster academic performance at TRU were not the result of merely being a poor historian. It went further than that and suggested a preparedness to overstate the severity of her symptoms, her diligence in addressing them, and their adverse impact. These troublesome features of Ms. Fontaine's testimony pose some concern.

**96**  Linked to their several discrete criticisms of Ms. Fontaine's credibility, and relevant to the issues of causation and damages, is the defendants' additional complaint that her account of the nature and duration of her symptoms does not harmonize with her day-to-day activities, including her exceptionally long workdays, and were not always reflected in the medical records. They also say that the significant gap of time between December 2007 and May 2009 where Ms. Fontaine did not seek any medical assistance or treatment for her injuries is especially telling and indicates that her injuries had essentially resolved within that timeframe.

**97**  In *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=) (S.C.), aff'd [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=), at paras. 34-37 N. Smith J. provided instructive commentary on the evidentiary use of clinical records including the relevance of the patient's documented statements and of their absence:

The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, [*2004 BCSC 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B283-00000-00&context=), at paragraph 104:

... the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the Accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

**98**  Remarks highlighting the need to take care in the judicial treatment of clinical records along similar lines can be found in numerous additional authorities. Particularly apt here are the remarks of Griffin J. in *Tsalamandris v. McDonald*, [*2011 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6201-00000-00&context=), para. 133:

... A treating physician is not a scribe, writing down everything the patient says verbatim in anticipation of a future legal battle where every word and every absent word will be highlighted for significance. Nor is the patient shown the notes at the time, and so she has no opportunity to correct the misunderstanding of what the patient said.

**99**  Defendants' counsel expanded the criticism to encompass Drs. Nwaka and Meerholz for their alleged failure to address the gap in Ms. Fontaine's medical appointments. Yet, defence counsel elected not to cross-examine either doctor on that point in any meaningful way. The absence of commentary on the part of these physicians does not detract from the weight to be afforded to their respective opinions.

**100**  I am likewise not bothered by the fact that on the occasions when Ms. Fontaine saw a physician for a non-Accident related complaint, she did not mention her injuries. It is also my view that she chose not to discuss her sore neck and headache symptoms when complaining of her ongoing low back pain because they were of small comparative importance and in her mind warranted less medical attention than her low back deficit. Indeed, I conclude that the frequency and intensity of Ms. Fontaine's neck whiplash and headaches improved considerably within the first year of the Accident, although they did not resolve entirely.

**101**  An inference that Ms. Fontaine had recovered from her injuries before or around the time of her move to Fort McMurray as urged by the defendants cannot be properly drawn solely or predominantly on the basis that certain symptoms are absent from the clinical records, nor from the existence of the 17 to 18 month gap in seeking medical treatment for her injuries. This is especially true in light of the fact that Ms. Fontaine continued to receive massage therapy within that period, is a stoic person not prone to complain, and was young and extremely physically fit when the Accident happened. Additionally, I accept that her low back pain and corresponding dysfunction gradually worsened in the year or so following the Accident, and so before then when she was living in St. Paul and in the early days in Fort McMurray, she reasonably perceived less need for continued medical intervention.

**102**  Evaluating Ms. Fontaine's testimony against the whole of the evidence, I conclude that some of the defendants' criticisms of her were little more than "straw man" arguments, and that a number of the shortcomings they emphasized are of no moment and did not impugn her credibility on central issues. As was observed by Brenner J. (as he then was) in *Noyes v. Stoffregen*, [*[1995] B.C.J. No. 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0TB-00000-00&context=) (S.C.), it is not uncommon for a plaintiff in a personal injury case to become deeply focussed on her injuries and unconsciously exaggerate the deleterious aspects of their effect upon her. (See also *Dinyar-Fraser v. Laurentian Bank et al.*, [*2005 BCSC 1432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B24S-00000-00&context=) at para. 18.) I am satisfied this largely explains Ms. Fontaine's repeated misstatements about the nature and timing of the treatment modalities undertaken after the Accident. Despite my misgivings, her testimonial deficiencies were not of the kind or significance to justify the conclusion that she is a discreditable witness across the board or to require independent corroborative evidence in order to accept her testimony about the sequelae of the Accident. I find this in large part because of the convincing force of the supportive testimony of her father and husband. That said, her credibility did not emerge entirely unsoiled at the end of cross-examination and I have approached her testimony with a degree of caution.

**CAUSATION**

\* **Basic Principles**

**103**  For Ms. Fontaine to recover damages there must be a causal link between the Accident and her injuries. The primary test used in determining causation is known as the "*but for*" test. The plaintiff bears the burden of showing, on the balance of probabilities, that "but for" the defendant's negligent act or omission, the injury would not have occurred.

**104**  A plaintiff does not need to establish that the defendant's wrongful conduct is the sole cause of the injury. So long as the plaintiff proves a substantial connection between the injuries and the defendant's ***negligence*** beyond the "*de minimus*" range, the defendant will be fully liable for the harm suffered, even if other causal factors, which the defendant is not responsible for, were at play in producing the harm: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=); *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=); *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=); *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=).

**105**  The causation test does not demand scientific precision and is not to be applied too rigidly: *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=). Causation is a practical question of fact that can best be answered by ordinary common sense. As Dardi J. reminded in *Midgley v. Nguyen*, [*2013 BCSC 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=), at para. 172, the legal concept of causation is different from the more rigorous standard applied in the medical field that approaches scientific certainty.

**106**  The court will exercise caution in inferring legal causation by exclusive or substantial reference to a temporal sequence of events, which often takes the form of comparing the plaintiff's condition in the pre and post-Accident scenarios: *Madill v. Sithivong*, [*2012 BCCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1T2-00000-00&context=) at para. 20; *White v. Stonestreet*, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=) at paras. 74-75. As I have noted in past decisions, it does not follow that the judicial insistence of caution signifies judicial thinking that temporal reasoning is an illegitimate analysis or a branch of logic to be seldom invoked: see also, *Midgley*.

**107**  The defendants' position is that Ms. Fontaine sustained minor soft tissue injuries to her neck and back as a result of the Accident. They contend that her degenerative disc disease is not causally related to the Accident and therefore any back complaints attributable to such disease, which they contend include all those she claims to have endured from May 2009 forward, were not caused by the Accident.

**108**  The parties agreed, by way of a formal admission, that the degenerative disc disease detected at the L3-4, L4-5 and L5-S1 levels of Ms. Fontaine's spine was not caused by the Accident.

\* **Analysis of Causation**

**Dr. Nwaka**

**109**  Dr. Nwaka was qualified as an expert in the area of family practice and provided an expert report dated June 30, 2012 on Ms. Fontaine's behalf.

**110**  In his opinion, Ms. Fontaine's long-standing chronic low back pain and neck complaints, which dated back to the occurrence of the Accident, were caused by it. I understood him to disagree with the proposition that the causative source of Ms. Fontaine's low back pain was her degenerative disc condition in the sense that whatever caused that condition also caused her symptoms. In his view, the Accident activated her degenerative condition and rendered it symptomatic. He was not prepared to defer her to a neurosurgeon such as Dr. Pacquette on that issue.

**111**  Dr. Nwaka's primary line of reasoning as to causation was based on a temporal comparison of Ms. Fontaine before and after the Accident, namely that she had experienced low back symptoms and impaired function after the Accident whereas she had not beforehand.

**112**  Dr. Nwaka did not know Ms. Fontaine's health or medical status before he began treating her on May 20, 2009. He was asked whether he would modify his opinion as to causation if she had a pre-Accident history of treatment by a chiropractor. He answered that even if Ms. Fontaine had received chiropractic treatment in the L5 area of her spine, it would not necessarily change his opinion. Whether or not he would modify his opinion in light of such information would depend on the reason Ms. Fontaine had sought chiropractic care and how long before the Accident such treatments had taken place.

**113**  Dr. Nwaka testified that by August 27, 2009, Ms. Fontaine came within the medical classification of obese. He agreed that obese people can have low back pain and that he would generally endorse a regimen of regular exercise for such patients. At no time did he comment on the relationship, if any, between Ms. Fontaine's post-Accident weight gain and the onset, nature or intensity of her chronic low back symptoms.

**114**  Dr. Nwaka predicted a very poor prognosis for Ms. Fontaine's complete recovery to her pre-morbid status. His view was that if the eight week stint of intensive therapy that she had recently undergone at the Blackgold clinic did not improve her condition, she would be left with "a long time continuing problem".

**Dr. William Meerholz**

**115**  Dr. Meerholz provided two written reports in this action respectively dated August 1 and August 12, 2012, and testified at trial.

**116**  In furtherance of their theory that Ms. Fontaine overstated the severity of the collision to her physicians, the defendants interpreted Dr. Meerholz's first report as stating that she told him the collision was a lateral side impact on both sides of her car. However, the way I read his report, that statement represents Dr. Meerholz's conclusion based upon Ms. Fontaine's accurate report to him about the nature of the Accident. More to the point, in Dr. Meerholz's second report, which is almost exclusively devoted to the question of causation, he relies on Dr. Pacquette's summary of the mechanics of the Accident and not his mistaken understanding that there had been a lateral collision. As mentioned, this line of argument was unhelpful to the defence.

**117**  Dr. Meerholz diagnosed Ms. Fontaine with grade 2 whiplash of her neck and upper and low back and opined that they were caused by the Accident. He noted that her symptoms had waxed and waned but had not resolved.

**118**  Dr. Meerholz agreed with the common-sense proposition that having knowledge of Ms. Fontaine's pre-Accident medical history was essential to the determination of causation. To that end, he had reviewed the medical records kept by Dr. Bradley and Dr. Barnard (or physicians at their respective clinics), Dr. Besse's chart, the records of Ms. Roberts (the massage therapist) and the medical reports of the other experts and, in the case of Dr. Nwaka, his clinical chart as well.

**119**  Dr. Meerholz referred to a long term scientific study that showed the presence of degenerative disc disease in the spine to be extremely common in individuals involved in competitive ice hockey as adolescents. He reasoned that findings of a degenerative disc in a person who played elite level hockey as a teenager, as did Ms. Fontaine, would therefore not be unexpected.

**120**  Dr. Meerholz also drew attention to a separate study that found the frequency of a degenerative disc condition in asymptomatic adolescents was 19 to 26%, and was present in 42 to 58% of adolescents who experienced low back symptoms. He remarked that it very common for individuals to have degenerative disc disease and yet be entirely asymptomatic and that, consequently, the existence of the disease does not invariably equate to the presence of pain or other symptoms.

**121**  Dr. Meerholz shared most aspects of Dr. Pacquette's opinion, except that the Accident had not been a significant contributor to Ms. Fontaine's post-Accident symptomatology. In his view, the extent of Ms. Fontaine's degenerative disc disease identified on the MRI evaluations correlated with her ongoing mechanical back symptoms. His belief is that the Accident flared up Ms. Fontaine's disc degeneration thereby triggering her back pain and symptoms. Dr. Meerholz opined that the Accident was therefore a causative factor to the onset of her low back pain. In his view, had the Accident not happened, Ms. Fontaine might have had an uneventful life with no back pain, as she had already appeared to have stopped playing high-level competitive hockey.

**122**  Defence counsel was dissatisfied with Dr. Meerholz's summary of Dr. Besse's pre-Accident chiropractic treatments in that he neglected to reference all entries pertaining to Ms. Fontaine's low back area. It is plain that Dr. Meerholz's omissions were not deliberate. I have concluded that Ms. Fontaine did not have an ongoing injury or problem with her low back or other chronic physical symptoms before the Accident. In light of my finding, Dr. Meerholz's oversight does not detract from the quality of his opinion and I conclude that nothing of importance turns on it.

**123**  Ms. Fontaine was cross-examined about what she told Dr. Meerholz were her functional abilities. In his initial report, he recorded that she reported she was independent in her activities of daily living, except for gardening. At trial, Dr. Meerholz was confident that when he raised the subject of daily living function with Ms. Fontaine, he had specifically questioned her about activities around the house, such as cooking, shopping, personal dressing and self-care. Ms. Fontaine, on the other hand, was adamant that he had explained the concept to her as encompassing bathing, personal grooming and the like, and that he had not asked her about her capacity to do housekeeping or other domestic-like chores.

**124**  At trial, Ms. Fontaine, her husband and her father gave extensive evidence about a wide range of limitations that Ms. Fontaine is said to face in her everyday life. The evidence that I accept amply demonstrates that Ms. Fontaine experiences an array of functional restrictions which impair her capacity to carry out domestic activities. Acknowledgment of those limitations are contained, at least implicitly, in other parts of Dr. Meerholz's opinion, including his recommendation for further extensive physiotherapy. All things considered, the probabilities of the situation indicate that Ms. Fontaine misunderstood the expansive definition intended by Dr. Meerholz when he explored her capacity to perform activities of daily living.

**125**  Dr. Meerholz understood that at the time of his August 1, 2012 examination of Ms. Fontaine, she was receiving physiotherapy three times per week and massage once a month. He recommended that she attend further physiotherapy three times per week for an additional three to six months. Dr. Meerholz confirmed that the fact she may have only began physiotherapy in June of that year did not alter his opinions. That said, he went on to say that her failure to follow through on the courses of physiotherapy he had recommended in 2009 and 2010 "could be problematic". However, he was not asked to clarify what he meant by that.

**Dr. Scott Pacquette**

**126**  Dr. Pacquette is a neurosurgeon whose practice is limited to the treatment of complex spine pathologies. At the defendants' request he performed an independent medical assessment of Ms. Fontaine on August 9, 2010. His expert opinion was tendered as part of the defendants' case and he testified at trial.

**127**  During the examination, Ms. Fontaine reported her presenting medical complaints as pain in her lower back, which at times radiated into her right or left hip region and intermittently down her right or left leg below the knee. She told Dr. Pacquette that her back felt sore when she was walking and worsened after prolonged sitting or standing and were especially intense when she flexed forward or extended her back after sitting or being bent forward. She also reported intermittent, very sharp pains in her lower back that would quickly dissipate, and regular incidences of exacerbated back pain brought on by sudden motions, which Dr. Pacquette agreed were consistent with the dynamics of starting and stopping in hockey.

**128**  When he prepared his report, Dr. Pacquette had an incomplete record of Ms. Fontaine's medical charts before and after the Accident. Notably, he did not have Dr. Barnard's pre-Accident records that confirmed an absence of complaints of any back symptoms in the four and a half years leading up to the Accident during which Ms. Fontaine had been her patient. The only pre-Accident clinical chart he had in hand were Dr. Besse's records that covered the period September 19, 1999 to March 24, 2003. He placed great emphasis on the contents of those documents:

Of particular interest to me were the notes from Gordon Besse, Doctor of Chiropractic. These are from the Back to Health Centre and are dated from September 19, 1999 to March 2003. These notes from Dr. Besse significantly precede the [Accident]. There are numerous entries in these notes describing pain in the lumbar region and thoracic region and manipulations provided for that. I am not fully aware of the nomenclature used by Dr. Besse, although there are numerous entries on every date of L4 of L5; presumably these represent treatments provided for symptoms at these levels.

**129**  Based on his interpretation of Dr. Besse's chart, Dr. Pacquette concluded that it was "clear" that Ms. Fontaine had issues with her low back long before the Accident. He did not adequately address the important fact that the sessions with Dr. Besse had concluded 4 1/2 years before the Accident

**130**  At trial, Dr. Pacquette appeared to agree that there was only a single entry in Dr. Besse's records indicating that Ms. Fontaine had actually reported back pain, namely the notation made on August 2, 2001 where "flexion antalgia" was charted. He acknowledged that the notation the following day recorded that Ms. Fontaine was much better and had no antalgia. Dr. Pacquette did not have the benefit of knowing about Dr. Besse's precautionary practice where he routinely performed chiropractic adjustments to areas of the spine that a patient was not complaining about. Indeed, Dr. Pacquette confirmed that he did not know what chiropractors do in their office and agreed that, therefore, he could not interpret what Dr. Besse's adjustments of Ms. Fontaine had been for or why or whether they had been indicated.

**131**  In Dr. Pacquette's opinion, the majority of Ms. Fontaine's low back difficulty arose from her very active life style at a young age. He diagnosed mechanical back pain secondary to degenerative disc disease. As to the role played by the Accident relative to her development of degenerative disc disease, he opined:

I do not believe that the [Accident] was a significant contributor to her development of degenerative disc disease.

...

I do not believe that the motor vehicle Accident was a significant contributor to Ms. Fontaine's progressive mechanical back pain. I feel this is due to degenerative disc disease. Generally this is a condition brought on partially by the patient's genetics and body habitus and also by lifestyle. I believe that her very active teenaged years, as a competitive varsity hockey player, have been a significant contributor to her degenerative disc disease.

**132**  The causation of Ms. Fontaine's degenerative spinal condition need not be decided because, as mentioned, the plaintiff admits that the Accident did not cause that condition. The causation issue relative to Ms. Fontaine's low back simply asks whether, on the balance of probabilities, the Accident was a causative factor as contemplated by the authorities in the emergence of her post-Accident symptoms, be they related to her degenerative disease, or not.

\* **Discussion**

**133**  I consider it significant that in cross-examination Dr. Pacquette agreed that a traumatic incident such as a motor vehicle accident can be a factor in causing an asymptomatic degenerative disc condition, such as that afflicting Ms. Fontaine, to become symptomatic. Within this analytical context he went on to concede that the Accident could be a causative factor or a "small contributor", along with other factors such as Ms. Fontaine's degenerative disc condition, to the onset of her progressive back pain. On those material points, he and Drs. Nwaka and Meerholz are essentially of one view.

**134**  As I have noted, the preponderance of the evidence that I accept indicates that Ms. Fontaine did not have a chronic, or even intermittent, low back problem prior to the Accident, whether suggestive of a degenerative condition or not, nor did she suffer from neck pain or headaches of an enduring nature. In my assessment, Dr. Pacquette's belief that she had suffered low back symptoms for which she had been treated periodically well before the Accident influenced his conclusions on the issue of causation. In that regard and to that extent, which is by no means minor, his analysis is built on flawed underpinnings.

**135**  All things considered, I prefer the combined opinions of Drs. Nwaka and Meerholz to that of Dr. Pacquette on the matter of causation to the extent of their differences. I am satisfied on a balance of probabilities that, but for the Accident, Ms. Fontaine would not have suffered the low back symptoms that surfaced after the Accident. Although unnecessary to do so, I conclude more specifically that, in all probability, Ms. Fontaine's degenerative spine was pre-existing and had been entirely asymptomatic before the Accident and would likely have remained so had the Accident not occurred, and further that the Accident was a contributing factor of significance in causing her dormant disease to become symptomatic.

**136**  The defendants sensibly concede that the Accident also injured Ms. Fontaine's neck. It also caused her headaches. I find too that in a domino-like fashion, the ill-effects of the Accident caused Ms. Fontaine ongoing disruption to her sleep and a decline in her mood and emotional health.

**137**  The evidence establishes that Ms. Fontaine's dominant low back pain negatively impacted her ability to engage in the intense level of cardiovascular and other activities that had been an everyday feature of her pre-Accident life. That far-reaching curtailment is the principal reason she was unable to keep her weight stable after the Accident. I find that her weight gain accelerated after moving to Fort McMurray in tandem with and due to the worsening of her low back injury and its entailing limitations. The probabilities of the evidence demonstrate that Ms. Fontaine's considerable post-Accident weight gain would not have occurred and that she would not have become obese in the absence of the Accident.

**DAMAGES**

\* **Basic Principles**

**138**  The essential purpose of damages is to restore an injured plaintiff to the same position he or she would have been in had the ***negligence*** not occurred, to the extent that objective can be achieved by way of a monetary award.

**139**  People have different physical and psychological susceptibility to injuries. A fundamental principle in the assessment of damages is that the defendant must take the plaintiff as she is. A plaintiff whose unique psychological makeup or pre-existing physical condition makes him more vulnerable to sustaining injury is to be compensated for the entire extent of his injury, both physical and/or psychological, caused by the defendant's ***negligence***. This is so even where due to some unique feature of the plaintiff, the injury was greater or of a more dramatic or severe or different type than one would expect an average person to sustain. It is no answer for a defendant to say that the plaintiff would have suffered less injury or a different kind of injury or no injury at all if he or she had been less susceptible or vulnerable. It is the impact of the defendant's ***negligence*** on the actual plaintiff, and not on a fictional one, that is relevant for compensatory purposes: *Athey*.

**140**  As fundamental is that a defendant is not expected to put the plaintiff in a better position than the plaintiff had been in the moment before the Accident happened. It is the difference between the plaintiff's original position with any attendant risks and shortcomings (e.g. a pre-existing condition) just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.

**141**  A pre-existing condition, latent or active, is part of the plaintiff's original condition. Where the evidence demonstrates a measurable risk that a pre-existing condition would have resulted in a loss to the plaintiff in the future without the defendant's ***negligence***, that risk of loss must be taken into account in assessing certain heads of damages and serves to reduce the award: *Athey* at para. 35; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, [*2012 BCCA 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S294-00000-00&context=). The contingency of a pre-existing condition manifesting on its own to cause a loss at some point does not have to be proven to a certainty -- it is given weight according to its relative likelihood: *A.(T.W.N.) v. Clarke*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=).

**142**  In the case at hand, the medical evidence that I accept does not support the finding of a measurable risk that, absent the Accident, Ms. Fontaine's degenerative disc disease (assuming its presence before the Accident) would have become symptomatic or that she would have otherwise experienced her persistent low back deficit, headaches or neck whiplash. Accordingly, there is no proper basis to reduce her damages on that footing.

\* **Non-Pecuniary Damages**

**143**  Ms. Fontaine seeks non-pecuniary damages in the range of $60,000 to $75,000. The defendants counter that an award falling between $30,000 and $40,000 is ample.

**144**  Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's ***negligence***. They are meant to encompass such damages suffered to the date of trial and those that the plaintiff will suffer into the future.

**145**  The award should be fair and reasonable for both parties as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, [*2012 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MS-00000-00&context=) at para. 176. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 637; *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at 25. The process is one of assessment and is not amenable to mathematical precision: *Drodge v. Kozak*, [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=); *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=); *Lindal*.

**146**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, Kirkpatrick J.A. set out a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

**147**  I do not propose to reiterate my summary of the nature and progression of Ms. Fontaine's injuries or of the adverse toll they have taken on her life. Suffice it to say that her low back symptoms have emerged as the most painful and functionally limiting of her injuries. They produce fluctuating degrees of chronic pain, have compromised her overall endurance and reduced her tolerance for her social and leisure activities. Ms. Fontaine is a young, newly married woman who is unable to be intimate with her husband in the way she was before the Accident. While she is not immobilized or completely disabled by any stretch, pleasurable things such as travelling, dinners and movies with her husband, and other outings, are more difficult and some, like dancing, have been largely abandoned.

**148**  The ill-effects of the Accident have all but completely prevented Ms. Fontaine from participating in the intense physical activities that she once enjoyed, including the game of hockey. With reference to hockey, the opinion of the occupational therapist, Nancy Scullion, discussed later in my Reasons, mentions that Ms. Fontaine reported an intention to pursue a hockey career after she returned to Kamloops in late 2006. It also states that she expressed aspirations of transferring to the varsity team at the University of Calgary and eventually joining the Canadian Women's Hockey Team or a professional European league. Mr. Fontaine testified to his understanding that after she left RMU, his daughter planned to play for Mount Royal College in Calgary. There was no evidence that she took any steps in that regard prior to the Accident. Indeed, I heard virtually nothing of these or similar plans from Ms. Fontaine at trial. While I accept that at one time she may have held that intention at least in a general way, I find that it changed before the Accident when she started dating Mr. Kaliszewski and they began planning for their own future as a couple. Moreover, there was no cogent evidence that after her failed semester at TRU, she held any genuine desire to continue her higher education at an institution in Calgary or elsewhere.

**149**  Bound up in the cascading sequelae that all too commonly occurs with soft tissue spinal injury and chronic pain, Ms. Fontaine's injuries have contributed in a significant way to her considerable weight gain, damaged self-perception and downcast mood.

**150**  Although her pain waxes and wanes, Ms. Fontaine is seldom free from it. As I have observed before, enduring the experience of chronic pain, even when it manifests intermittently and ranges from mild to moderate as in Ms. Fontaine's case, compels unwelcome adjustments to life and lifestyle, and takes a toll on the ordinary pleasures of life.

**151**  There can be no question that the Accident has negatively impacted the quality and enjoyment of Ms. Fontaine's life.

**152**  Dr. Nwaka holds the view that if Ms. Fontaine's condition does not improve with rehabilitative therapy, she will be left with a long-time continuing problem. At the time he authored his report, Dr. Pacquette was also hopeful that Ms. Fontaine would benefit from physiotherapy and core muscle strengthening. While he considered it too early to provide a prognosis, his belief is that in light of the duration of Ms. Fontaine's symptoms her prognosis for a full recovery was guarded. The evidence suggests that the physiotherapy she has undertaken at the Blackgold clinic has therapeutic value. I appreciate that it is most unlikely that Ms. Fontaine will completely recover to her symptom-free former self, even if she diligently follows through with the recommended course of physiotherapy, which she stated a firm intention to do. The recommended therapy is not a cure. Even so, I think it reasonable to infer that so long as she remains committed to the additional six months of intensive physiotherapy favoured by Dr. Meerholz and maintains her program of stretching and exercising at home, there is a real prospect of an improved outcome over time.

**153**  I have reviewed all of the cases placed before me by counsel. I do not propose to review them in any detail as they provide general guidelines only and none of them, particularly those relied on by the defendants, are on all fours with Ms. Fontaine's circumstances.

**154**  Having considered the totality of the evidence and the application of the governing principles, it is my opinion that a fair and reasonable award for Ms. Fontaine's non-pecuniary damages is $75,000.

\* **Cost of Future Care and Loss of Housekeeping Capacity**

**155**  Damages for the cost of future care are meant to compensate for a financial loss reasonably incurred by an injured plaintiff to sustain or promote her mental and/or physical health: *Gignac v. ICBC*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 30. The services and items must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence: *Milina 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.); *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=); *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=).

**156**  The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), at paras. 21-22:

Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

**157**  Recommendations made by a medical doctor or by other health care professionals are relevant in determining whether an item or service is medically justified: *Gregory v. ICBC*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 38. An evidentiary link between the medical assessments and the recommended treatment is essential: *Gregory* at para. 39; *Gignac* at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where and as appropriate: *Gignac* at para. 52.

**158**  Nancy Scullion has considerable expertise as an occupational therapist in evaluating physical functioning related to work and life outside of work. She completed an occupational therapy assessment in Ms. Fontaine's home on July 16, 2012, from which she produced a written report admitted as expert opinion evidence at trial.

**159**  It is important to note at the outset that, for the purposes of her opinion, Ms. Scullion did not delve into the causation of Ms. Fontaine's injuries or limitations.

**160**  In Ms. Scullion's view, Ms. Fontaine presented with several physical and functional restrictions as summarized below:

1. inability to sit for more than 60 to 75 minutes at a time, corresponding to the lower end of the category of "Occasional", which is defined as less than 33% of an eight hour day;
2. inability to complete static and dynamic standing tasks on more than an Occasional basis;
3. inability to complete squatting tasks on more than an Occasional basis, with heavy reliance on external supports such as a counter for balance, stability and to grade movement;
4. inability to tolerate static or sustained bending/stooping on even an Occasional basis;
5. inability to safely negotiate stairs while carrying items;
6. fear of pain and reinjury, severe depression and severe anxiety;
7. abnormal standing posture and gait pattern; and
8. inability to lift and carry items within the demands of the "Limited Strength" classification using one hand on even an Occasional basis, and inability beyond the "Limited Strength" definition when using both hands on more than an Occasional basis.

**161**  Ms. Scullion determined that Ms. Fontaine was able to complete some aspects of light home maintenance and house cleaning tasks. However, her view is that Ms. Fontaine would not be able to perform certain of those tasks that required her to lift, carry, bend, stoop, stand or sit beyond the limitations noted above. In Ms. Scullion's opinion, this assortment of restrictions negatively impinged on Ms. Fontaine's ability to do many ordinary chores, such as changing bed linens, washing floors, vacuuming, washing walls, bathtubs and shower stalls, carrying laundry up and down the stairs to and from the laundry room, loading and unloading the dishwasher, and to complete heavier housekeeping tasks such as spring and fall cleaning.

**162**  Relying on her own assessment in conjunction with her review of the medical reports, Ms. Scullion concluded that a number of services and equipment were reasonable and necessary to facilitate Ms. Fontaine's functional rehabilitation and independence. Darren Benning, an experienced economist with PETA Consultants Ltd., provided an expert report setting out the estimated lump sum present values (inclusive of applicable taxes) of the future care costs identified by Ms. Scullion. Set out below is an overview of the type and cost of the future care items recommended by Ms. Scullion with Mr. Benning's present value estimations. Their combined evidence yielded a total present value cost (excluding the home gym equipment and psychological counselling, as explained below) of $310,859, plus live-in nanny costs in the amount of $35,146.

*1.* *Physical Therapy*

**163**  Ms. Scullion endorsed Dr. Nwaka's recommendation that Ms. Fontaine participate in the physical therapy program three days per week for eight to eleven weeks. She shares the view that this therapy is reasonably required in order to address both Ms. Fontaine's back symptoms as well as her neck. She also anticipates that Ms. Fontaine will have a periodic need for physiotherapy throughout her lifetime.

1. cost of initial program = $1,821.00
2. cost of ongoing reassessments every two years from year 3 until age 80, with three therapeutic sessions each time = $3,422.

*2.* *Massage/Chiropractic Therapy*

**164**  Based on Ms. Scullion's assessment of Ms. Fontaine's physical limitations, presentation and pain, she recommended both massage therapy and chiropractic treatment. She understood that Dr. Nwaka also endorsed those modalities. In her report, Ms. Scullion showed the treatment duration as being unknown; however, Mr. Benning annualized them over the remainder of Ms. Fontaine's lifetime.

1. annual cost of 12 sessions at $72.50 per = $870 per year, totalling $21,462 over Ms. Fontaine's lifetime.

*3.* *Homemaking Services*

**165**  Ms. Scullion's opinion is that given Ms. Fontaine's impairments, she would benefit from the provision of homemaking services. She estimated a requirement for a team of two or three housekeeping staff on a weekly basis to perform regular domestic tasks, and twice per year to take care of the heavier cleaning. The housecleaning services offered in Fort McMurray were the most expensive Ms. Scullion had come across in her career. The cost of weekly assistance averaged $192.50, amounting to an annual cost of $10,106, if used 50 weeks per year. Allowance for two heavy cleaning sessions each year added another $1,365 annually. Mr. Benning calculated the present value of those costs until Ms. Fontaine's 80th birthday as $241,117 for regular housekeeping plus $32,566 to cover the semi-annual heavy chores for an aggregate sum of $273,683.

*4.* *Live-In Nanny Services*

**166**  It is Ms. Scullion's opinion that Ms. Fontaine's limited physical tolerances and expressed desire to have two or three children warrants the provision of a live-in nanny with the arrival of each child from birth to four years of age. She recognized that the nanny would do the laundry and carry out regular light housekeeping chores in addition to caring for the children, and therefore the employment of a nanny would decrease Ms. Fontaine's housekeeping requirements. Ms. Scullion did not account for that overlap in her report; however, Mr. Benning addressed it in his. He calculated the cost of the nanny services suggested by Ms. Scullion ($75,320) and deducted from that figure what he estimated as the amount to be saved by the nanny performing those of regular domestic services ($40,174), leaving the estimated present value of the projected cost of a live-in nanny at $35,146.

*5.* *Psychological Counselling*

**167**  Ms. Scullion administered a series of what I am satisfied represent standardized questionnaires to determine Ms. Fontaine's subjective experience of pain, her fear of pain and her perception of its interference in key aspects of her daily life, as well as her levels of anxiety and depression. She concluded that Ms. Fontaine's test scores were suggestive of severe depression and anxiety and that she was in need of intervention in terms of her perception and experience of pain. For the reasons given below, no award will be made for psychological counseling and thus there is no purpose in reciting Mr. Benning's cost projections.

*6.* *Weight Watchers Program*

**168**  In light of Ms. Fontaine's significant weight gain in the aftermath of the Accident and her persistent low back pain, Ms. Scullion recommended that she be provided costs associated with a weight loss program, in this case Weight Watchers.

1. one time cost for 18 months = $445.

*7.* *Home Gym Equipment*

**169**  As Ms. Fontaine acquired a home gym prior to trial, I have addressed this cost under the heading of special damages.

*8.* *Additional Items*

**170**  Ms. Scullion recommends:

1. a portable ergonomic seating system to support Ms. Fontaine's back at work, home and in the car, to be replaced on average every 12.5 years - initial outlay plus replacement every 12.5 years = $568;
2. back and seat cushion - initial outlay plus replacement every 7.5 years = $447;
3. steam mop - initial outlay plus replacement every 9 years = $504;
4. self-propelled lawn mower - one time outlay = $551;
5. bathtub wall grab bars - one time outlay = $105;
6. step stool - initial outlay plus replacement every 12.5 years = $93;
7. pregnancy back support with each pregnancy - $55.

*9.* *Medications*

**171**  Ms. Fontaine reported to Ms. Scullion that she had derived a degree of benefit from the topical application of an analgesic lotion to her back and neck. Ms. Scullion determined that she would require an average of two 4-ounce tubes per month over an unknown duration. The yearly cost of $312 replenished annually amounted to a present value of $7,702 over her lifetime.

\* **Conclusions about Ms. Fontaine's Cost of Future Care**

**172**  Based on the recommendations of the medical experts digested in the context of the whole of the evidence, and taking into account the relative contingencies, I am satisfied that the reasonable expenses set out below represent therapies, services and items that would be beneficial to Ms. Fontaine and promote her health and well-being, are medically justified within the meaning contemplated by the authorities and are likely to be incurred. I have expressed these reasonable costs in present day values.

*1.* *Physical therapy*

**173**  Drs. Nwaka and Meerholz both recommended that Ms. Fontaine participate in courses of intensive physiotherapy. At the time of trial, Ms. Fontaine had just completed the eight weeks of therapy recommended by Dr. Nwaka. As recently as August 1, 2012, Dr. Meerholz suggested that she undergo additional physiotherapy for another three to six months at a frequency of three times per week (a range of 36 to 72 appointments). Dr. Pacquette also believed that Ms. Fontaine would benefit from core muscle strengthening and other "physiotherapy endeavours". He did not place a time span or limitation on that treatment.

**174**  The evidence establishes that although Ms. Fontaine's symptoms have certainly not resolved from her physiotherapy program at Blackgold, those treatments have provided her with temporary symptomatic relief and seem to be somewhat superior to the benefits she had derived from the massage therapy alone or, at a minimum, complement that modality. Ms. Fontaine credibly confirmed that she is prepared to follow the advice that she continue with further physiotherapy for an additional three to six months. Her treatments at Blackgold plus an additional six months of physiotherapy as recommended by Dr. Meerholz, are medically justified and reasonable. To that end, I award her the sum of $4,400.

**175**  In the circumstances, including the nature of Ms. Fontaine's physical condition, the persistence of her low back injury, her long work days and relatively guarded prognosis, I consider Ms. Scullion's recommendation that she be further assessed and treated to be a reasonable and prudent step toward achieving a sustained improvement. However, the evidence does not justify the recommendation that she undergo such appointments for years into the future. For the additional physiotherapy, I award the sum of $400.

*2.* *Massage and Chiropractic Treatment*

**176**  Dr. Nwaka prescribed monthly massage alternating with chiropractic sessions in the hope the treatments would assist Ms. Fontaine in maintaining some quality of life. The evidence shows that she has pursued massage therapy with far greater regularity than chiropractic care. I am not satisfied that Ms. Fontaine has any intention of incurring future chiropractic costs on account of her Accident-induced injuries, or will do so. Accordingly, no award is made toward the cost of that future care item.

**177**  The opposite is true with respect to future massage treatments. In my view, regular sessions over the next 24 months will likely complement Ms. Fontaine's physiotherapy and help ameliorate her symptomatic discomfort and provide other positive benefits. For that, I award the sum of $1,680.

*3.* *Psychological Counselling*

**178**  The difficulty with respect to this item is that I have no cogent evidence that Ms. Fontaine has any interest in receiving or attending counselling. Demonstrating her likelihood to incur such costs is an essential ingredient and its absence is fatal to her claim.

*4.* *Housekeeping and Nanny*

**179**  Ms. Scullion's opinion is remarkable in its identification of the nature, degree and projected duration of the limitations and impairments that Ms. Fontaine is said to experience. I have formed the view that in some instances this is the result of Ms. Fontaine's tendency to overly focus on her symptoms and overstate their intensity and the extent of the sequelae of the Accident, as opposed to any flaw in Ms. Scullion's mode of analysis.

**180**  I find, for example, the purported physical limitation of Ms. Fontaine not being able to sit for more than one-third of an eight-hour working day is completely at odds with the reality of her daily functioning at her sedentary job. Between her working hours and commuting, she sits for 15-16 hours each day, 16 days in a row. While the evidence supports an inference that she is able to periodically leave her chair and move around while in the office, and I accept that at the end of her 16-day shift it takes her a day or two to recover, all of which is material to the issue of her functioning, the preponderance of the evidence satisfies me that Ms. Fontaine is perfectly able to remain seated for more than 75 minutes at a time and over a span of considerably more than one-third of an eight-hour day without compromising her function.

**181**  The area of Ms. Fontaine's housekeeping need is particularly flawed. For the purposes of her report, Ms. Scullion assumed that Ms. Fontaine would require a team three times a week, 50 weeks a year. The fact of the matter is that for nearly five years after the Accident, other than using a cleaning service to clean her father's "dirty home" when they purchased it, Ms. Fontaine was able to make do with the sporadic help of her sister and recently a tenant to mow the lawn and without engaging any outside housekeeping services. She and her husband did not hire a housekeeper until the summer of 2012 when they moved into their larger home, and even then, they only use those services once every three weeks or so, despite the fact that they can well afford more. Another hurdle is that there was no cogent evidence that Ms. Fontaine would actually employ such services with that frequency. The evidence, including Ms. Fontaine's own testimony, is not convincing that she requires, or even desires, cleaning assistance at the rate of three times per week, 50 weeks of the year.

**182**  It appears that one of the assumptions underlying Ms. Scullion's recommendation is that, due to his work schedule, Mr. Kaliszewski is rarely home to help with domestic chores and maintenance. That was not borne out by the evidence. Additionally, Mr. Kaliszewski's testimony about the many day-to-day housekeeping tasks that Ms. Fontaine is able to functionally perform (meal preparation, purchasing groceries, wiping kitchen and other surfaces, some vacuuming, wet mopping the floors) is inconsistent with a reasonable need for paid housekeeping practically every other day for two adults. This disconnect becomes even more pronounced in light of the fact that I am awarding Ms. Fontaine costs for the purchase of certain adaptive cleaning aids to help her carry out domestic tasks, such as a self-propelled lawn mower and a steam mop.

**183**  I am not persuaded of Ms. Fontaine's requirement for housekeeping services on the scale recommended by Ms. Scullion. In fairness to Ms. Scullion, it must be said that all of her recommendations were explicitly stated to be subject to modification if Ms. Fontaine's status were to change.

**184**  Although far from certain, there remains in the minds of the physician experts some prospect for a qualified optimistic outcome for Ms. Fontaine provided she remains committed to the recommendation for extensive physiotherapy. At the same time, the evidence demonstrates the chances are low for a realistic possibility that she will be able to carry out household chores on the demanding end of the spectrum, such as heavy cleaning and scrubbing, within the foreseeable future. Despite the several deficiencies associated with the estimation of the future cost of housekeeping services for Ms. Fontaine, it cannot be legitimately denied that her ability to perform all domestic chores and aspects of ordinary yard maintenance has been impaired by her injuries. In my view, the preferred approach to appropriately compensate her is as a standalone award for the loss of her housekeeping capacity.

**185**  The leading decisions concerning a claim for loss of housekeeping capacity are *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.), a decision of a five-member panel of the Court of Appeal, and *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=).

**186**  In *McTavish*, Huddart J.A. comprehensively surveyed the majority and minority decisions in *Kroeker*, as well as other pertinent authorities, and summarized the essential principles in relation to past and future loss of capacity claims. At para. 43, her Ladyship emphasized the important point that claims for loss of housekeeping capacity are distinct from claims respecting the plaintiff's future cost of care:

As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely.

**187**  Because an award for the loss of housekeeping capacity reflects the loss of personal capacity, which is an asset, the issue of whether the plaintiff had used replacement services or is likely to hire such assistance in the future does not inform the analysis. That distinguishes those damages from future cost of care awards as recently affirmed by Kirkpatrick J.A. in *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at para. 67:

... Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:

It is clear that both the *need* and the *opportunity* for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature -- such as institutional care -- then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff.

**188**  Keeping in mind that an award for the loss of housekeeping capacity is meant to compensate Ms. Fontaine for her diminished loss of capacity -- the loss of her asset -- and is not a precise mathematical calculation, and taking into account the relevant contingencies supported by the evidence as best I am able, I conclude that the sum of $40,000 is a fair award to reflect the whole of Ms. Fontaine's loss of housekeeping capacity. It should go without saying that I have not included any part of this award in the assessment of Ms. Fontaine's non-pecuniary damages.

**189**  The provision of live-in nanny services engages an interesting and important remoteness of damages issue. That issue was poorly developed in the evidence and entirely absent from final argument. It need not be explored in this case, however, because Ms. Fontaine testified that if she and her husband have children their plan would be to hire a nanny to enable Ms. Fontaine to return to work for reasons that are largely financial and unconnected to the Accident.

*5.* *Remaining Cost of Future Care Items*

**190**  Ms. Fontaine has also established her entitlement to the following:

1. Weight Watchers program - $445.00
2. Portable ergonomic seating system - initial outlay only - $231.00
3. Steam mop - initial outlay only - $157.00
4. Self-propelled lawn mower - one time outlay - $551.00
5. Back and seat cushion - initial outlay only - $120.00
6. Analgesic lotion - $500.00

**191**  Regarding bathtub wall grab bars, Ms. Scullion suggested that Ms. Fontaine required them to address periods of dizziness she is said to sometimes experience and reports of falls while getting into and out of the bathtub. There was virtually no cogent evidence at trial of those events. Even so, the implementation of those safety bars in Ms. Fontaine's bathtub strikes me as entirely reasonable in the overall objective of promoting her physical health, given her difficulties squatting, bending, stooping and sitting, all stemming from her low back injury. I award the sum of $105 for that apparatus.

**192**  Leaving to the side the potentially vexing question of the remoteness of the cost of a pregnancy back support, it is disallowed on the basis there was no evidence to explain the need for such support in addition to the allowed costs for the back and seat cushions and portable back support system.

\* **Loss of Earning Capacity**

**193**  The legal framework that informs an award for loss of earning capacity was helpfully summarized by Dardi J. in *Midgley* at paras. 236-240:

The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at para. 19; *X. v. Y.*, [*[2011] B.C.J. No. 1378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=), at para. 183.

As enumerated by the court in *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) at para. 41, aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=), the principles which inform the assessment of loss of earning capacity include the following:

1. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
2. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* [*(1990), 75 O.R. (2d) 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) at 636 (C.A.).
3. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11.

Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *Bradley* *v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at paras. 31-32; *X. v. Y.* at para. 185.

While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=), at para. 29,

"What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

**194**  The law has long recognized that unknown contingencies and uncertain factors make it impossible to calculate lost opportunities and a loss of earning capacity with any precision: *Erickson* *v. Sibble*, [*2012 BCSC 1880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X31K-00000-00&context=) at para. 271. It is because the occurrence of hypothetical and future events is unknown that allowances must be made for relevant and realistic positive and negative contingencies.

**195**  Ms. Fontaine does not seek damages for loss of earnings or lost earning capacity prior to trial.

**196**  As to her claim for loss of future capacity, Ms. Fontaine contends that the Accident is responsible for an impairment of that capacity in that some occupations will be closed to her, and it is impossible to say that over the span of her entire working life, the impairment will not harm her income earning ability. Ms. Fontaine proposes that her diminished capacity be quantified by reference to the factors that inform the capital asset approach laid out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.). On that basis, she asserts entitlement to the sum of between $60,000 and $75,000.

**197**  The defence's simple counterpoint is that she has failed to prove any loss under this head.

**198**  My task is to compare the likely future of Ms. Fontaine's working life if the Accident had not happened, to her likely future working life after the Accident: *Gregory* at para. 32.

**199**  The only job Ms. Fontaine was unable to perform due to her injuries was the entry-level position of call clerk that she held on a probationary basis at the time of the Accident. Other than that, she has been able to work on a full-time basis and has missed no time from work on account of her injuries since the Accident. Ms. Fontaine has applied for and succeeded in obtaining and keeping the jobs that she desired in the past number of years. There is nothing persuasive in the evidence to suggest that state of affairs might change or that her symptoms will worsen over time. There is no evidence that she has foregone opportunities, missed promotions or advancements or lost bonuses due to her injuries. Her income has increased significantly since the Accident, effectively doubling since 2010.

**200**  While I accept that working her long day shifts can cause Ms. Fontaine discomfort and is more physically draining on her because of the ill-effects of the Accident, the concomitant pain, suffering and loss of enjoyment of life can be adequately reflected in the measure of her non-pecuniary damages. I have taken these factors into account in quantifying her loss under that head.

**201**  Ms. Fontaine has failed to prove a real and substantial possibility that the injuries caused by the Accident will generate a pecuniary loss. Accordingly, she is not entitled to an award of damages under this head.

\* **Special Damages**

**202**  Ms. Fontaine is permitted recovery of the out-of-pocket expenses she reasonably incurred as a result of her injuries. Her entitlement is derived from the fundamental principle that an injured person is to be restored to the position she would have been in had the ***negligence*** not happened: *Milina* at 78.

**203**  Most of the expenses Ms. Fontaine has incurred are not being claimed because they were covered by her husband's health plan. Her primary special expense -- and it is contentious -- is the cost of her home gym and related equipment purchased in June 2012 for the sum of $7,706.54. Before they acquired the equipment, she and her husband consulted a certified personal trainer and Ms. Fontaine discussed the matter with her physiotherapist.

**204**  Mindful of Ms. Fontaine's current physical status, the need to complete her home strengthening and stretching, her work schedule and weight gain, Ms. Scullion opined that certain features of the home gym are beneficial for her current and anticipated rehabilitation. Among the pieces of equipment that she believes has therapeutic value are the pulley cable system, elliptical, bench presses with weight plates, and mats. The aggregate cost of those items is $4,445.88 and that is the amount that Ms. Fontaine seeks to recover.

**205**  The evidence establishes that in the months leading up to trial that Ms. Fontaine had access to the equipment, she used only some of the features and then "very rarely". For example, she tried the elliptical on the lowest level on approximately four or five occasions. She has also made a few attempts to use the pulley cable system to strengthen her arms, as well as the attachments designed to work her core. I accept Mr. Kaliszewski's testimony that he and his wife genuinely believed that she would be able to use the equipment more fully and frequently, but to date their expectation has not panned out because of the limitations imposed by Ms. Fontaine's injuries. Mr. Kaliszewski, on the other hand, use the majority of the component parts of the gym "all of the time".

**206**  In my view, the majority of the gym components endorsed by Ms. Scullion were reasonably incurred for Ms. Fontaine's therapeutic benefit and to enhance her rehabilitation. Although her progress has been slow and discouraging to date, she has expressed an intention to persevere. Given Ms. Fontaine's lifelong athleticism, I think it reasonable to infer that she will remain committed to trying to use the home gym with the prospect that she will gradually be able to avail herself of longer and more varied workouts, particularly as she moves through her physiotherapy program. While Mr. Kaliszewski presently uses most of the equipment, the evidence does not indicate that it was purchased for his benefit. The fact that he is able to use the equipment reasonably purchased to promote Ms. Fontaine's improvement does not negate the legitimacy of her claim for recovery or diminish the amount for which she should be reimbursed. In my view, Ms. Fontaine is entitled to recover the amount of $4,445.88 for that expenditure.

**207**  Ms. Fontaine also seeks reimbursement of the sum of $840, which represents the cost of thoroughly cleaning their current home before taking possession. She testified that the house was "quite dirty" when her father moved out and that she was not physically able to do the cleaning required. The applicable invoice indicates that most of the cleaning performed would qualify as heavy chores, such as steam cleaning the carpets, cleaning windows, scrubbing walls, baseboards, floors and the inside of the oven and fridge, and vacuuming the floors and walls. I am satisfied this qualifies as a reasonable out-of-pocket expense and is properly recoverable by Ms. Fontaine.

**208**  In sum, I award Ms. Fontaine the amount of $5,285.88 in special damages.

**MITIGATION**

**209**  Ms. Fontaine's positive duty to take reasonable steps to minimize her losses brought about by the Accident is well-settled: *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=); *Chiu (Guardian ad litem of) v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=); *Shapiro v. Dailey*, [*2012 BCCA 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62B8-00000-00&context=); *Gregory* at para. 56. The burden of proof to show she has failed to discharge her duty rests on the defendants.

**210**  The law does not hold Ms. Fontaine to a high standard of conduct in mitigation. It is satisfied if she has taken reasonable steps in the circumstances to reduce her loss. The second essential element of the test requires the defence to prove that, had Ms. Fontaine followed the recommended treatment, her losses would have been reduced: *Gregory* at para. 56.

**211**  The defence contends that Ms. Fontaine failed to reasonably mitigate her losses by failing to comply, until mid-June 2012, with the recommendation made by more than one of her treating physicians over the course of a number of years that she follow the basic treatment option of physiotherapy.

**212**  In the early aftermath of the Accident, Ms. Fontaine complied with the advice to have massage therapy but was unable to afford physiotherapy. As it was, she had to borrow money from her parents to pay for her massages. She later implemented home exercises and stretches in addition to receiving periodic massage treatments. In my view, until Dr. Meerholz made his second recommendation to Ms. Fontaine on May 12, 2010 that she partake in intensive rehabilitation that included physiotherapy, she had not acted unreasonably in all the circumstances. However, it was unreasonable for her not to adhere to Dr. Meerholz's second recommendation made nearly a year after his initial recommendation and in circumstances where her symptoms persisted and continued to interfere with the enjoyment of most facets of her life. There is no evidence to suggest that at that time Ms. Fontaine was not able to afford such treatments or had any reasoned excuse not to pursue Dr. Meerholz's recommendation.

**213**  The combined evidence of Ms. Fontaine and her husband is that the course of physiotherapy she finally started a few months before trial has produced some positive effects although, so far, they are only temporary. Ms. Fontaine testified that on her days off, when she is able to attend physiotherapy and massage appointments she feels much better. Having now received physiotherapy, she is sufficiently hopeful about its therapeutic value to commit to Dr. Meerholz's recommendation that she engage in a further treatment regimen.

**214**  In assessing Ms. Fontaine's damages, I was persuaded that her completion of six more months of physiotherapy could improve her condition and positively influence her overall prognosis. In all the circumstances, I think it is reasonable to infer that the same prospect to one degree or another was present in May 2010 when she received Dr. Meerholz's advice. A reasonable plaintiff in Ms. Fontaine's shoes would have followed such advice and Ms. Fontaine has acted unreasonably in not doing so.

**215**  Unfortunately, it is not anticipated that physiotherapy will cure Ms. Fontaine's low back injury. However, on the whole of the evidence, I consider it more probable than not that had she incorporated an appropriate regimen of physiotherapy around the time that Dr. Meerholz recommended it a second time in 2010, the ill-effects of the Accident would have been somewhat reduced and, in turn, her non-pecuniary losses would have been somewhat less.

**216**  In arriving at these conclusions, I have not overlooked the fact that Dr. Meerholz's second recommendation was for Ms. Fontaine to complete a spinal rehabilitation program where physiotherapy was only one component along with massage and exercise.

**217**  All things considered, it is my view that a small downward adjustment of 5% should be made to Ms. Fontaine's non-pecuniary damages as a result of her failure to mitigate. I am not persuaded of any principled basis to reduce her other heads of damages.

**COSTS**

**218**  If the parties are unable to agree as to costs, they may file written submissions implementing a time table of their choosing that incorporates a final deadline of November 25, 2013.

S.K. BALLANCE J.

**End of Document**

[***Ilett v. Buckley, [2016] B.C.J. No. 1611***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KDN-X121-F2F4-G081-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

V. Gray J.

Heard: February 22-26 and March 2, 2016.

Judgment: July 28, 2016.

Docket: M142140

Registry: Victoria

**[2016] B.C.J. No. 1611** | 2016 BCSC 1407

Between Kyle Ilett, Plaintiff, and Leah Michelle Buckley, Defendant

(251 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Neck — Soft tissue — Arm injuries — Fibromyalgia or chronic pain — Action by 23-year-old plaintiff for damages for personal injuries sustained in 2012 collision between his bicycle and defendant's vehicle allowed — In 2012, plaintiff had completed one year of university and was working full-time as labourer — Had intended to keep working for three years prior to returning to school — Sustained soft tissue injuries to shoulder, neck, back and hip with secondary myofascial pain disorder of neck and shoulder — Full recovery unlikely — Awarded $100,000 in non-pecuniary damages, $183,500 for gross past lost earning capacity, $225,000 for loss of future earning capacity, and $1,969 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action by 23-year-old plaintiff for damages for personal injuries sustained in 2012 collision between his bicycle and defendant's vehicle allowed — In 2012, plaintiff had completed one year of university and was working full-time as labourer — Had intended to keep working for three years prior to returning to school — Sustained soft tissue injuries to shoulder, neck, back and hip with secondary myofascial pain disorder of neck and shoulder — Full recovery unlikely — Awarded $100,000 in non-pecuniary damages, $183,500 for gross past lost earning capacity, $225,000 for loss of future earning capacity, and $1,969 in special damages.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Cyclists — Intersections — Meeting, overtaking and passing — Turns — Left turn at intersection — Liability — Civil actions — Breach of rules of the road — *Negligence* — Action by 23-year-old plaintiff for damages for personal injuries sustained in 2012 collision between his bicycle and defendant's vehicle allowed — Plaintiff, riding on shoulder, cycled through intersection and collided with defendant's left-turning vehicle — Defendant commenced turn slowly but accelerated through turn before seeing whether cyclist was approaching — Defendant breached duty to yield to plaintiff pursuant to s. 174 of Motor Vehicle Act — She did not take reasonable care for plaintiff's safety — Plaintiff had not failed to take reasonable care for his own safety — Defendant entirely responsible for plaintiff's injuries — Motor Vehicle Act, ss. 158, 166(c), 174.**

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| Action by the 23-year-old plaintiff for damages for personal injuries sustained in a collision between his bicycle and the defendant's vehicle in 2012. The plaintiff, riding on the shoulder of the road, cycled through an intersection and collided with the defendant's left-turning vehicle. At the time of the accident, the plaintiff had completed one year of university and was working full-time as a shipyard labourer. He had intended to keep working for three years prior to returning to school. He initially experienced pain in his neck, back, right hip and right shoulder, trouble sleeping and constant headaches. He attended physiotherapy and massage therapy and a rehabilitation program for his injuries. The plaintiff returned to university after the accident. He attempted to cycle across Canada in the summer of 2013. In 2014, the plaintiff resumed part-time work with an income of $24,000. At trial, he continued to experience constant pain in his right shoulder and frequently in his neck. He anticipated graduating from university in May 2016 with a bachelor's degree in economics and continued to work part-time at a bank.  HELD: Action allowed.  On a balance of probabilities, it was established the defendant commenced her turn slowly but accelerated through her turn before seeing whether a cyclist was approaching. The defendant breached her duty to yield to the plaintiff pursuant to s. 174 of the Motor Vehicle Act. She did not take reasonable care for the plaintiff's safety. The plaintiff breached s. 158 of the Act by passing the lane of traffic on his left while riding on the shoulder. The plaintiff had not failed to take reasonable care for his own safety. The defendant was entirely responsible for the plaintiff's injuries. The plaintiff had sustained soft tissue injuries to his right shoulder, neck, back and hip with secondary myofascial pain disorder of the neck and shoulder. It was unlikely he would fully recover. As a result of the accident, the plaintiff was disabled from working as a labourer. The plaintiff was awarded $100,000 in non-pecuniary damages. He was awarded $183,500 for gross past lost earning capacity. There was a real and substantial possibility the plaintiff would earn less income in the future than he would have earned if he had not been injured. The most appropriate way to value the plaintiff's future loss was to use an earnings approach. The plaintiff was entitled to $225,000 for loss of future earning capacity. He was awarded $1,969 in special damages. |

**Statutes, Regulations and Rules Cited:**

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. 144(1), s. 158, s. 166(c), s. 174, s. 183

**Counsel**

Counsel for the Plaintiff: L.G. Oss-Cech, D.G. Quantz.

Counsel for the Defendant: C.H. McDougall.

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| **GRAY J.** |

**INTRODUCTION**

**1**  Mr. Ilett was 19 years old on July 17, 2012, when he was injured in a collision between the bicycle he was riding and the car driven by Ms. Buckley. The accident occurred about three and one-half years prior to the trial.

**2**  At the time of the collision, Mr. Ilett had completed one year of study at the University of Victoria ("UVic"), and was working as a labourer at Victoria Shipyards ("Shipyards").

**3**  Mr. Ilett's claim for damages proceeded to a six-day trial.

**4**  Ms. Buckley denied liability, arguing that Mr. Ilett was fully or at least partially responsible for the collision. Mr. Ilett was cycling northbound on the shoulder straight through an intersection when he collided with Ms. Buckley's left-turning car, which turned from southbound to eastbound.

**5**  The parties also disagree about the extent of Mr. Ilett's symptoms now and in the future, their effect on his ability to work, and about whether he is likely to suffer any future wage loss. Mr. Ilett's position is that he suffered a number of injuries, including a right shoulder injury which has left him with chronic pain and impaired his function, rendering him incapable of labouring work or sustained typing.

**6**  I am grateful to counsel for their efficient presentation of the evidence and their thorough and helpful submissions.

**ISSUES**

**7**  The issues are as follows:

1. Is Ms. Buckley wholly or partially responsible for Mr. Ilett's damages arising from the collision?
2. What was Mr. Ilett's income in 2014?
3. What is the extent of Mr. Ilett's ongoing symptoms?
4. What is Mr. Ilett entitled to recover for his damages?

**FACTS**

1. **Before the Accident (of July 17, 2012)**

**8**  Mr. Ilett was born in December 1992 and grew up on Vancouver Island, first in Port Alberni, B.C. and later in Chemainus, B.C.

**9**  While in high school, Mr. Ilett was active in outdoor recreation, including hiking, baseball, off-road motor biking, swimming, kayaking, and mountain bicycling. He also worked out at a gymnasium several times a week.

**10**  During his high school years, Mr. Ilett worked in a variety of part-time jobs, including work in construction, at a gas station, as a barista, and doing lawn work. He performed labour work around the home, assisting his father with significant renovations.

**11**  Mr. Ilett reported about $4,600 in income in his 2010 tax return.

**12**  Mr. Ilett graduated from high school in Chamainus in June 2011 and moved to Victoria.

**13**  Mr. Ilett was not sure what he wanted to do for a career. He had considered pursuing nursing. He decided to go to university because his girlfriend was attending university.

**14**  Mr. Ilett attended UVic starting in September 2011. He took general studies.

**15**  Dr. Dyson is a general practitioner physician who practices at UVic. He began caring for Mr. Ilett in September 2011, being about ten months before the accident.

**16**  Mr. Ilett reported about $5,300 in income in his 2011 tax return.

**17**  Mr. Ilett completed four courses for 1.5 credits each in the fall 2011 term, and three courses for 1.5 credits each in the spring 2012 term. Three courses is a light semester. He started a fourth course in the second semester but dropped it when he found it uninteresting. His 2011-2012 sessional grade point average was 3.29, being about a C+.

**18**  Mr. Ilett began working for Shipyards on May 11, 2012, following the completion of his spring term of studies at UVic. He was pleased with the job because it was well-paid compared to other work available for someone with his level of education. He was earning $24.28 per hour as a probationary employee, unless he was using tools, in which case the wage increased to about $32.89 per hour for "semi-skilled" work. He was working full-time, Monday to Friday from 7:30 a.m. to 4:00 p.m.

**19**  Mr. Ilett's work at Shipyards was physical work. It included carrying heavy objects up and down ladders, lifting and lowering loads down holes to crews working at different heights, and manipulating tools, including a pneumatic (i.e. pressurized air) gun for removing rust and paint.

**20**  Mr. Ilett became friends with Mr. Esnouf, who also worked at Shipyards. Mr. Esnouf had started as a labourer and became an apprentice metal fabricator in June 2012. Messers. Ilett and Esnouf worked together on tooling crews at Shipyards. They went to the gym regularly after work and occasionally went dirt-biking on the weekends.

**21**  Mr. Ilett was considering working at Shipyards for a matter of years, and probably going to university afterwards. He estimated at the time of his examination for discovery that he thought he might have continued to work at Shipyards for one to three years. At trial, he initially estimated up to five years.

**22**  Mr. Ilett was very physically active before the accident. He rode his bicycle to work three or four days a week, when the weather was suitable. The ride took him nearly an hour each way. He also worked out at the gym three or four days a week for 45 minutes at a time.

**23**  Mr. Ilett is right hand dominant. He is about 6 feet tall.

**24**  Before the accident, Mr. Ilett was happy, hard-working, motivated, and active. Mr. Ilett was also very active recreationally. He enjoyed the outdoors, and was active in swimming, baseball, hiking, canoeing, kayaking, and rock climbing. There was no evidence that he suffered any physical limitations.

**25**  At the time of the accident, Mr. Ilett was six days short of completing his probationary period at Shipyards. The wage rates at the time at Shipyards following probation were $36.00 per hour for unskilled work and $40.21 per hour for semi-skilled work, being an average of $38.10 per hour.

1. **The Accident (on July 17, 2012)**

**26**  The accident occurred at the intersection of Admirals Road and Seenupin Road in Esquimalt, B.C. ("Intersection") at about 4:10 p.m., during rush hour. The weather was dry and sunny and the road conditions were good. Admirals runs northeast and southwest at that point, but I will refer to it as essentially northbound and southbound. The Intersection is a T-intersection, with Seenupin terminating at Admirals, and running essentially east from Admirals before it curves south. There is a stop sign facing westbound traffic from Seenupin, but there are no traffic controls facing traffic on Admirals at the Intersection. There is a traffic light north of the Intersection.

**27**  The Intersection is a short distance north of the intersection of Admirals and Maplebank, being more than several hundred yards but less than a mile away. The area of the Intersection is flat. At this point, Admirals has a single lane of travel both northbound and southbound, and on each side there is a fog lane with a paved shoulder.

**28**  Bicyclists commonly ride on the shoulders of Admirals, and treat the shoulders as bicycle lanes. The shoulders are wide and paved. They are not painted in a way suggesting that they are bicycle lanes. However, there was a warning sign for northbound traffic on Admirals at the curve which was about 300 yards south of the Intersection. The sign is yellow in colour and diamond in shape, and has a drawing of a pedestrian in the top half of the sign and a bicycle in the bottom half. This suggests a warning that pedestrians and bicyclists may be on the roadway.

**29**  Mr. Ilett was travelling in the direction I will refer to as northbound. He had finished work at Shipyards, cycled along Maplebank Road, and made a left turn onto Admirals. There was one lane of vehicle traffic travelling in the same direction as Mr. Ilett, and Mr. Ilett was riding on the shoulder.

**30**  Ms. Buckley had been driving her 1996 Dodge Neon car southbound on Admirals, and then turned left to go east onto Seenupin. Ms. Buckley's car was facing what was essentially east when Mr. Ilett struck it with his body and bicycle.

**31**  Three witnesses testified about the accident. Both parties testified about it, and in addition, Mr. Ilett called the evidence of Ms. Mattina. She was driving southbound on Admirals immediately behind Ms. Buckley. I will describe the evidence of each of them.

**32**  At the time of the accident, traffic northbound on Admirals was backed up, meaning it was moving very slowly or was stationary northbound. The evidence conflicted about whether the southbound traffic was stop-and-go or flowing.

***i. Mr. Ilett's Evidence***

**33**  Mr. Ilett travelled on the right shoulder down a small hill towards a straight section of Admirals. He testified that there was a line of cyclists in front and behind him. He considered the shoulder to be a bike lane. He was passing stopped and slowly moving vehicles on his left. For about the last 300 yards that he cycled prior to the collision, the road was flat. He was not able to estimate his speed.

**34**  Mr. Ilett testified that he was scanning the traffic as he rode, and saw a large northbound vehicle just south of the Intersection, possibly a pickup truck with a dumping box, but he could not say if it was stopped or moving slowly. He saw a gap open at the Intersection in front of the northbound traffic, but he does not recall seeing a gap in front of the southbound traffic. He had never before seen a southbound vehicle turning left onto Seenupin.

**35**  Mr. Ilett testified that he did not see anyone turning left and did not have any warning about Ms. Buckley's vehicle. He did not apply his brakes. He testified that he heard screeching brakes and saw a green hood, and then he was on the ground. He apparently travelled over the hood and landed on the north side of Ms. Buckley's car. Mr. Ilett stuck out his right arm to protect his head. He felt most of the impact on his right arm, and he rolled over it. There was a small hole in his helmet. He was unable to stand owing to pain and the immobility of his hip. He went to hospital.

***ii. Ms. Buckley's Evidence***

**36**  Ms. Buckley testified that she was very familiar with the Intersection at the time of the accident, having turned left from Admirals onto Seenupin probably 60 times before. She knew that bicyclists frequently rode on the shoulders of Admirals.

**37**  Ms. Buckley testified that at the time of the accident, the southbound traffic was flowing and the northbound traffic was very congested and was not moving. She testified that she came to a complete stop at the Intersection and turned on her left turn signal. She testified that she remained stopped for about 45 to 60 seconds. She testified that the southbound traffic continued to advance so that there was a gap in front of her. She testified that the northbound vehicle just south of the Intersection was a large vehicle, and she thought it was a cube truck ("Large Vehicle"). She testified that it was stopped at the Intersection and the driver of the Large Vehicle waved at her, indicating she could make the turn.

**38**  Ms. Buckley testified that she looked for oncoming bicycle traffic, but her vision was impeded by the Large Vehicle. She testified that she leaned forward because there were a lot of cyclists and pedestrians on that road. Ms. Buckley testified that as she started to turn left, she carefully moved forward and stopped to check if there was anyone there. She testified that she moved slowly, and that at one point she could see down the passenger side of the Large Vehicle, which had been obstructing her view. She testified that at that point she was just about to accelerate when Mr. Ilett struck her car in the front passenger side quadrant.

**39**  Ms. Buckley testified that she was barely moving when Mr. Ilett struck her car very close to her passenger side door, damaging her radio antenna and her passenger side mirror.

**40**  The evidence did not include photographs of Ms. Buckley's car. There was a photograph of a similar model, and it shows that the radio antenna and the passenger side mirror were both close to the front windshield.

***iii. Ms. Mattina's Evidence***

**41**  Ms. Mattina testified at the request of Mr. Ilett. She did not know either Mr. Ilett or Ms. Buckley personally. She lives in Calgary, Alberta, and in the period between the collision and the trial, she was struggling with serious health problems.

**42**  Ms. Mattina did not provide a statement at the scene of the accident and was first contacted by Mr. Ilett's counsel in 2014, being about two years after the accident.

**43**  In about mid-2015, Ms. Mattina provided an oral statement to Mr. Ilett's counsel and signed a statement drafted by the lawyers. In the written statement, she wrongly described Admirals Road as "Esquimalt" Road, and wrongly described the date of the accident as July 13, 2012 instead of July 17, 2012.

**44**  Defence counsel asked to speak to Ms. Mattina prior to the trial, but she responded that they had her witness statement and if there were any further questions for her, they could be asked when she was in the witness box. She testified that, mainly for personal reasons, she did not have time to talk to defence counsel in the several weeks prior to the trial.

**45**  Ms. Mattina testified that she was travelling southbound on Admirals when she stopped her Nissan Sentra immediately behind Ms. Buckley's vehicle. Ms. Mattina testified that she saw Mr. Ilett riding down the road, and saw Ms. Buckley signal a left turn. She testified that Ms. Buckley inched forward, but there was no gap in traffic to permit her to drive through the intersection.

**46**  Ms. Mattina testified that they were stopped about two minutes, during which she saw Mr. Ilett approaching.

**47**  Ms. Mattina testified that the northbound traffic began to move, and a northbound driver stopped to let Ms. Buckley through. Ms. Mattina was not able to describe the vehicle that stopped. Ms. Mattina testified that Ms. Buckley immediately, without hesitation, made her left turn, and Mr. Ilett went over Ms. Buckley's hood.

1. **Between the Accident (on July 17, 2012) and Trial**

***i. July 17, 2012 to December 31, 2012: Off Work and Fall Term UVic***

**48**  Mr. Ilett had x-rays of his right forearm, elbow, and wrist on July 17, 2012. They did not disclose any fractures. He was in a lot of pain in many places.

**49**  On the day following the accident, Mr. Ilett had pain through much of his body. It was worse on his right shoulder and right hip. He had trouble sleeping owning to pain, and had constant headaches.

**50**  Mr. Ilett saw Dr. Dyson on July 18, 2012, the day after the accident. Dr. Dyson noted that Mr. Ilett had a slow, shuffling gait, and was dragging his right leg to minimize hip movement. Mr. Ilett wanted to return to work the following day, but Dr. Dyson told him that it would not be safe for Mr. Ilett or his co-workers if he did so. In fact, Mr. Ilett did not work again at Shipyards.

**51**  Dr. Dyson noted abrasions to Mr. Ilett's forearms, especially the right, and abrasions on his sacral region. Mr. Ilett's right hand was swollen generally, particularly the thumb. Mr. Ilett was not able to raise his right arm higher than horizontal to the floor. He described pain in his right shoulder, both with movement and rest, especially over the AC (acromioclavicular) joint. He had pain in his right hand and a restricted range of motion. He described pain in his neck, especially on the right side, and had a restricted range of motion in his neck.

**52**  Dr. Dyson diagnosed Mr. Ilett with abrasions of both forearms and sacrum, moderate soft tissue strains, and contusions to his neck, torso, hips, and limbs. Dr. Dyson also diagnosed a severe sprain to the right hand with possible fracture, likely AC separation of the right shoulder, and likely fracture of the right lateral rib.

**53**  Dr. Dyson saw Mr. Ilett again on July 23, 2012, and found point tenderness to the scaphoid. He found localized chest wall pain, suggesting a fracture. Mr. Ilett reported that his shoulder continued to be painful, and x-rays showed a mild separation. Mr. Ilett's right hip was now better defined, with tenderness to the right gluteal muscles from the SI region to the greater trochanter. Mr. Ilett report that his neck was improving.

**54**  Dr. Dyson saw Mr. Ilett again on July 30, 2012. Dr. Dyson thought most injuries were largely resolved, except for the right hip and right shoulder. However, Mr. Ilett testified that his right wrist and elbow pain continued for over another month. At that point, Dr. Dyson thought Mr. Ilett needed at least a further four weeks to recover. Dr. Dyson prescribed medication for sleep and to reduce restlessness. Mr. Ilett used them only briefly because they caused him to suffer nausea and dizziness.

**55**  Dr. Dyson saw Mr. Ilett on August 7, 2012, being about three weeks after the accident. Dr. Dyson diagnosed him at that time with right shoulder and hip injuries with secondary mood disturbance (reactive depression). Dr. Dyson prescribed a small dose of Seroquel for sleep and to reduce restlessness.

**56**  Shipyards laid Mr. Ilett off on August 30, 2012 due to lack of work. Shipyards frequently lays off workers and later rehires them.

**57**  Mr. Ilett resumed courses at UVic in September 2012. Dr. Dyson suggested he take a light course load, so he only enrolled in four courses. As a result of his injuries, he found it difficult to study, sit through classes, and sleep, and his grades suffered. He dropped Math 102 in September 2012.

**58**  Dr. Dyson saw Mr. Ilett in September 2012. Mr. Ilett reported to Dr. Dyson that his hip was back to about 80% of normal activities. Studying seemed to aggravate Mr. Ilett's right shoulder and neck pain.

**59**  Mr. Ilett attended physiotherapy roughly twice weekly for about four months, taking 29 sessions. He also used ice packs and received five massage therapy treatments.

**60**  Mr. Ilett completed two courses for 1.5 credits each in the fall 2012 term, receiving one grade of B- and one grade of D. He took a third course which continued into the spring term. His transcript does not refer to a fourth 1.5 credit course in math which he took in the fall of 2012 but failed, because he satisfied UVic that his injuries had affected his academic performance.

**61**  Mr. Ilet reported about $10,500 in his 2012 tax return, almost all from Shipyards.

***ii. January 1, 2013 to April 30, 2013: Spring Term UVic***

**62**  By January 2013, about six months after the accident, many of Mr. Ilett's symptoms had disappeared. He no longer had problems with his ribcage, right wrist, or right hand. The pain in his elbow and mid-back was less severe.

**63**  Mr. Ilett attended a work-hardening program at the Canadian Back Institute ("CBI") from about January to April 2013. CBI employees suggested exercises, which Mr. Ilett continues to do when he is sore. He did a lot of cycling in this program.

**64**  On February 15, 2013, Mr. Ilett suffered a scaphoid fracture in his left hand. He was attempting to start a friend's dirt bike, but was not familiar with the bike. He lost his balance and fell onto his left hand. His left wrist was in a cast for about three months.

**65**  There was a wage increase at Shipyards, effective March 1, 2013. The unskilled rate became $38.65 per hour, and the semi-skilled rate became $43.17 per hour, being an average of $40.91 per hour.

**66**  Mr. Ilett completed four courses for 1.5 credits each in the spring 2013 term. He obtained a B-, a C, a D, and an F. His sessional grade point average for the academic year of 2012-2013 was 1.86, being closer to a C than to a D.

***iii. May 1, 2013 to August 31, 2013: Cycling Trip***

**67**  In May 2013, after his UVic courses were finished, Mr. Ilett embarked on what he hoped would be a cross-country cycling trip with his friend Mr. Hess. The plan was to cycle from Tsawwassen, B.C. to Newfoundland. The plan was to ride a steel-framed bicycle carrying a tent, mat, sleeping bag, food, water, change of clothes, and raingear. The plan was to sleep in tents or at the homes of friends.

**68**  Mr. Ilett wanted to make the trip because he thought it would improve his mood, strength, and confidence.

**69**  Mr. Ilett cycled from Tsawwassen, B.C. to near Calgary, Alberta, a distance of about 1,000 km. Mr. Hess rode with him for about a week, to Penticton or Kelowna, and then stopped the trip. Mr. Hess's evidence was that he argued with Mr. Ilett and decided to stop the trip as a result.

**70**  Mr. Ilett hitchhiked into Calgary, Alberta. He then travelled to Montreal, Quebec, through a combination of bicycling and hitchhiking. The parts that he cycled included Medicine Hat, Alberta to Maple Creek, Alberta; Winnipeg, Manitoba to Dryden, Ontario; and Mississauga, Ontario to Montreal, Quebec. He tried to cycle 100 km per cycling day.

**71**  Mr. Ilett found the cycling painful. He would cycle for a couple of days and then rest for a couple of days. The trip ended in Montreal after about two months.

**72**  Mr. Ilett returned to Victoria in August 2013. He saw Dr. Gershwin, who recommended that he increase his strength and activity. He took nine kinesiology sessions.

***iv. September 1, 2013 to April 30, 2014: Two Terms at UVic and Part-time Work in 2014***

**73**  Mr. Ilett returned to UVic in September 2013 and his grades improved. His mood had improved, he felt stronger, and he was proud of what he had accomplished.

**74**  Mr. Ilett's symptoms have not changed significantly since around September 2013. The pain continues in his right shoulder, neck, and right bicep; he has periodic pain in his right knee, right hip, and lower back; and he suffers periodic headaches.

**75**  Mr. Ilett had an x-ray of his right AC joint on October 2, 2013, which showed no separation. He had a bone scan on October 4, 2013, which showed no significant abnormality in his shoulder.

**76**  In November 2013, Mr. Ilett went to hospital after hitting his head when a friend jumped on him in jest at a bar.

**77**  Mr. Ilett completed four courses for 1.5 credits each in the fall 2013 term, receiving grades of B, B-, C+, and D.

**78**  Mr. Ilett did not earn any income in 2013.

**79**  In January 2014, during his university term and after Dr. Dyson told him it was fine to do so, Mr. Ilett resumed part-time work. He worked for College Pro Painting for about three to five hours a week, for about two-and-one-half months, as a door to door salesman soliciting estimates to paint houses. He was paid a commission based on the number of customers obtaining estimates. He estimated that he earned about $15.00 per hour.

**80**  In February 2014, Mr. Ilett met his current girlfriend, Ms. Banks. When they first met, Ms. Banks did not realize that he had any injuries, but by the time she lived with him, she observed that he suffered pain and it could affect his mood.

**81**  Around April 2014, Mr. Ilett quit his job at College Pro Painting because he found that it was increasingly difficult to solicit estimates, and he was earning less for the time he spent. Around the same time, he began working for STS Pain Pharmacy ("STS"). Initially, he worked about nine hours a week in shifts of three hours a time, earning $12.00 per hour. His work involved meeting with people and working with other organizations in a program to help people reduce their use of pain medications. For example, Mr. Ilett organized a food drive.

**82**  After his UVic term completed, Mr. Ilett started working 13-14 hours a week for STS. He also began working part-time for his friend Mr. Bayley, who operates a business cleaning trucks and semi-trailers. Mr. Ilett usually worked a four-hour shift on Sundays and was paid $20.00 per hour. He estimated that he earned about $600.00 from Mr. Bayley in 2014.

**83**  Mr. Ilett usually suffered two or three days of pain following a shift of cleaning trucks. He would not use the pressure washer, instead sweeping the lower parts of trucks with a broom.

**84**  Mr. Esnouf also worked at Mr. Bayley's business. He described the pressure washing work as comparable in physical demand to the work at Shipyards. However, Mr. Ilett did not use the pressure washer. When Mr. Esnouf and Mr. Ilett worked together, they shared the duties so that Mr. Ilett did not have to reach up with a large, heavy scrubbing tool. Instead, Mr. Esnouf did that, leaving Mr. Ilett to clean the lower portions of the trucks.

**85**  Mr. Ilett completed four courses for 1.5 credits each in the spring 2014 term, receiving grades of A-, B, C+ and C. His grade point average for the 2013-2014 session was 3.75, being closer to a B- than to a C+.

**86**  Around the spring of 2014, Mr. Ilett also obtained a couple of odd jobs, including assisting in the moving of furniture and boxes, for a total of about six hours of work.

***v. May 1, 2014 to December 31, 2014: Island Savings Chemainus and Saltair Pub***

**87**  Mr. Ilet, decided to take time off from university after completing the spring 2014 term to make money.

**88**  Around June 2014, Mr. Ilett moved with Ms. Banks to Chemainus, B.C. Mr. Ilett obtained a job there with Island Savings, a bank. He worked about 36 hours a week, consisting of four days for seven and one-half hours per day, and a fifth day for six hours. His job title was "banking advisor" and he earned $17.60 per hour. His duties included rolling coins, counting bills, and dispensing cash.

**89**  Mr. Ilett found the bank work manageable as long as he was able to move from his desk and stretch periodically. However, he experienced significant pain after tasks involving stretching his right arm forward, such as typing on a calculator.

**90**  In June or July 2014, Mr. Ilett did some casual jobs in Chemainus for Mr. Stanton, who is a contractor. Mr. Stanton employed Mr. Ilett to work on a job at a museum and a job at Mr. Stanton's residence. Mr. Ilett's work included moving lumber, weeding, and cleaning up. Mr. Stanton thought he paid Mr. Ilett $15.00 per hour, while Mr. Ilett thought he was paid $20.00 per hour. Mr. Ilett was in pain for nearly a week after helping Mr. Stanton.

**91**  Mr. Stanton did not notice Mr. Ilett displaying any physical difficulties in performing this work for him. However, Mr. Ilett's evidence is that this work aggravated his symptoms, and that is why he stopped doing it.

**92**  Mr. Ilett found some extra work at the Saltair Pub near Chemainus in August 2014. He worked as a bartender two or three times a week for shifts lasting two or three hours. He worked up to 18 hours a week, earning $9.00 per hour plus tips. His tips ranged from a low of $30.00 to a high of $110.00 per shift. He was exhausted from working a total of about 45 hours a week, but was determined to pay off his debts and return to university.

**93**  Mr. Ilett decided not to return to UVic for the fall 2014 term and stayed at his job at Island Savings in Chemainus.

**94**  Mr. Ilett sprained his ankle in October 2014 when he was motorcycling on an unfamiliar motorcycle of a friend's and it fell hard on his ankle. He took one day off work and wore a brace for a period after that.

**95**  Mr. Ilett's gross income reported in his 2014 income tax return was $19,980. The defence argued that his actual income was about $25,000.

***vi. January 1, 2015 to December 31, 2015: Three Terms at UVic and Island Savings Victoria***

**96**  Mr. Ilett returned to UVic in January 2015 for the spring 2015 term. He declared a major in economics.

**97**  Mr. Ilett transferred within Island Savings from the Chemanius branch to the Royal Jubilee branch in Victoria. He began working 11.75 hours per week, with occasional additional shifts at other Victoria branches.

**98**  Mr. Ilett's grades improved dramatically in the spring 2015 term. He took his heaviest course load, taking five courses and obtaining his best grades to date. He took five courses of 1.5 credits each. His grades ranged from A to B-, with a sessional grade point average of 6.20, being a little better than a B+.

**99**  Around May 2015, Mr. Ilett's relationship with Ms. Banks broke up temporarily. Also around that time, Mr. Ilett resumed the truck-cleaning work for Mr. Bayley, continuing it for one four-hour shift most weeks until the time of trial.

**100**  In the summer of 2015, Mr. Ilett ran an ad on the website "Used Victoria", offering to assist people with odd jobs. He found work two or three times a week for two to three hours per job over a period of about two months. The odd jobs included spreading top soil and bark mulch, trimming a hedge, pressure washing a driveway, painting a fence, cleaning a crawl space, and moving landscaping bricks. He was in a lot of pain after moving the bricks.

**101**  Mr. Ilett took UVic courses during the summer 2015 term, but his grades dropped. He took four courses of 1.5 credits each, achieving one B+ and three grades of C+.

**102**  Mr. Ilett resumed a relationship with Ms. Banks in September 2015, and the relationship continued at the time of trial. However, Ms. Banks moved to Port Alberni, and she and Mr. Ilett see each other only on weekends. Ms. Banks testified that she and Mr. Ilett's activities together include hiking, walking, swimming, and dirt-biking.

**103**  Mr. Ilett's grades recovered in the fall 2015 semester. He completed five courses of 1.5 credits each. He achieved an average of almost 80%, being an A-.

**104**  Mr. Ilett's gross income in 2015 was $14,343.53.

1. **At the Time of Trial**

**105**  At the time of trial, Mr. Ilett was continuing his studies at UVic. He anticipated receiving his bachelor's degree in economics, with a minor in business, in May 2016. He was not sure what he would do after that. He was considering applying to become a certified public accountant, or applying for law school.

**106**  Mr. Ilett continued to work part-time for Island Savings and roughly twice a month for Mr. Bayley. He finds the work for Mr. Bayley to be substantially easier than his previous work at Shipyards, because his shoulder has been accommodated by working only at lower tasks. He was still in a relationship with Ms. Banks, who is a student in Port Alberni.

**107**  Mr. Ilett's biggest physical complaints at trial were of constant pain in his right shoulder and right bicep, and frequently in his neck. He also had some chronic pain in his right hip and intermittent low back pain. The pain is aggravated by labour work and can last one or two days. He also feels pain after tasks like writing and typing. He also suffers headaches, sometimes lasting weeks. He still has trouble sleeping owning to pain, often waking hourly to adjust his position. He no longer runs. He has trouble bending his right knee and it will be sore after long walks. He uses over-the-counter pain medications two to four times a week.

**108**  Mr. Esnouf testified that he worked for Shipyards for four years, and was laid off twice for no more than two months each time. Mr. Dardengo, who works in human resources for Shipyards, testified that it was common for laid-off employees to be hired back if they had the right skill set, and that hiring for a labourer like Mr. Ilet was not based on seniority. He testified that the factor affecting whether Mr. Ilett would have been re-hired was his displayed skill set.

**109**  By the time of trial, Mr. Ilett was engaging in some recreation. However, he is far less physically active than he was prior to the accident. He has modified his activities, such as by swimming shorter distances, and he rests frequently. He stopped baseball, rock climbing and wrestling because of his injuries. He will occasionally go dirt-biking, but only for short periods of about 30 minutes. He suffers pain constantly. He is also less social and outgoing. He would no longer participate in renovations because it would increase his pain.

1. **Expert Medical Evidence**

**110**  Mr. Ilett relied on the medical evidence of Dr. Graboski, a physiatrist; Dr. Dyson, a general medical practitioner; and Mr. Towsley, an occupational therapist. The defence relied on the expert medical evidence of Dr. Regan, an orthopedic surgeon.

***i. Dr. Dyson, general medical practitioner***

**111**  Dr. Dyson is Mr. Ilett's family doctor and testified at his request. He was accepted as a physician expert in family practice. He initially diagnosed Mr. Ilett with the following:

1. abrasions of both forearms and sacral region of low back;
2. moderate soft tissue strains, contusions of the neck, torso, hips and limbs;
3. severe sprains of the right hand with possible fracture;
4. likely AC (acromioclavicular joint) separation of the right shoulder; and
5. likely fracture of right lateral rib.

**112**  Dr. Dyson diagnosed Mr. Ilett in August 2012 with secondary mood disturbance (reactive depression). In Dr. Dyson's opinion, Mr. Ilett's depression had cleared by April 2014. However, Mr. Ilett continued to have complaints of pain.

**113**  In his report of January 2, 2015, Dr. Dyson wrote that Mr. Ilett's pain complaints were not a matter of muscle conditioning or depression, since Mr. Ilett had recovered his muscle bulk and strength, and the depression had lifted.

***ii. Dr. Graboski, physical medicine and rehabilitation specialist ("physiatrist")***

**114**  Dr. Graboski is a physician with a specialty in physical medicine and rehabilitation, which focuses on management of pain and disabilities. Such physicians are commonly referred to as "physiatrists". Dr. Graboski was accepted as an expert in physiatry and in the diagnosis and treatment of brain injury, including reading films. Dr. Graboski saw Mr. Ilett for the purpose of providing a report to the Court and testified at Mr. Ilett's request.

**115**  In July 2015, Dr. Graboski diagnosed the following as a result of Mr. Ilett's injuries in the accident:

1. soft tissue injury to the right shoulder, possible acromioclavicular joint separation;
2. proximal bicipital tendinopathy on the right, possible labral involvement;
3. musculoligamentous strain of the cervical spine with secondary myofascial pain disorder of the neck and shoulder girdle;
4. soft tissue injury to the right hip -- has seen good resolution but still has mild symptoms;
5. musculoligamentous strain of the low back -- majority of pain has resolved;
6. right rib probable fracture -- resolved;
7. right wrist soft tissue injury -- resolved;
8. right distal bicep tendinopathy;
9. abrasions to the right forearm, lateral hip and sacrum -- resolved; and
10. headache, most likely cervicogenic.

**116**  In Dr. Graboski's opinion, it is medically probable that these diagnoses are directly causal to the accident. Further, in her opinion, the post-accident fracture of the left scaphoid caused Mr. Ilett to have a delay in continuation of his CBI kinesiology program, but he was able to return to it.

**117**  In Dr. Graboski's opinion, unless there is a definable surgical lesion, Mr. Ilett is unfortunately going to be left with chronic shoulder pain. Despite his diligent participation in an active rehabilitation program, and his maintenance of his physical fitness, he still has chronic musculoskeletal injuries that have not recovered fully and in Dr. Graboski's opinion, will not recover fully in the future.

**118**  In Dr. Graboski's opinion, Mr. Ilett's soft tissue injuries will continue to limit him in physically demanding jobs and recreation.

***iii. Mr. Towsley, occupational therapist***

**119**  Mr. Towsley was accepted at trial as an expert in occupational therapy, functional work capacity evaluation, and osteopathy. He conducted two days of functional capacity testing on Mr. Ilett and testified at his request. In Mr. Towsley's opinion:

1. Mr. Ilett does not meet the strength requirements for a labourer job at Shipyards, although he meets the strength requirements for medium strength jobs, with select aspects of heavy strength capacity jobs;
2. Mr. Ilett has difficulty with walking and climbing owing to his right hip symptoms, and they also affect his ability to work in confined spaces;
3. there were no modifications which would accommodate Mr. Ilett's limitations;
4. Mr. Ilett is doing well working at the bank, except for adding cheques and using his calculator;
5. Mr. Ilett's pain, especially related to headaches, could interfere with his studies; and
6. Mr. Ilett may have difficulty with typing and writing notes in class.

**120**  Mr. Towsley made some observations to determine Mr. Ilett's level of effort, and concluded that Mr. Ilett appeared to be putting in good effort.

***iv. Dr. Regan, orthopedic surgeon***

**121**  Dr. Regan testified at the request of the defence. He was accepted as an expert in orthopedic surgery, particularly of the upper extremities and knees. He saw Mr. Ilett once, for the purposes of giving an opinion for the Court.

**122**  Dr. Regan's opinion included the following:

1. Mr. Ilett had significant road rash and soft tissue injuries to his right upper extremity and right hip region associated with significant abrasions to his sacral and bilateral forearms as a result of the accident;
2. Mr. Ilett had soft tissue injuries that would resolve;
3. Mr. Ilett would not be limited in ladder climbing and lifting, and there would not be any impediment to him returning to work as a shipyard labourer or as a certified public accountant; and
4. Mr. Ilett reasonably had difficulty with his first semester after the accident, arising from soft tissue pain caused by his injuries in the accident.

***v. Discussion of Medical Evidence***

**123**  I accept Dr. Regan's opinion that Mr. Ilett reasonably had difficulty with his first semester after the accident, arising from soft tissue pain caused by his injuries in the accident.

**124**  I do not accept Dr. Regan's opinion that Mr. Ilett can return to work at Shipyards. When he wrote his opinion, Dr. Regan did not have the benefit of Mr. Towsley's functional capacity evaluation. Dr. Regan is not expert in occupational health or functional capacity. Where it conflicts with Mr. Towsley's opinion, I prefer Mr. Towsley's opinion.

**125**  I also reject Dr. Regan's opinion that Mr. Ilett's soft tissue injuries are likely to resolve. Dr. Regan wrote that it was of note that Mr. Ilett went on a bike trip from Victoria to Montreal and felt that he had improved following the trip. Dr. Regan did not appreciate that much of the trip was hitchhiking. In addition, Dr. Regan's concern was whether Mr. Ilett would suffer further injury, such as an increase to a tear in a muscle, and he accepted that it was possible that Mr. Ilett would suffer pain during the trip.

**126**  Dr. Regan provides surgical treatment, and sometimes refers patients to physiatrists. He testified that he did not assert that Mr. Ilett was pain-free, but rather that there was no organic pathology that would be made worse with heavy labour. The question for the Court is how Mr. Ilett can reasonably function, and it is not appropriate to require him to work with significant pain just because it will not cause further damage.

**127**  Overall, I prefer the opinion of Dr. Graboski because she is a physiatrist, and has training and experience with a greater focus on managing pain.

**128**  I accept Dr. Regan's opinion that it does not appear that surgery will assist Mr. Ilett. However, I prefer the opinions of Drs. Graboski and Dyson and Mr. Towsley in respect of the continuing effect of Mr. Ilett's injuries on his functioning.

1. **Expert Economic Evidence**

**129**  Mr. Ilett relied on the expert evidence of Mr. Wickson, economist. The defence relied on the expert evidence of Mr. Hildebrand, economist.

***i. Mr. Wickson, economist***

**130**  Mr. Ilett relied on the evidence of Mr. Wickson, who was accepted at trial as an economist and expert on the valuation of loss. He provided tables estimating the present values for Mr. Ilett's past and future wage loss.

**131**  Mr. Wickson also provided calculations regarding average income of men with a baccalaureate level of education. He included data regarding men with a bachelor's degree in law.

**132**  Mr. Wickson considered the average earnings for a male, living in British Columbia, born around the same time as Mr. Ilett, who has a baccalaureate level of education (including law), after contingencies of unemployment, possible part-time work, non-participation in the labour force and for the average value of employer provided benefits, but without the possibility of working after the age of 70. In his opinion, the average annual earnings are $76,482 annually, with the present value of lifetime earnings being $2,449,800.

***ii. Mr. Hildebrand, economist***

**133**  The defence relied on the evidence of Mr. Hildebrand, who was accepted as an economist with expertise in calculating past and future wage loss. He too provided tables estimating the present values for Mr. Ilett's past and future wage loss.

**134**  Mr. Hildebrand's opinion was based on data for males with a baccalaureate level of education other than law. In his opinion, the labour market outcomes of law graduates are significantly above those of undergraduates in other major fields of study. As a result, he made calculations using data excluding a bachelor's degree in law, and his projection was about 11% lower than Mr. Wickson's.

**135**  Mr. Hildebrand's opinion, on that basis, was that the average annual earnings are $68,220, and the lifetime earnings would be $2,185,733. He estimated the impact of a one-year delay in entering the labour market to be $53,488.

**ANALYSIS**

**136**  I begin by addressing the specific issues, and then consider the award under the different headings of damages.

1. **Liability for the Accident**

**137**  Mr. Ilett argued that Ms. Buckley was solely responsible for the collision. He argued that she turned left when it was not safe to do so, and thereby caused the collision.

**138**  Ms. Buckley's position is that Mr. Ilett caused the collision wholly or partially when he overtook the northbound cars and passed them on the right.

***i. What Happened in the Accident***

**139**  There are some conflicts in the evidence of the parties and Ms. Mattina. The most significant conflict is between Ms. Buckley's evidence and Ms. Mattina's evidence about the speed of Ms. Buckley's turn.

**140**  Ms. Buckley's evidence is that she moved slowly, and after she could see down the passenger side of the Large Vehicle obstructing her view, she was just about to accelerate when Mr. Ilett struck her. In contrast, Ms. Mattina testified that Ms. Buckley inched forward, and after a northbound driver stopped to let her through, Ms. Buckley immediately, without hesitation, made her left turn. Mr. Ilett testified that he heard screeching brakes at the time of impact.

**141**  I prefer Ms. Mattina's evidence to Ms. Buckley's evidence. Ms. Mattina is an independent witness who had a clear view of the accident. She appeared to have a clear recollection. She had no reason to favour either Mr. Ilett or Ms. Buckley in her evidence. While Ms. Mattina was mistaken in a written statement about the details of the date and the street name, those details are not important and do not show that she had forgotten the important aspects of what she saw. While Ms. Mattina did not agree to speak to defence counsel in the few weeks prior to trial, she had serious personal health issues requiring her time and attention.

**142**  In addition, Ms. Buckley's evidence is improbable. If, as she testified, Ms. Buckley was in a position to see down the passenger side of the Large Vehicle obstructing her view, she should have seen Mr. Ilett. He was cycling on the shoulder, and so should have been visible to her, and Ms. Mattina saw him.

**143**  Further, the location of the damage on Ms. Buckley's Dodge Neon car is not consistent with Ms. Buckley's evidence. If, as she testified, she was moving very slowly so she could see if there was a cyclist on the shoulder, Mr. Ilett and his bicycle should have struck her car near the front bumper. Instead, the damage was closer to the middle of her car, around the windshield.

**144**  As a result, I conclude on the balance of probabilities that Ms. Buckley commenced her turn slowly, and after there was an opening in the northbound traffic, but before she could see whether there was a cyclist approaching on the shoulder, she accelerated and crossed the northbound traffic lane. Nearly half of her vehicle had crossed the shoulder at the time Mr. Ilett struck it.

***ii. Law and Analysis***

**145**  Mr. Ilett relied on the following sections of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*:

1. s. 144(1), requiring a driver to drive with due care and attention;
2. s. 166(c), requiring a driver to determine, prior to turning left, that it can be done safely, 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; and
3. s. 174, requiring a driver to yield the right of way to traffic approaching from the opposite direction that is in the intersection or is so close as to constitute an immediate hazard.

**146**  The defence relied on the following provisions of the *Motor Vehicle Act*:

1. the definitions of "Laned Roadway" and "Roadway" in s. 119(1), as follows:

**"laned roadway"** means a roadway or the part of a roadway that is divided into 2 or more marked lanes for the movement of vehicular traffic in the same direction;

...

**"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;

1. s. 158 regarding passing on the right, as follows:

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

1. when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
2. when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
3. on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
4. Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
5. when the movement cannot be made safely, or
6. by driving the vehicle off the roadway.
7. s. 174, regarding yielding the right of way on the left turn, as follows:

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

1. s. 183, regarding the application of provisions governing motorists to cyclists, as follows:

**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.

1. A person operating a cycle
2. must not ride on a sidewalk unless authorized by a bylaw made under section 124 or unless otherwise directed by a sign,

...

1. must, subject to paragraph (a), ride as near as practicable to the right side of the highway,

...

1. 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 operate a cycle
2. on a highway without due care and attention or without reasonable consideration for other persons using the highway, ...

...

**147**  The defence position is that Mr. Ilett contravened s. 158 by passing the line of vehicle traffic on his right. The defence argued that s. 158 governs passing on the right, and prohibits doing so with the three listed exceptions. The defence argued that none of the exceptions applied here, and that the exception for passing when there is an unobstructed lane on the side of the roadway cannot apply because a paved shoulder does not fall within the definition of either "Roadway" or "Laned Roadway".

**148**  The defence relied on *Smeltzer v. Merrison*, [*2012 BCCA 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1F9-00000-00&context=). In that case, the plaintiff driver had been southbound and was turning left across the northbound traffic. The defendant driver was driving north but passing another vehicle on the right. The Court of Appeal held that the passing on the right could be dangerous, and the trial judge was wrong to have concluded that there was an unmarked but *de facto* lane that allowed passing on the right. The Court of Appeal held that the drivers were equally responsible for the accident.

**149**  The defence also relies on *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*]. In that case, the plaintiff cyclist and the defendant unidentified driver were travelling in the same direction. The defendant driver passed the plaintiff cyclist, slowed down, and abruptly and inexplicably veered to the right over the fog lane before continuing. The vehicle struck the bicycle in the fog lane.

**150**  The majority held that the cyclist passing the vehicle in the right fog lane was entirely responsible for the accident, while the minority would have upheld the trial judgment that the motorist was 70% responsible.

**151**  The majority judgment included the following at para. 17 and 21:

[17] The fact that the vehicle slowed while descending the hill bearing caution signs, even to a near stop approaching the bottom, and then moved abruptly to the right side of the lane in which it was travelling, up to two feet over the fog line, before carrying on cannot of itself be an act of ***negligence*** ...

[21] It is contended that the driver should not have moved across the lane in ... which the vehicle was being driven without checking the rear-view mirrors, although there is of course no evidence and for that matter no finding that was not done. But, while vehicles must always be driven with due care and attention, in the absence of an evidentiary basis on which to find the driver knew or ought to have known a cyclist may have been behind the vehicle, and would attempt to pass on its right side, in the same lane, as Ormiston did, it is difficult to see why the driver should be faulted for moving across the lane without checking the vehicle's mirrors in this instance. In any event, while it is apparent the driver did not see Ormiston accelerate to pass on the right, it cannot be said that if he or she had seen him in the rear-view mirrors following behind, the vehicle's move to the right of its lane, for whatever reason may have been, would not and should not have been made. It was the vehicle's lane.

[Underlining added.]

**152**  The majority discussed the cyclist using the shoulder as a cycling lane as follows at paras. 23-25:

[23] Under the *Motor Vehicle Act* a cyclist is required to ride as near as practicable to the right side of the highway (s. 183(2)(c)). "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.

[24] The contention is that because cyclists must sometimes ride on the shoulder while vehicles cannot travel on that part of a highway, the shoulder must, where practicable, be a lane for cyclists within the meaning of s. 158(1)(b) such that, when riding on the shoulder, they are able to take advantage of the exception it provides and pass vehicles on a roadway on their right. It does appear that what may be practicable could vary considerably having regard for the differing widths of the shoulder over any given stretch of a highway, or from one highway to the next, as well as the condition of the surface. One cyclist may have a much different view than another as to what is practicable in any given instance.

[25] While I doubt the legislative intention was to create by this somewhat convoluted statutory route what would be thousands of miles of unmarked and ill-defined bicycle lanes across the province, I do not consider s. 158 (1)(b) constitutes an applicable exception to the prohibition against passing on the right in any event. As defined, the exception applies to a laned roadway being a roadway divided into marked lanes for vehicles travelling in the same direction. The markings divide the roadway; the lanes marked are on the roadway. A roadway does not include the shoulder. The shoulder could not be an unobstructed lane on a laned roadway. The "laned roadway" exception has, as the judge said, no application here. It does not permit cyclists to pass vehicles on the right by riding on the shoulder. It must follow the driver of the vehicle would have had no reason to expect a cyclist like Ormiston would attempt to pass on the right by riding on the shoulder. That must be particularly so here when the shoulder was not fit for a bicycle because it was strewn with gravel and Ormiston was riding as far to the right of the highway as he considered practicable.

[Underlining added.]

**153**  In *Ormiston*, the majority of the Court of Appeal concluded that there was no evidentiary basis for the finding that the driver knew or ought to have known a cyclist may have been behind the vehicle and would attempt to pass on its right side in the same lane.

**154**  However, in this case, Ms. Buckley knew that cyclists frequently travelled on the shoulder of Admirals in the area of the Intersection. Further, there was a hazard sign indicating the presence of cyclists on Admirals, although it was for northbound traffic.

**155**  *Kimber v. Wong*, [*2012 BCSC 783*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3W1-00000-00&context=) [*Kimber*], is a case which bears many factual similarities to this case. In *Kimber*, Mr. Justice Pearlman found a left-turning driver and a straight-going cyclist each 50% responsible for an accident at a T-intersection. There was one lane of travel in each direction, and cars were parked on the shoulder.

**156**  The plaintiff cyclist approached the intersection to the left of the parked cars and to the right of the vehicles in his lane. The defendant was approaching in the opposite direction, intending to turn left across oncoming traffic. The defendant stopped at the intersection for about one minute before commencing her left turn, when a motorist driving a small Hyundai Accent in the oncoming lane waved to the defendant to indicate she could make her left turn. The Accent blocked the driver's view of potential bicycle traffic to the right of the stopped vehicles. The cyclist was traveling at about 28-30 km/hr when he struck the right front side of the defendant driver's vehicle.

**157**  In contrast to the facts in *Kimber*, Ms. Buckley knew that cyclists often rode on the shoulder at the Intersection. A hazard sign indicated the presence of cyclists on Admirals. The shoulder was effectively being used as a cycling lane, and the area Mr. Ilett was travelling in was not filled with parked cars as in *Kimber*. The cyclist in *Kimber* ought to have been able to observe stopped vehicles to his left at the uncontrolled intersection, which in the circumstances suggested a left-turning vehicle. In contrast, Mr. Ilett was riding beside a lane of stationary and slow-moving vehicles, and the fact that vehicles were stopped indicated heavy traffic and not necessarily a turning vehicle.

**158**  The defence argued that Ms. Buckley met the standard of care required of her on the basis that she drove into her left turn slowly. However, as stated, I have concluded that Ms. Buckley drove into the turn quickly and without hesitation.

**159**  Ms. Buckley had a duty pursuant to s. 174 to yield in making her left turn to traffic so close as to constitute an immediate hazard. As a result, she had a duty to yield to Mr. Ilett. The Large Vehicle may have impeded her view of the shoulder that Mr. Ilett was travelling on. However, if she had moved slowly enough, she would have seen Mr. Ilett and stopped, avoiding the accident.

**160**  I conclude that Mr. Ilett breached s. 158 of the *Motor Vehicle Act*, because he passed the lane of traffic which was on his left while he rode on the shoulder. However, while breaching statutory duties can be taken into account in setting the standard of care and as evidence of ***negligence***, breaching of statutory duties is not proof of ***negligence***. See *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=).

**161**  The first overriding question concerning liability for this accident is whether Ms. Buckley took reasonable care for the safety of Mr. Ilett, and if not, whether her failure to do so was one of the causes of the accident. Similarly, the other overriding question is whether Mr. Ilett took reasonable care for his own safety, and if he failed to do so, whether his failure was one of the causes of the accident. See *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) [*Bradley*] at para. 27.

**162**  Ms. Buckley did not take reasonable care for the safety of Mr. Ilett. Section 166(c) required her not to turn unless she had ascertained that her left turn could be made safely, having regard for the nature, condition and use of the road and the cyclists that might reasonably be expected to be on the northbound shoulder. Ms. Buckley failed to do that, and thereby caused the accident. Ms. Buckley drove into her left turn without hesitation when she did not have a clear view of the northbound shoulder, and when she knew that cyclists frequently rode on the shoulder. She was making a left turn at an intersection which did not require traffic on Admirals to stop. The fact that she drove without a clear view of where she was driving caused the accident. It was reasonably foreseeable that she would collide with a cyclist by turning left without a clear view of the northbound shoulder.

**163**  Mr. Ilett did not fail to take reasonable care for his own safety. Cyclists frequently rode on the shoulder at the Intersection and many were doing so that day. Mr. Ilett was visible to Ms. Mattina for a significant distance prior to the Intersection. There were no signals requiring northbound traffic on Admirals to stop. Although Mr. Ilett passed the slowly moving and stopped lane of traffic which was on his left while he rode on the shoulder, it was commonplace for cyclists to do so.

**164**  As a result, Ms. Buckley is entirely responsible for Mr. Ilett's injuries.

1. **Mr. Ilett's income in 2014**

**165**  The defence argued that the $19,980 which Mr. Ilett reported as income in his 2014 income tax return was incorrect, and that he earned about $25,000.

**166**  Mr. Ilett's 2014 income tax return included $17,767.79 from Island Savings, and $2,012 from a numbered company which was probably the Saltair Pub. It also included $200 in "other employment income", which Mr. Ilett suggested were tips from the Saltair Pub.

**167**  The evidence does not permit a precise determination of Mr. Ilett's earnings in 2014. However, the evidence suggests that he earned about $4,225.00 more than he reported in his 2014 income tax return, consisting of the following:

1. about $600.00 from College Pro Painting, assuming an average of four hours work per week for 10 weeks (40 hours) at about $15.00 per hour;
2. about $600.00 from Mr. Bayley for one four-hour shift per week for seven or eight weeks at $20.00 per hour;
3. about $650.00 from Mr. Stanton;
4. about $650.00 from STS for six weeks of nine hours a week at $12.00 per hour;
5. about $50.00 from odd jobs he obtained through Used Victoria; and
6. about $1,675.00 in further tips from Saltair Pub, calculated as 2.5 days per week for about 15 weeks at about $50.00 per day less the $200.00 reported as other income.

**168**  As a result, I conclude that Mr. Ilett's actual earnings in 2014 were about $24,000.00.

1. **Likelihood and Timing of Mr. Ilett Achieving Full Recovery**

**169**  The defence argued that, while Mr. Ilett's account of his injuries was generally consistent with the surrounding evidence, some of Mr. Ilett's evidence was exaggerated. In particular, the defence argued that Mr. Ilett's testimony wrongly suggested that the truck-washing work Mr. Ilett did for Mr. Bayley was less physically demanding than it actually is, and wrongly suggested that Mr. Ilett was not able to participate in many outdoor activities.

**170**  The case of *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.), is often cited as a reminder of the approach the Court must take in assessing injuries which depend on subjective reports of pain. At 397-399 of the reasons for judgment, Chief Justice McEachern wrote:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation. Previously decided cases are some help (but not much, because obviously every case is different). ...

...

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=) I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury.

**171**  Overall, Mr. Ilett has been stoic. He has worked hard, not only in his studies but also in his physical conditioning and in obtaining part-time work. He demonstrates a determination to accomplish things despite the pain.

**172**  I do not accept that Mr. Ilett has exaggerated his injuries, either at trial, or to the medical professionals. If anything, Mr. Ilett has tried to minimize his difficulties. He has done some physical labour, including the truck-washing and odd jobs, but he has paid a price in resulting pain even when some accommodations have been made. Similarly, he has engaged in some outdoor activities, such as dirt-biking, but only after making accommodations like shortening the duration of the activity, and only with resulting pain.

**173**  I accept the medical evidence of Drs. Graboski and Dyson and Mr. Towsley. In the event of conflict between their evidence and that of Dr. Regan, I prefer the evidence of Drs. Graboski and Dyson and Mr. Towsley.

**174**  I conclude that Mr. Ilett suffered the following injuries in the accident:

1. soft tissue injury to the right shoulder, possible acromioclavicular joint separation;
2. proximal bicipital tendinopathy on the right, possible labral involvement;
3. musculoligamentous strain of the cervical spine with secondary myofascial pain disorder of the neck and shoulder girdle;
4. soft tissue injury to the right hip -- good resolution but with some mild symptoms;
5. musculoligamentous strain of the low back -- majority of pain has resolved;
6. right rib probable fracture -- resolved;
7. right wrist soft tissue injury -- resolved;
8. right distal bicep tendinopathy;
9. abrasions to the right forearm, lateral hip and sacrum -- resolved; and
10. headache, most likely cervicogenic.

**175**  Mr. Ilett also suffered a secondary mood disturbance, reactive depression, for less than a year.

**176**  I conclude the following regarding Mr. Ilett's current condition and ability to function:

1. Mr. Ilett does not meet the strength requirements for a labourer job;
2. Mr. Ilett has difficulty with walking and climbing owing to his right hip symptoms, and they also affect his ability to work in confined spaces;
3. there are no ergonomic modifications which would accommodate Mr. Ilett's limitations;
4. Mr. Ilett is doing well working at the bank, except for adding cheques and using his calculator;
5. Mr. Ilett's pain, especially related to headaches, could interfere with his studies; and
6. Mr. Ilett may have difficulty with typing and writing notes in class.

**177**  Unfortunately, it is probable that Mr. Ilett will be left with chronic shoulder and neck pain, chronic right hip pain, and chronic intermittent low back pain. Despite his diligent participation in an active rehabilitation program, and his high level of physical fitness, he still has chronic musculoskeletal injuries that have not recovered fully in the three-and-one-half years since the accident, and likely will not recover fully.

**178**  Mr. Ilett may experience some modest improvement in the next few years, as suggested by Drs. Dyson and Graboski. However, the improvement is not likely to be significant, and is not likely to enable him to work as a labourer.

**179**  It is probable that Mr. Ilett's soft tissue injuries will continue to limit him in physically demanding jobs and recreation, and in jobs that require him to engage in frequent or sustained forward and overhead reaching with his right hand.

1. **Assessment of Damages**

***i. Non-pecuniary Damages***

**180**  Mr. Ilett claims non-pecuniary damages of $120,000, arguing that he was a young and very energetic man who was just starting out in life at the time of the accident, and that his injuries have completely altered his life.

**181**  Ms. Buckley's position is that the appropriate award for non-pecuniary damages is in the range of $60,000 to $90,000.

**182**  Mr. Ilett's counsel relied on these cases:

1. *Chahal v. Righele*, [*2014 BCSC 1086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0XJ-00000-00&context=). In that case, the plaintiff suffered chronic back pain, sleep disturbance, secondary headaches, and residual depression, all of which were anticipated to be ongoing. Affleck J. awarded $120,000 for non-pecuniary damages. In contrast, Mr. Ilett's depression has lifted;
2. *Karlsson v. Noormohamed*, [*2015 BCSC 911*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21K3-00000-00&context=). Abrioux J. awarded $120,000 for non-pecuniary damages to a plaintiff who suffered a fracture dislocation of the shoulder requiring surgery, anxiety and depression, and chronic pain and severe limitation in the right arm. In contrast, Mr. Ilett has not undergone surgery, and he does not have ongoing depression or anxiety;
3. *Ferguson v. McLaughlin*, [*2015 BCSC 2432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HSD-C7M1-JFSV-G4CD-00000-00&context=). Griffin J. awarded $80,000 for non-pecuniary damages to a young man whose career prospects were diminished due to ongoing back pain; and
4. *Hong v. Wagner*, [*2014 BCSC 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61PF-00000-00&context=) [*Hong*]. In that case, B. McKenzie J. awarded $85,000 for non-pecuniary damages to a plaintiff who suffered persistent shoulder pain contributing to a lower mood.

**183**  The position of the defence is that an appropriate award for Mr. Ilett's non-pecuniary damages is in the range of $60,000 to $90,000. Mr. McDougall, for the defence, relied on these cases:

1. *Hong* also cited by Mr. Ilett's counsel;
2. *Chabot v. Chaube*, [*2014 BCSC 300*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1W2-00000-00&context=), in which N. Brown J. awarded $80,000 in non-pecuniary damages to a 34-year-old plaintiff for a shoulder injury. Her injury affected her career as a research scientist and caused her to change to a less lab-intensive and less lucrative career. As a result of her activities, she gave up canoeing, kayaking, and swimming, and had to modify her participation in skiing and hiking;
3. *Dorosh v. John*, [*2013 BCSC 1442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B287-00000-00&context=), in which Power J. awarded $90,000 in non-pecuniary damages to a 35-year-old plaintiff. She suffered chronic shoulder pain, as well as headaches. Her injury impaired her relationship with her youngest daughter during the critical years of the daughter's development, and caused the plaintiff to retrain. She became a nurse but was not able to work full-time; and
4. *Jorgensen v. Coonce*, [*2013 BCSC 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M38Y-00000-00&context=), in which Baird J. awarded $60,000 in non-pecuniary damages to a 42-year-old plaintiff for chronic pain in his right shoulder. The injury played a role in his loss of a job he had held for 23 years in the paving business. He was expected to continue to experience chronic pain, and there was a substantial possibility that his career in paving would be cut short. The injury also negatively affected his relationship with his children, and changed him from a happy to a downcast individual.

**184**  The purpose of an award for non-pecuniary damages is to compensate Mr. Ilett for his pain, suffering, and loss of amenities of life. Mr. Ilett is entitled to an award to provide solace and to make his life more endurable with the injuries that he lives with.

**185**  *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at paras. 45-46, leave to appeal ref'd [*[2006] SCCA No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=), is often cited regarding non-pecuniary damages and the principles behind them. Those paragraphs are as follows:

[45] ... I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from ***Lindal v. Lindal***, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[46] The inexhaustive list of common factors cited in ***Boyd*** that influence an award of non-pecuniary damages includes:

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

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

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

[Emphasis in original.]

**186**  I would summarize the significant factors regarding Mr. Ilett as follows:

1. At the time of trial, Mr. Ilett was 23 years old. He was about 19 years old at the time of the accident;
2. Mr. Ilett suffered soft tissue injuries. He continues to suffer pain chronically in his shoulder, neck, and right hip, and intermittently in his lower back, and to suffer secondary headaches. His other injuries have largely resolved;
3. Mr. Ilett's pain in his shoulder, neck, and right hip has been relatively continuous and severe, and it is unlikely that this pain will resolve completely or even to the point that he will be able to work full-time in labouring jobs;
4. As a result of the accident, Mr. Ilett is disabled from work as a labourer, and is limited in work involving frequent forward or overhead reaching with his right hand and in work involving static positioning of his right arm, such as typing;
5. There was no medical evidence that Mr. Ilett is presently suffering a psychiatric illness such as depression, although he suffered reactive depression for a period of less than one year. However, Mr. Ilett has suffered from the loss of his sense of well-being; and
6. Mr. Ilett's life has changed dramatically as a result of the accident. Before the accident, he was very physically active, including working as a labourer, cycling to work, hiking, and swimming and dirt-biking on his non-work hours. He can now only participate in a minor way in those activities.

**187**  No two cases are alike. I have considered the cases cited by both counsel and Mr. Ilett's particular circumstances.

**188**  Mr. Ilett is entitled to $100,000 for non-pecuniary damages.

***ii. Past Loss of Earning Capacity***

**189**  Mr. Ilett claims $226,492.23 for lost past earning capacity, before deductions for tax.

**190**  Ms. Buckley's position is that Mr. Ilett is entitled to $19,824 to $20,537 net for past lost earnings, calculated as about $6,800 to $7,500 for 2012 and about $13,000 for 2013.

**191**  The award for past loss of earning capacity is designed to compensate Mr. Ilett for what he would have earned if he had not been injured in the accident. This was explained as follows in *Bradley v. Bath* at para. 32 by Tysoe J.A.:

[32] ... this head of damages, both pre-trial and post-trial is properly characterized as a loss of earning capacity. This was explained in *The Queen v. Jennings*, [*[1966] SCR 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=) at 54, [*57 DLR (2d) 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=), referring to the 7th Report of the Law Reform Committee (August 1958):

Damages should, so far as any monetary award can do so, restore the plaintiff to the position in which he would have stood but for the defendant's wrongdoing. On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment ...

**192**  The principles for evaluating a claim for past loss of earning capacity were summarized by Saunders J. as follows 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. 43:

Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the balance of probabilities - *Steenblok v. Funk*, [*[1990] 5 W.W.R. 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=), 46 B.C.L.R. (3d) 133 (BCCA); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss of earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earning capacity, both past and future.

**193**  Mr. Ilett's position is that, if he had not been injured in the accident, he likely would have worked at Shipyards for three years before returning to UVic in September 2015. Instead, he has continued his schooling, except for the periods he has taken off to earn income to continue his studies.

**194**  The defence position is that Mr. Ilett's wage loss for the period from July 18, 2012 to August 30, 2012 is fully compensable, being either $6,804 or $7,517.

**195**  The defence argued that, because Mr. Ilett was laid off at the end of the summer of 2012, he likely would have returned to studies at UVic in September 2012 if he had not been injured in the accident, and worked in part-time jobs during university terms and full-time between terms. The defence's position is that Mr. Ilett is entitled to compensation for 2013, but that in the following years, he earned what he would have earned even if he had not been injured in the accident.

**196**  The defence's position is that, if Mr. Ilett had not been injured, he would have been able to earn as much in 2013 as he in fact earned in 2015. The defence's position is that the difference is a net amount of about $13,000.

**197**  Mr. Ilett's counsel, Mr. Oss-Cech, offered two alternate options for quantifying Mr. Ilett's past wage loss.

**198**  First, Mr. Oss-Cech argued that the Court could calculate three years of earnings at Shipyards, on the assumption that Mr. Ilett would have returned to university in September 2015. Using the hourly rates set out in the collective agreements, Mr. Oss-Cech calculated $260,815.76 for Mr. Ilett's past wage loss before taxes and mitigation. That calculation was on the basis of eight hours of work per day at an hourly rate which was the average wage rate of unskilled and semi-skilled labourers for the relevant period.

**199**  The alternative suggested by Mr. Oss-Cech was to use the calculations of Mr. Wickson, an economist. Mr. Wickson was asked to assume that Mr. Ilett would have returned to university after his lay-off on August 30, 2012, and would have worked at Shipyards while he was not attending university. Mr. Wickson calculated a loss on that basis of $58,700.

**200**  The evidence shows that, as a result of his injuries in the accident, Mr. Ilett has been unable to work at Shipyards. His injuries have meant that he is not capable of working in any labouring jobs, and is limited even in office jobs because of the limitation on his ability to type and use a calculator.

**201**  Mr. Ilett is entitled to be put into the financial position he would have been in if the accident had not occurred.

**202**  Mr. Ilett was injured before he had established a career or even a career path. He was pleased to be working at Shipyards because the job was lucrative and physical.

**203**  Mr. Ilett's work history demonstrates that he has a strong work ethic, as well as ambition. Even if he had not been injured in the accident, he would likely have decided to pursue a university degree. However, he enjoyed physical work, and likely would have worked at Shipyards for a period, in order to save money for his education and his future generally.

**204**  It is likely that, if he had not been injured in the accident, Mr. Ilett would have spent some time working at Shipyards. While temporary lay-offs were common at Shipyards, Mr. Ilett is a hard worker and he would likely have been re-hired when Shipyards needed more workers. He would not likely have been troubled by periods of temporary lay-off, because he was adept at finding short-term work whenever he had available time.

**205**  Mr. Ilett was not able to give a precise plan for how long he would have worked at Shipyards. His estimates varied from one year to five years. It is not surprising that Mr. Ilett could not provide a precise plan, because the accident occurred when Mr. Ilett had worked at Shipyards for only about two months.

**206**  It is appropriate to begin the assessment of Mr. Ilett's loss of past earning capacity by assuming that, if he had not been injured in the accident, he would have worked for three years at Shipyards, and returned to UVic in September 2015.

**207**  I begin with the figure of $260,815.76 calculated by Mr. Oss-Cech. That was based on the average wage rate between the unskilled and semi-skilled labour category.

**208**  That figure requires modification upon consideration of positive and negative contingencies.

**209**  Mr. Ilett's position is that the positive contingencies, that he might have earned overtime, obtained a promotion into a trade, or worked on other jobs in addition to Shipyards, are roughly equal to the negative contingency that he would have been laid off from time to time.

**210**  One negative contingency is that Mr. Ilett would have earned less owing to periodic lay-offs. Mr. Ilett was laid off on August 30, 2013. Mr. Esnouf was laid off for only about four months in four years, being less than 10% of the time, but Mr. Esnouf was an apprentice metal fabricator and his work opportunities at Shipyards would have differed from Mr. Ilett's. There is also the chance that Mr. Ilett would have worked for less than three years at Shipyards.

**211**  There are also positive contingencies. Mr. Ilett was hard-working and motivated. There is a strong likelihood that he would have achieved promotions at Shipyards.

**212**  In the circumstances, a reduction by 15% reflects the positive and negative contingencies. That reduces the figure to $221,693.40 ($260,815.76 x .85).

**213**  Mr. Ilett's actual earnings in those three years must be deducted from that figure. They were a total of about $38,000, as follows:

1. nothing in 2013;
2. about $24,000 in 2014; and
3. about $14,000 in 2015.

**214**  That reduces the amount to $183,693.40 ($221,693.40 less $38,000).

**215**  The award for past lost earning capacity is an assessment, and in this case, requires significant assumptions. As a result, it is appropriate to round the figure to $183,500.00.

**216**  Mr. Ilett is entitled to the amount, net of taxes, reflecting an award for gross past wage loss of $183,500.00. If counsel cannot agree on the amount net of tax, the calculation is referred to the registrar for determination.

***iii. Lost Future Earning Capacity***

**217**  Mr. Ilett claims $297,900 for lost future earning capacity.

**218**  Ms. Buckley's position is that Mr. Ilett is not entitled to anything for lost future earning capacity. In the alternative, it is her position that the lost earning capacity award should be less than $53,488, on the basis that Mr. Ilett's education was delayed for one year by his injuries.

**219**  The law with respect to loss of earning capacity was summarized by Mr. Justice MacKenzie in *Stull v. Cunnningham*, [*2013 BCSC 1140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M131-00000-00&context=), as follows:

[131] In *Wong v. Hemmings,* [*2012 BCSC 907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24FJ-00000-00&context=), at paras. 146-151, Fitch J. summarized the legal principles pertaining to this head of damages:

[146] 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 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=).

[147] 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.

[148] 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.

[149] There are two possible approaches to assessing of loss of future earning capacity: the "earnings approach" from *Pallos;* and the "capital asset approach" in *Brown.* Both approaches are acceptable. Reliance on the capital asset approach will be more useful where, as in this case, the loss in question is not easily measureable: *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=).

[150] 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; 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.

[151] The capital asset approach involves considering factors such as: i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown; Gilbert* at para. 233.

[132] 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, the Court said:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings,* [*[1966] S.C.R. 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=), *supra*. A capital asset has been lost: what was its value?

[133] 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 court stated:

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.).

[134] The court in *Bhadlawala v. Baxter,* [*2012 BCSC 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-629B-00000-00&context=), at para. 138, stated:

The assessment of loss of future earning capacity is not a mathematical exercise, and must deal to some extent with the unknowable. As Huddart J.A. put it 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, '[p]ossibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation'."

**220**  The threshold question is whether Mr. Ilett has proven a real and substantial possibility of a future event leading to an income loss. Mr. Ilett argued that he has proven that, and Ms. Buckley argued that he has not.

**221**  Ms. Buckley's position is that Mr. Ilett is not limited in his capacity to engage in desk work, because only the occupational therapist Mr. Towsley suggested that, and none of the doctors did so. As discussed above, I have accepted Mr. Towsley's evidence on that point.

**222**  Ms. Buckley's further position is that, even if Mr. Ilett is limited in future work as a labourer, he is still capable of working in an office environment, and will likely earn more in such a job than as a labourer.

**223**  The evidence shows that, as a result of his injuries in the accident, Mr. Ilett is no longer able to work as a labourer, and is not able to comfortably perform work which requires prolonged static positioning of his shoulder, such as work requiring typing and handwriting. Although he has obtained some labouring work since the accident, such as the truck-washing for Mr. Bayley and some of the odd jobs, they have been for short working periods and are sometimes followed by significant pain.

**224**  Mr. Ilett is the kind of person who will work with pain when he needs the money, and who has demonstrated an ability to find work from a variety of sources. It is likely that if he had not been injured, he would have worked for various people at various times in his life depending on the money he wished to earn and the opportunities he found. He is now far more restricted in the work he can reasonably perform, and he likely will be restricted for the rest of his life.

**225**  In addition, the pain he suffers may limit him from working long hours in an office job, and this may limit his opportunities as well.

**226**  As a result, there is a real and substantial possibility that Mr. Ilett will earn less income in the future than he would have earned if he had not been injured in the accident.

**227**  Having satisfied the threshold burden, the next question is how to quantify Mr. Ilett's loss.

**228**  At the time of the accident, Mr. Ilett had not decided on his career path. His opportunities are now more limited because of the accident. At the time of trial, he expected to complete his economics degree in the spring. He may pursue accounting or law, but his career path was not entirely clear at trial.

**229**  Mr. Ilett is likely to pursue an office job. He may have some difficulties in such a job owing to his problems with prolonged typing. He is likely to struggle and experience pain if he needs to work long hours. In addition, he no longer has the ability to work as a labourer, either for extra income or in times when he cannot work in an office job.

**230**  The Court of Appeal discussed the method of assessing the loss of future earning capacity in two relatively recent cases.

**231**  In *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=), Hall J.A. wrote as follows at paras. 18 and 19:

[18] In the recent case of *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=), Saunders J.A. said this:

[57] There are two major components to an assessment of loss of future earning capacity. One is the general level of earnings thought by the trial judge to be realistically achievable by the plaintiff but for the accident, taking into account the plaintiff's intentions and factors that weigh both in favour of and against that achievement, and the other is the projection of that earning level to the plaintiff's working life, taking into account the positive and negative vagaries of life. From these two major components must be applied an analysis that produces a present value of the loss, adjusted for all appropriate contingencies.

[19] I think this to be a helpful framework for a court to follow in fixing a measure of damages for future loss. Some cases speak of the loss of a capital asset and some of the loss of future earnings, but the essential matter that engages the attention of a court making an assessment in this area is to endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career.

**232**  In *Mackie v. Gruber*, [*2010 BCCA 464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4G2-00000-00&context=), Neilson J.A. wrote as follows at paras. 18 and 19:

[18] Quantifying an award for loss of future earning capacity is a notoriously difficult judicial task given the multitude of factors and future uncertainties at play. It is not a mathematical calculation, but a matter of assessment and judgment, guided by the basic principle that a plaintiff is entitled to be placed in the same position she would have been in but for the accident, and directed at producing an award that is reasonable and fair to all parties: *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=).

[19] In *Pallos*, the case referred to by the trial judge, Mr. Justice Finch set out a number of approaches to this task:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. 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 years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. ...

**233**  In *Miller v. Lawlor*, [*2012 BCSC 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BF-00000-00&context=), Mr. Justice MacKenzie made an award for lost future earning capacity to a young man who was left with permanent impairments which limited his capacity at work, but who was able to return to his pre-injury employment. The award was for the equivalent of three years of annual income as a journeyman sprinkler-pipefitter.

**234**  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=), Mr. Justice Kent awarded three years of annual income to a 36-year-old firefighter for lost future earning capacity. He had continued to work as a full-time firefighter, but stopped his "side job" as a mortgage broker, and there was a risk that in the future he might not be able to meet the physical requirements of being a firefighter.

**235**  Mr. Ilett's position is that an award equal to earnings of $10,000 per year until Mr. Ilett reaches the age of 65 appropriately reflects his loss. That reflects a reduction of about 13% in his lifetime income. Using Mr. Wickson's figures, the present value is about $307,000. Using Mr. Hildebrand's tables, the figure is about $297,900. I will use the figure of about $300,000.

**236**  Alternatively, Mr. Ilett's position is that 3.9 years of income, calculated at $297,900, on the basis of Mr. Wickson's calculation of about $76,400 annually, appropriately reflects his loss.

**237**  Ms. Buckley's position is that if Mr. Ilett is entitled to anything for lost future earning capacity, it should consist of one year of earnings, on the basis that his education was delayed for that period by his injuries. Mr. McDougall argued on Ms. Buckley's behalf that Mr. Ilett will be completing his degree after five-and-one-half years, not including the term he took off to work in Chemainus.

**238**  The above analysis of Mr. Ilett's lost past earning capacity was on the basis that, if the accident had not occurred, he likely would have worked for three years at Shipyards and then returned to UVic in September 2015. If so, and if he completed his degree in a total of four or five years of studies, he would have graduated in spring 2018 or 2019 respectively. In fact, Mr. Ilett is scheduled to graduate two or three years earlier, in spring 2016.

**239**  As a result, it is not appropriate to value Mr. Ilett's loss on the basis that his post-university career was delayed. In fact, on this analysis, it has been accelerated.

**240**  The most appropriate way to value Mr. Ilett's loss is using an earnings approach. This is particularly appropriate because he is a man who, if he had not been injured in the accident, might have taken on periodic casual work alongside his main career. After that, it is necessary to consider both positive and negative contingencies.

**241**  It is appropriate to begin with the suggestion that Mr. Ilett will lose about $10,000 per year in income owing to his injuries. He earned $14,000 in 2015 while pursuing full-time studies at UVic. As a result, $10,000 is a reasonable starting figure for what Mr. Ilett would have earned in extra work. This figure also reflects the likelihood that, because of his injuries, he will be unable to work long hours in his career, will be unable to do periodic casual work, and may be unemployed longer between jobs without being able to do alternate work as a labourer.

**242**  It is appropriate to deduct $75,000 on the basis that Mr. Ilett is likely to commence his post-university career two or three years earlier than he would have done if he had not been injured in the accident. That sum reflects the uncertainty over how much earlier he will have finished his courses, and that if he had not been injured, he might have continued to work part-time at Shipyards or at some other job during his studies.

**243**  On those calculations, Mr. Ilett would be entitled to an award of $225,000 for lost future earning capacity. I note that such a sum is roughly equal to almost three years of earnings on the basis of Mr. Wickson's calculation of about $76,400 annually, and about 3.3 years on the basis of Mr. Hildebrand's calculation of about $68,000 annually.

**244**  The award cannot be a precise calculation. It is an assessment made after considering the relevant factors.

**245**  Mr. Ilett is entitled to $225,000 for loss of future earning capacity.

***iv. Special Damages***

**246**  Mr. Ilett claims $1,968.75 for special damages. The defence position is that he should receive $1,904.72, being about $65.00 less.

**247**  The defence argued that the $90.00 cost of the UVic recreation pass should not be included in the award for special damages. Mr. Ilett testified that after the accident he started working out at a different gym from the one he had used before the accident, because there was different equipment available to him in the new gym, and he incurred the fee to attend the new gym. I accept his evidence on that point, and accept that the pass was an appropriate expense for Mr. Ilett's efforts to recover. I also accept his other claims.

**248**  Mr. Ilett is entitled to $1,968.75 for special damages.

**COSTS**

**249**  Mr. Ilett's position is that he may have submissions on costs, depending on the trial decision.

**SUMMARY**

**250**  In summary, Mr. Ilett is entitled to the following:

1. $100,000 for non-pecuniary damages;
2. the amount net of tax equivalent to the gross amount of $183,500 for lost past earning capacity;
3. $225,000 for lost future earning capacity;
4. $1,968.75 for special damages; and
5. applicable pre-judgment interest.

**251**  If the parties cannot agree on the figures relating to pre-judgment interest or the amount of past lost earning capacity net of tax, the question or questions are referred to the registrar for determination. If either party wishes to make submissions on costs, counsel should estimate the time required and schedule a hearing before me through the registry. If neither party wishes to make submissions on costs, Mr. Ilett is entitled to his costs on Scale B, for matters of ordinary difficulty.

1. GRAY J.

**End of Document**

[***Jokhadar v. Dehkhodaei, [2010] B.C.J. No. 2280***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4B7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.M. Willcock J.

Heard: May 31, June 1-4, 7-11 and 14-17, 2010.

Judgment: November 22, 2010.

Docket: M082592

Registry: Vancouver

**[2010] B.C.J. No. 2280** | [*2010 BCSC 1643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TH-00000-00&context=) | [*194 A.C.W.S. (3d) 1142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TH-00000-00&context=) | [*2010 CarswellBC 3146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TH-00000-00&context=)

Between Huda Jokhadar, Plaintiff, and Shahram Dehkhodaei and Shokat Siavosh, Defendants

(162 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Soft tissue — Psychological injuries — Considerations impacting on award — Pre-existing injuries — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant head-on after he lost control of vehicle — As result of accident plaintiff suffered soft tissue injury and spinal disc protrusion which caused back, neck, shoulder and arm pain and weakness and exacerbated pre-existing bipolar disorder, but plaintiff likely would have suffered increasing symptoms of bipolar disorder in absence of accident — Plaintiff awarded non-pecuniary damages of $90,000, past loss of income of $30,000, loss of future earning capacity of $95,000 and special damages of $35,100.**

**Damages — Types of damages — General damages — Categories of — Loss of enjoyment of life — Emotional and mental distress — For personal injuries — Considerations — Aggravation of pre-existing injury — Pre-existing medical conditions — Loss of earning capacity — Special damages — Past loss of income — Expenses and expenditures — Therapy or rehabilitation — Housekeeping services — Non-pecuniary loss — Pain and suffering — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant head-on after he lost control of vehicle — As result of accident plaintiff suffered soft tissue injury and spinal disc protrusion which caused back, neck, shoulder and arm pain and weakness and exacerbated pre-existing bipolar disorder, but plaintiff likely would have suffered increasing symptoms of bipolar disorder in absence of accident — Plaintiff awarded non-pecuniary damages of $90,000, past loss of income of $30,000, loss of future earning capacity of $95,000 and special damages of $35,100.**

**Damages — Assessment of damages — Measure of damages — Discount rate — Limiting factors — Pre-existing conditions — Thin or crumbling skull rule — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant head-on after he lost control of vehicle — As result of accident plaintiff suffered soft tissue injury and spinal disc protrusion which caused back, neck, shoulder and arm pain and weakness and exacerbated pre-existing bipolar disorder, but plaintiff likely would have suffered increasing symptoms of bipolar disorder in absence of accident — Plaintiff awarded non-pecuniary damages of $90,000, past loss of income of $30,000, loss of future earning capacity of $95,000 and special damages of $35,100.**

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| Action by a motorist for damages for injuries sustained in a motor vehicle accident. In October 2006, the plaintiff was struck head-on by the defendant after the defendant lost control of his vehicle. The accident resulted in significant damage to both vehicles. Immediately after the accident, the plaintiff went into shock. By the time she arrived at the hospital, she was crying hysterically and felt pain all over. She complained of neck pain radiating into her arm and back pain. She was thought to have suffered a sprain of her cervical spine and was discharged in a neck collar. At the time of the accident, the plaintiff was married with two children, and was pregnant with her third child. Due to her pregnancy, she was not taking medication for her previously diagnosed bipolar disorder, and as a result her disorder was manageable, but not stable, and she experienced occasional flare-ups. She was employed as a hairdresser and, in the years prior to the accident, she had worked approximately four days her week earning approximately $14,400 per year. Post-accident, her family noted emotional and behavioural changes. The plaintiff remained bedridden for a week after the accident and she was very emotional. She did not take care of herself and she stopped socializing. A month after the accident the plaintiff began complaining of constant pain. For months after the accident, the plaintiff continued to experience pain in her back, shoulder and neck, and doctors believed that she was suffering from chronic whiplash symptoms. Approximately 16 months after the accident, the plaintiff returned to work. However, constant pain made work intolerable and she reduced her hours to part-time. She still experienced depression, was tired and her mood rapidly fluctuated. 18 months after the accident, the plaintiff was admitted to hospital as a result of bizarre behaviour due to her bipolar disorder. She was admitted to hospital on three other occasions as a result of manic symptoms. Up to the time of trial, the plaintiff continued to suffer shoulder, cervical and thoracic back pain and she required regular physiotherapy for her chronic whiplash injury. Almost three years after the accident, the plaintiff was diagnosed with a large disc protrusion and cord compression. She underwent a cervical nerve root block in 2009, but she continued to struggle with emotional instability, chronic post-traumatic stress disorder, and chronic pain, and she was unable to return to work. As of the time of trial, the plaintiff continued to suffer pain. She was receiving CPP disability benefits as she was unable to work because of the combined effects of her physical limitations and bipolar illness.  HELD: Action allowed.  As a result of the accident the plaintiff suffered a soft tissue injury and a spinal disc protrusion which caused back, neck, shoulder and arm pain and weakness. In addition, symptoms of her bipolar disorder, which was a pre-existing condition, were triggered and aggravated by the stress caused by the motor vehicle accident, concern about her pregnancy, her physical injuries and the difficulty she had in returning to work, and the accident was a significant cause of the worsening of her bipolar disorder. However, as the plaintiff was off her medication due to her pregnancy, she still would have suffered increasing symptoms of bipolar disorder even in the absence of the accident. As the accident had a significant effect on the plaintiff's life due to her physical injuries and the exacerbation of her bipolar disorder, she was entitled to non-pecuniary damages of $90,000. As the plaintiff's inability to return to work was mainly a result of her bipolar illness, and given that she would have taken a maternity leave and time off work due to period of mania and depression, she was entitled to past loss of income of $30,000. In addition, she was entitled to $95,000 for loss of future earning capacity, which was approximately one-third of her estimated income earning capacity. The plaintiff was also entitled to special damages of $35,100 for ongoing psychological therapy, occupational and vocational counselling, housekeeping assistance and other special damages. |

**Counsel**

Counsel for the Plaintiff: T. Pettit, J.V. Marshall.

Counsel for Defendants: L.C. Boulton, J.S. Frahm.

**Reasons for Judgment**

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| **P.M. WILLCOCK J.** |

**Introduction**

**1**  Huda Jokhadar seeks compensation for injuries she suffered in a motor vehicle accident in the interchange at the north end of the Lions Gate Bridge in West Vancouver on October 18, 2006. Since the accident she has experienced back, neck, right shoulder and right arm pain and weakness that is, in part, a result of a soft tissue injury and, in part, a result of irritation of the nerve root caused by protrusion of a disc at the C5-6 level of her spine. In addition, Ms. Jokhadar says a bipolar affective disorder which has affected her for years has been exacerbated by the emotional and physical impact of the accident. That disorder is said to coexist with and contribute to post-traumatic stress disorder, which is also said to arise out of the accident. The assessment of Ms. Jokhadar's claim for loss of enjoyment of the amenities of life and the loss of past and prospective income requires careful consideration of her lengthy and complex psychiatric history.

**Evidence**

**Ms. Jokhadar's Pre-2002 Medical History**

**2**  Ms. Jokhadar was born in Beirut, Lebanon on January 17, 1972, and raised in Syria. She married Hishram Wattar, a Syrian-born businessman, in 1986 when she was 14 and he was 24. The couple immigrated to Fredericton, New Brunswick in the summer of 1987. Their first child, a daughter, was born in 1988 when Ms. Jokhadar was 16 years of age. After the birth of her daughter she returned to Syria, where she remained with her family for 5 months. While she was in Syria she learned of her husband's intention to divorce her, which he did, according to religious practice, by letter. Surprised by this development, she made arrangements to return to Canada in an attempt to save her marriage.

**3**  On her return to Canada she reconciled with her husband and moved with him to Ottawa. She gave birth to a second daughter in 1992 and describes her subsequent life in Ottawa as stable, happy, and stress-free. She missed Syria, however, and made plans to return. Mr. Wattar considered moving to Syria to accommodate her but following her departure, he decided to remain in Ottawa and again divorced her. Neither party to the marriage now attributes the divorce to mental illness or emotional instability.

**4**  Ms. Jokhadar remained with her family and children in Syria for approximately nine months before returning to Ottawa at the end of 1994 so that her daughters could be near their father. On her return she lived in an apartment with her girls and trained to become a hairdresser. Although she was on welfare for some period of time in Ottawa she says this was an enjoyable time in her life.

**5**  Mr. Wattar moved to Vancouver in 1996, accompanied by his eldest daughter, in search of a more moderate climate. In Vancouver, Mr. Wattar married another woman, with whom he had a third daughter. He occasionally made arrangements to have his eldest daughters visit and speak with Ms. Jokhadar by telephone, but he was not so close to her as to be aware of her psychiatric illness or treatment while she was in Ottawa.

**6**  From 1996 to 2002, with the exception of short visits and telephone calls, Ms. Jokhadar was separated from her husband and daughters. During this period she completed her hairdressing training and focused on herself and her career. By 2001, however, she became depressed; in part because she was alienated from her family, and had trouble doing her job. She occasionally drank excessively. On one occasion, while returning from a club in early 2001 she was stopped by the police because she was driving erratically. When asked to provide a breath sample she felt that if she blew even a small breath into the apparatus the world would explode. Surprisingly, she says she was permitted to go home. The next day she went to the office of her children's paediatrician and created a disturbance. The police arrived; she was taken to the Ottawa General Hospital; and she was admitted to the psychiatric ward, where she remained for three weeks. She says it was at that time her bipolar disorder was first diagnosed. This experience was said to be a turning point in her life. She changed jobs, stopped associating with some friends and altered her lifestyle. She acknowledges, however, that even after moving to a new job, she was suffering from significant depression.

**7**  The medical records in evidence contain summary descriptions of Ms. Jokhadar's pre-2002 medical and psychiatric history. Because the sole source of those entries was her memory and because that memory is frail, the pre-2002 history is incomplete and vague. The entries are, however, of some value in appreciating the longstanding nature of Ms. Jokhadar's illness. In addition to documenting the events described above, the records refer to a two week hospital admission in Ottawa in 1996, said to have been a result of a general mental breakdown related to the end of a relationship with another person. Unfortunately there is little evidence of the nature and extent of that breakdown and no medical diagnosis. The records also establish that Ms. Jokhadar periodically suffered from depression after her 1986 marriage, related to, among other things, isolation and loneliness and a history of miscarriages.

**8**  It was suggested to Ms. Jokhadar, at trial, that she had suffered from auditory and visual hallucinations since childhood. She acknowledged that as a child she once saw what she believed to be angels. Dr. Termansen, her treating psychiatrist, cautions that one must not make too much of that because for a young woman in her culture a memory of such a vision is not unusual. This incident was so remote and so poorly described in the evidence that nothing significant can be made of it. The most that can be said on the evidence is that Ms. Jokhadar suffered from depression in the 1990s that culminated in at least one acute manic episode, in 2001, and perhaps another in 1996. From 2001 to the present the medical records reflect periodic significant ongoing symptoms of bipolar disorder.

**2002-2006**

**9**  Ms. Jokhadar moved to Vancouver in early 2002. She had hoped for an immediate reconciliation with her husband but that did not happen. She began working as a hairdresser but soon felt her depression was becoming overwhelming and called the police to her apartment. She was admitted to the psychiatric unit at St. Paul's hospital in early 2002. In the records of that admission Mr. Wattar is recorded to have stated that he had divorced Ms. Jokhadar as a result of her mental instability. At trial he denied that was the case. He said that Ms. Jokhadar had been emotional and demanding but that he had not considered her to be suffering from mental illness until he first learned of her bipolar disease while she was at St. Paul's. That diagnosis caused him to consider her behaviour from a completely different perspective and to become more understanding. Having ended his relationship with the woman who bore his third daughter, Mr. Wattar again reconciled with Ms. Jokhadar in March 2002 and they have lived together since then.

**10**  The 2002 hospital admission led to Ms. Jokhadar being referred to a family physician, Dr. Peter Schwarz together with Dr. Carolyn Gilbert, a frequent locum in his office, he has regularly treated Ms. Jokhadar from 2002 to date. From March 2002 onward there are records of prescriptions for antidepressants and antipsychotics from Drs. Schwarz and Gilbert and references to regular referrals for follow-up psychiatric assessment and treatment. In September 2002 Dr. Gilbert referred Ms. Jokhadar to Dr. Mohamed Abdel-Fattah, a psychiatrist and the director of the acute psychiatric service at the Lions Gate Hospital. Dr. Abdel-Fattah formed the opinion that she was suffering continuing symptoms of bipolar disorder. He has subsequently seen the plaintiff and her husband on many occasions.

**11**  Ms. Jokhadar's life became normalized for a period following the 2002 hospital admission. She worked as a hairdresser and made $25,000 in 2002. She remarried Mr. Wattar, lived with her children, and did some gardening and housekeeping. Her medical problems, however, continued. In December 2002 she began to see Dr. Werner Pankratz, a psychiatrist. He thought that Ms. Jokhadar was suffering from a bipolar mood disorder which was only partially in remission and advised her that she would require long-term management which would include medication, a mood stabiliser, and consistent psychiatric follow up. He noted that Mr. Wattar was of the view that there was a much longer history of significant untreated mood swings than Ms. Jokhadar had reported.

**12**  On January 16, 2003, Dr. Schwarz saw Ms. Jokhadar for symptoms of De Quervain's syndrome, an inflammatory condition of the wrist that is an occupational hazard among hairdressers. On January 30, 2003, he excised a nodule in a tendon and gave a steroid injection. His testimony was that Ms. Jokhadar was off work for four months from December 2002 to April 2003 for symptoms of De Quervain's. With the exception of that period, Ms. Jokhadar claims to have worked four days per week in 2003. She reported earned income of $14,400 from employment and $5,202 in Employment Insurance ("EI") benefits in 2003.

**13**  Ms. Jokhadar says she continued to work as a hairdresser four days per week in 2004 until she suffered an ankle injury that required her to wear a cast and take three months off work. She reported income from employment of $14,413 and EI income benefits of $1,668 in 2004.

**14**  Dr. Pankratz continued to see Ms. Jokhadar periodically until May 2004. During that period he recorded that she occasionally failed to take her medication as prescribed; she had difficulty accepting the bipolar diagnosis. When he was advised in May 2004 by Ms. Jokhadar and Mr. Wattar of their desire to have another child. Dr. Pankratz cautioned them that Ms. Jokhadar should stop taking mood stabilisers and seek psychiatric care for her mood disorder when off medication.

**15**  It is Mr. Wattar's evidence that if he had any concerns that pregnancy would be problematic he would not have attempted to have another child. He says from 2002 to 2006 Ms. Jokhadar had no difficulty doing physical work. She did housework, was energetic and maintained a clean house. She experienced depression, but not psychotic episodes. The family got together with friends; their business was doing well; they were having fun.

**16**  Ms. Jokhadar's 22 year old daughter, a well-spoken psychology student, testified with respect to her very difficult experiences as the child of a parent suffering from bipolar disorder. Her testimony was honest but clearly affected by her youth at the time she made certain observations and her desire to be supportive of her mother, with whom she is very close. She remembers nothing of her mother's problems before 2002. She does not recall her mother being anxious or moody; she seemed normal and happy with her life. Following her mother's move to Vancouver and her 2002 hospitalization she was happy to have her mother return home. She recalls her as an organizing force in the period from 2002 to 2006. The family home was happy during her high school years and she remembers pleasant family trips. She recalls that her mother's work as a stylist was limited by her ankle injury for a while but she loved her work and she had many loyal clients. She was aware of her parents' plans to have another child and thought it was a great idea. Her parents had been stable and close, so far as she could tell, to 2004. She knew pregnancy would mean her mother would have to go off her medication. She did not know what her mother was using, but did not anticipate a problem. She says neither she nor her father would have approved the idea of having another child if they had any concerns about Ms. Jokhadar's emotional stability.

**17**  In late 2004 Ms. Jokhadar advised Dr. Schwarz that she and her husband had visited an artificial insemination clinic in Spokane, Washington twice and she had been off her psychiatric medication for six months. He agreed with the decision to go off medication. Mr. Wattar reported that she was manageable but not stable while off medications. She was depressed, anxious and weepy at times.

**18**  A letter from Human Resources and Skills Development Canada indicates that between July 11, 2004, and July 9, 2005, Ms. Jokhadar was employed for 633 hours. She therefore worked an average of 12 hours per week, less than two days a week, in that period.

**19**  There was a flare-up in her manic symptoms in July 2005. An EI record shows that that she received employment benefits from July 10 to October 30, 2005. That corresponds with the flare-up in manic symptoms documented in the records. Ms. Jokhadar went back on medication. After she returned to work she advised Dr. Schwarz that she was suffering a tremor, a side effect of the use of the antipsychotic used to treat her bipolar disorder, Seroquel. Her reported income from employment in 2005 was $9,582 and her EI benefits were $3,604.

**2006 Pre-accident**

**20**  On April 27, 2006, Ms. Jokhadar advised Dr. Gilbert that she was depressed and lethargic; she had been tearful at work. On May 11, 2006, she was still very tired. Her medications were adjusted and blood tests were ordered to investigate causes of fatigue. On June 30, 2006, she saw Dr. Abdel-Fattah, complaining of reduced concentration and depression. She was weepy. Dr. Abdel-Fattah noted that she was depressed. He was cautious in his treatment because he was concerned that use of antidepressants might trigger a manic episode.

**21**  From August 2006 through to the accident that gives rise to this claim Ms. Jokhadar was prescribed, at various times, the antidepressants Cipralex, fluoxetine and Welbutrin. She claims not to have taken many of the prescribed antidepressants because she was still trying to get pregnant. She continued, however, to receive prescriptions for Welbutrin until September 13, 2006. She is uncertain of the date she stopped taking the medications prescribed and dispensed to her, but it would make little sense for her to continue to obtain and pay for medication she was not using. I find that she was using that medication on an ongoing basis until at least the date each was last dispensed.

**22**  At her last pre-accident visit on September 13, 2006, Dr. Schwarz noted that Ms. Jokhadar was on Welbutrin, and that her mood was stable with few ups or downs. She reported that she was sleeping well but irritable and angry at times, especially at work. Dr. Schwarz noted that she advised him that she often felt the need to have a drink for confidence to go to work. She was working about 3 days per week, up to 30 hours a week, in the months before her accident. There is some evidence that her anger at work in 2006 was a symptom of a manic phase of her illness.

**23**  We now know that between the office visit and her accident on October 18, 2006, Ms. Jokhadar became pregnant. Before her accident she was therefore destined to go off mood stabilizing medications for at least the duration of her pregnancy to July 2007. When she had previously gone off medication while attempting to become pregnant, in 2004-2005, her depression had become disabling. She required medication on an ongoing basis to control her longstanding bipolar disorder.

**24**  Ms. Jokhadar declared income of $26,047 in 2006, and denied income splitting with her husband that year. I place little reliance upon the 2006 declared income for the purpose of assessing her loss of income and income-earning capacity. Ms. Jokhadar did not work at all in November and December 2006. She only claims to have worked 3 days per week when she was working in 2006. Given that she later did engage in income splitting with Mr. Wattar, by declaring some of the income from his restaurant business to be hers for tax purposes, given no other explanation for the 2006 declared income and given the absence of any documentary evidence of income for employment, I conclude that the declared income on the 2006 income tax return is not as indicative of Ms. Jokhadar's pre-accident income or her future income earning capacity as the declared income in 2003-2005.

**25**  Mr. Wattar's recollection is that in the summer prior to her accident their family life was normal and happy. Ms. Jokhadar was not unusually depressed. He thought everything was fine at her work and was not aware of her drinking in the morning. He does not think that occurred; it would have been impossible to hide. He knew about disputes at her work but regarded these as normal in the workplace. Mr. Wattar's evidence about this period is inconsistent with the medical records, which I regard as a more reliable indicator of the state of Ms. Jokhadar's pre-accident health. Mr. Wattar minimizes the extent of Ms. Jokhadar's pre-accident depression. For example, he cannot recall the symptoms that led her to take three months off work in 2005. Nor does he remember her becoming increasingly depressed when off medications, although that is well-documented.

**26**  Her daughter also testified that Ms. Jokhadar was emotionally stable in 2006. She was getting ready to go to university at that time and her mother was pleasant and helpful to her and her friends. She said she had never seen her mother drinking other than at dinner on special occasions. She does not remember having alcohol in the house.

**27**  Ms. Sadik, a family friend who has known Ms. Jokhadar since 2002, saw her regularly at the family home and went on many family trips with her She described Ms. Jokhadar as a very energetic woman who loved life before her accident. She was very clean and organized, "a 1st class housewife". She appeared to have no problems with physical activities. She was not moody and appeared to be happy with her children, her house, and her husband. Ms. Sadik was unaware of any family difficulties prior to 2006; was unaware of Ms. Jokhadar's documented unhappiness at work in September 2006 or her trouble with depression when she stopped taking medication to become pregnant in early 2005; and was entirely unaware Ms. Jokhadar had a mental illness until 2008. To some extent Ms. Sadik's ignorance of significant functional problems prior to the 2006 motor vehicle accident is a measure of the relative quiescence of Ms. Jokhadar's bipolar illness but it must also be regarded as evidence that Ms. Sadik was not close enough to Ms. Jokhadar at this time to be regarded as a knowledgeable observer of her mental health. There is support for this conclusion in Ms. Jokhadar's own evidence that she only felt comfortable discussing her depression with her treating doctors.

**October 18, 2006**

**28**  On Wednesday, October 18, 2006, Ms. Jokhadar went to her salon at Park Royal in West Vancouver. It was dark when she left Park Royal. As she drove east along Marine Drive through the Lions Gate Bridge interchange she suddenly saw headlights coming toward her. She braked and shut her eyes on impact. She recalls little of the collision, but says that when she got out of the car and walked to the nearby curb she was shaking and felt cold, she was not sure she was alive. She remembers little pain at the accident scene, but says that when she got to the Lions Gate Hospital in North Vancouver she began crying hysterically and felt pain all over.

**29**  Mr. Dehkhodaei does not deny responsibility for the accident giving rise to this claim. He testified not to the absence of fault, but to what he regarded as the minor nature of the collision. In the early evening he was driving north on the Lions Gate Bridge at about 60 km/h in heavy rain, intending to turn east on Marine Drive to proceed to Capilano Road. As he began to turn he lost control of his vehicle. The left front wheel of his car hit the concrete median, causing his car to spin. He bounced over the median and travelled into the other eastbound lane of traffic, that coming from West Vancouver, where he collided with Ms. Jokhadar's vehicle and a second median, separating westbound from eastbound traffic. Although he felt his car sliding and then turning, he does not believe his car ever turned so far as to face eastbound traffic. There was significant damage to the front and front right corner of his car. He noted that the hood of Ms. Jokhadar's car had been crumpled and forced open. Her airbag was activated in the collision.

**30**  Mr. Michael Allen, an ICBC estimator, described the damage to Ms. Jokhadar's car. It was not insignificant. Most of the damage was to the front and right front corner. Because the frame rail was bent the car was a constructive total loss.

**31**  Mr. Dehkhodaei denied the suggestion that this was a head-on collision, despite his difficulty remembering many of the details of the accident. He insisted that Ms. Jokhadar's vehicle struck his car on the driver's side near the door, despite the absence of any evidence of a significant collision at that point. I conclude that he was mistaken in his recollection at trial, which differed in many respects from his earlier description of the accident. I accept Ms. Jokhadar's recollection of the accident and conclude that the vehicles collided violently while facing each other almost head on.

**32**  After the collision, Ms. Jokhadar remained in her car for 5 to 10 seconds before she opened her car door and got out, unassisted, but she soon began crying and trembling. She indicated to Mr. Dehkhodaei that she was OK, but was weeping.

**33**  When the emergency health services personnel arrived at the scene of the accident, Ms. Jokhadar was alert and oriented but she complained of neck pain and back pain. She was taken to the Lions Gate Hospital. On admission she complained of neck pain radiating to her left elbow and discomfort in her mid-abdomen. She was discharged home in a hard collar and advised that she should wear that for two days, then replace it with a soft collar and follow up with her family doctor. She was thought to have suffered a sprain of her cervical spine.

**2006 Post-accident**

**34**  Ms. Sadik went with the family on the day after the accident to see Ms. Jokhadar's vehicle, saw her sit on the floor and heard her say that when the accident occurred she saw the other car's headlights, closed her eyes, and said to herself "I'm dead, I'm finished, I'm done".

**35**  Dr. Gilbert saw Ms. Jokhadar on October 20, 2006. She was weepy as she described the accident. She complained of pain in her right arm and tenderness over the 2nd and 3rd cervical vertebrae. Dr. Gilbert did not prescribe an anti-inflammatory, as she otherwise would have done, because it was thought Ms. Jokhadar might be pregnant. By the time Ms. Jokhadar was again seen by Dr. Gilbert on November 3, 2006 she was known to be pregnant. Dr. Gilbert suggested a referral to Dr. Misri, the director of The Reproductive Mental Health Program at St. Paul's Hospital, an expert in the treatment of women with psychiatric illnesses during pregnancy and in the postpartum period. Ms. Jokhadar was afraid of the potential effect of the accident on her pregnancy and was afraid to see Dr. Misri. There is no record of her doing so. When Ms. Jokhadar learned she was pregnant she became fearful of losing the foetus or its features being affected. Ms. Sadik tried to comfort her but to no avail.

**36**  On October 24, 2006, she attended at physiotherapy and complained of pain down the right side of her back radiating to her toes. She returned to physiotherapy on four occasions to December 5, 2006.

**37**  On November 15, 2006, Ms. Jokhadar complained to Dr. Gilbert of symptoms consistent with injuries in the motor vehicle accident. Dr. Schwarz first saw her after the accident on December 5, 2006. She complained then of right-sided pain in the shoulder and neck. He found muscle spasm and inflammation on palpation. She was very emotional. Normally at this stage a patient might be engaging in gentle range of motion and gentle stretching exercises. Dr. Schwarz felt Ms. Jokhadar was unfit to work due to her injuries.

**38**  Her family noted post-accident emotional and behavioural changes. Ms. Jokhadar remained bedridden for a week after the accident and was very emotional. When her daughter tried to reassure her, Ms. Jokhadar said she felt numb. Her emotional state became unstable, she slept in the daytime, didn't take care of herself and was not well dressed. She stopped socializing. A month after the accident she began to complain of constant physical pain. She was, in her daughter's words: "Totally out of whack". Fear seemed to take over her life. She was afraid to walk, to go to the mall or to drive. Her daughter knew she had nightmares, but her mother would not tell her what they were about.

**2007**

**39**  On January 10, 2007, Ms. Jokhadar saw Dr. Schwarz for symptoms of pneumonia. Her next visits were predominantly for those symptoms, but in February 2007, she was referred to Dr. Mark Adrian, a specialist in physical medicine and rehabilitation. Dr. Adrian obtained a history of symptoms of neck pain, predominantly on the right side, radiating into the right shoulder girdle. Ms. Jokhadar also complained of pain in the lower back region over the right lumbosacral junction travelling into the right buttock. Her symptoms were aggravated with reaching, pushing, pulling, carrying, and prolonged sitting. Dr. Adrian diagnosed mechanical neck, thoracic, and lumbar spinal pain. He anticipated a gradual recovery over three to six months and recommended a low-impact, light exercise program.

**40**  In March 2007, Ms. Jokhadar reported continuing significant back and neck pain to Dr. Schwarz, who again referred her to Dr. Misri. Again, she did not attend.

**41**  Ms. Jokhadar gave birth to a healthy baby, a son, on July 10, 2007. Her eldest daughter was concerned about her ability to manage at home, didn't want to leave her, and felt obliged to take care of the house. She had been a good and popular student in high school, but because of her obligations at home at this time she made few friends at university and failed a course that fall. She felt her mother became too focused on herself and gave her son little attention. She breastfed him less than a month, complaining of shoulder pain when feeding.

**42**  By the fall of 2007 Ms. Jokhadar was still doing little at home. In December 2007 she was again complaining to her doctors about injuries and stress related to the car accident. Dr. Schwarz felt that Ms. Jokhadar was suffering from chronic whiplash symptoms. He referred her to Dr. Paul Termansen for treatment of her bipolar disorder.

**2008**

**43**  Ms. Jokhadar believes she returned to work and worked 8 hours per day for three months, commencing in late February 2008. She was encouraged to do so by her family who felt work would lift her depression. Constant pain made work intolerable and she soon reduced her hours to part-time. She was tired and guilty because she was not doing her job well. According to her family, she came home from work crying every day and had no energy to do housework. In March 2008, Dr. Schwarz made a note that Ms. Jokhadar appeared to be suffering from hypomania; her mood was rapidly fluctuating. She had been working, going to the gym, and going for walks but she was irritable, self-critical, and retreating from life. Dr. Schwarz prescribed an antidepressant and referred her to Dr. Pankratz.

**44**  Dr. Schwarz continued to see Ms. Jokhadar regularly and monitored her antidepressant and antipsychotic medication. On March 28, 2008, he recorded the patient's wish to die. In April he noted that the antipsychotic she was then taking "zombified" her. She felt her psychiatric medications were becoming less effective. They then made her tired, frustrated and bored.

**45**  She went to see Dr. Pankratz on April 8, 2008 because, in her words, she felt dead. She reported that since her motor vehicle accident she had felt fearful when outside her home and that she lived with a sense of apprehension and dread. Dr. Pankratz felt she was still obviously depressed and functioning at a poor level.

**April 12 to 17, 2008, Lions Gate Admission**

**46**  From April 12 to 17, 2008, Ms. Jokhadar was an in-patient at the Lions Gate Hospital, having been admitted through the emergency department as a result of bizarre behaviour. While at Lions Gate she was assessed by Dr. Glen Freedman and Dr. Abdel-Fattah. Dr. Freedman noted that on admission her thoughts were tangential, her speech was pressured, her thoughts were racing, and she was preoccupied with visual and auditory hallucinations. Dr. Abdel-Fattah was advised by Mr. Wattar of a suspicion that Ms. Jokhadar had been taking too many antidepressants and had refused to take mood stabilizers, as they made her feel dull. Dr. Abdel-Fattah believed that antidepressants had precipitated manic episodes in the past. He counselled her to avoid the use of antidepressants as they appeared to trigger delusional manic episodes. The admission was described in the hospital records as having occurred as a result of an adverse reaction to Manerix (a MAO inhibiting antidepressant), which was thought to have precipitated a manic episode. Ms. Jokhadar accepted a recommendation that she commence a trial of Lamictal, an antiepileptic drug used as a mood stabilizer for depressed bipolar patients, as a means of avoiding antidepressants. The defendants say it is noteworthy that on this admission Dr. Abdel-Fattah was not aware of the patient's motor vehicle accident. He agreed that the car accident was not an issue he ever addressed. He did not diagnose post traumatic stress disorder ("PTSD").

**47**  During the April 12 to 17, 2008, Lions Gate admission Ms. Jokhadar expressed some dissatisfaction with Dr. Pankratz's care and she was referred to Dr. Pedro Paragas for treatment on her discharge. Dr. Paragas saw her in June 2008. He concluded she was suffering from a mood disorder, in partial remission. He prescribed both Lamictal and the modafinil that had been discontinued by Dr. Abdel-Fattah.

**June 23-30, 2008 Lions Gate Admission**

**48**  In June 2008 Ms. Jokhadar was again hospitalised. Family members again believed she had been non-compliant with her medication. When her behaviour had become increasingly bizarre over a period of approximately two weeks they called the police, who again took her to Lions Gate Hospital. During the course of the resulting June 23-30 admission, she was assessed by Dr. Avinder Minhas, who concluded that she had been in a manic phase of her bipolar disorder. Ms. Jokhadar denies she told the hospital staff on that admission she had gone off her medication, as was recorded in the chart.

**49**  By June 30, 2008, her thought disorder and perceptual disturbances had resolved. She was on appropriate medication and was discharged to see Dr. Allan Burgmann for follow up. She was taken off the modafinil prescribed by Dr. Paragas. On discharge she consulted with Dr. Schwarz; he prescribed medication sufficient to effectively treat her condition during a planned vacation to Syria commencing July 7, 2008.

**2008 Post-Discharge**

**50**  In June 2008 the family moved to a new home. To reduce the stress of the move the family arranged for Ms. Jokhadar to visit Syria with one of her daughters and her son. From July to September 2008 she was in Syria. The family felt she did not improve at all. Ms. Sadik, who was in Syria at that time, met her there and then first learned of Ms. Jokhadar's bipolar illness. On returning to Vancouver Ms. Sadik agreed to live with the Wattars and assist with housework and child care. In late 2008, Ms. Jokhadar continued to complain of pain, was unhappy, and did not engage in activities.

**51**  Mr. Wattar says when Ms. Jokhadar went back to work after returning from Syria in 2008 she had not recovered emotionally. She was desperate to work and contacted the salon but they didn't want to hire her. Mr. Wattar made a plea on her behalf that led to a decision to permit her to return to work 2 or 3 days per week. When she did so in October 2008, she tried to hide her pain and limitations from co-workers. She continued to use antipsychotics and antidepressants. In October and November 2008 she reported to her doctors that she suffered right shoulder pain and right cervical and thoracic back pain after work. Dr. Schwarz's notes indicate that as her mood disorder was increasingly well-managed she made more regular complaints of neck and right shoulder pain. In early 2009, she complained of significant, continuing paravertebral and cervical thoracic pain.

**February 21-25, 2009, Richmond General Admission**

**52**  On February 21, 2009, Ms. Jokhadar suffered another episode of acute manic psychosis leading to hospitalisation. Her family again noticed her behaviour becoming increasingly erratic over a period of five to seven days until she was admitted involuntarily and kept in secure seclusion. She gradually settled over a number of days as her medication was adjusted. There is an uncertain history with respect to whether Ms. Jokhadar had been compliant with her medication prior to admission. Mr. Wattar suspected she was becoming addicted to modafinil and using more than usual. Ms. Jokhadar claims to have been taking medication as recommended by her physicians and she denies her husband's suggestion to the staff that she was addicted to modafinil or that this had acted as a stimulant, triggering manic episodes. She denies that she stopped taking the antipsychotic, Seroquel. She acknowledges, however, that she has given inconsistent histories to health care providers, Seroquel caused her to feel "dead", and once she began using modafinil she suddenly became awake.

**53**  Ms. Jokhadar was discharged against medical advice on February 25, 2009. Mr. Wattar says that upon her discharge she seemed to be calmer, but she had not recovered. She was still manic, was dressing provocatively and acting strangely.

**March 2-30, 2009 Lions Gate Admission**

**54**  Ms. Jokhadar was again involuntarily admitted to hospital shortly thereafter, on March 2, 2009, as a result of manic symptoms. During this hospitalisation she was again seen by Dr. Abdel-Fattah. In his opinion she demonstrated both ends of her bipolarity and had poor insight. She was histrionic, flamboyant and narcissistic. Dr. Abdel-Fattah recorded Mr. Wattar's statement that she was not using the Seroquel that had been prescribed for her and noted that Ms. Jokhadar admitted that she was not using medications as prescribed. Dr. Abdel-Fattah has no recollection or note of any discussion of the motor vehicle accident on this visit.

**55**  Ms. Jokhadar was given extended leave from the hospital on March 30, 2009, rather than being discharged, because of the family's continuing concern about non-compliance with medication. It was a term of her leave that she would attend regularly at Community Psychiatric Services and stay on the medications prescribed.

**56**  Ms. Jokhadar says her problems in early 2009 were due to stress. She denied non-compliance with prescriptions and attributed her hospitalization to the vagaries of bipolar disease, particularly in the presence of stress. Mr. Wattar says he thought non-compliance with medical advice was a problem until physicians advised him that Ms. Jokhadar could not handle stress. It was a relief to him to learn that Ms. Jokhadar's manic episodes were not intentionally self-induced. He understood that she would attend the outpatient clinic upon her discharge and, on that basis, he was willing to stay with Ms. Jokhadar and support her. He had considered divorce before the 2009 hospitalization, but says that is not on his mind now.

**2009 Post-Discharge**

**57**  Ms. Jokhadar came into the care of Dr. Termansen, who first saw her in consultation on April 4, 2009 and has since seen her regularly and followed her participation in the Community Psychiatric Services programme.

**58**  There is evidence that Ms. Jokhadar's physical injuries have not resolved. Through 2009, Ms. Jokhadar continued to see Dr. Schwarz. She regularly complained to him of shoulder pain and upper thoracic pain. She attended acupuncture and found that this was helpful. On May 22, 2009, she returned to see Dr. Adrian for follow-up assessment. Dr. Adrian noted a mild restriction of neck range of motion and tenderness at the base of the neck and over the mid-back spinal segments. He thought Ms. Jokhadar was continuing to experience clinical features of mechanical neck and mid-back pain.

**59**  On June 1 and June 18, 2009, Ms. Jokhadar attended at an assessment by Dr. William Koch, a psychologist retained by her counsel.

**60**  On June 19, 2009, she attended an independent medical assessment conducted by Dr. Kevin Solomons, the psychiatrist retained by the defendant.

**61**  On July 23, 2009, Dr. Schwarz noted that Ms. Jokhadar required regular physiotherapy for her chronic whiplash injury. When her pain persisted he referred her to the Rapid Access Spinal Clinic at Lions Gate Hospital. On September 11, 2009, she attended for a cervical spine x-ray that revealed moderate disc space narrowing and small osteophytes at the C5-6 level. She underwent a CT scan at Canadian Magnetic Imaging on September 24, 2009. The CT scan revealed a large disc protrusion at the C5-6 level with cord compression and significant foraminal narrowing described as follows:

At C5-C6 there is a moderate disc space narrowing and desiccation. There is a right paracentral and foraminal broad-based disc protrusion. This significantly indents and deforms the cord. Significant mass effect on the cord is noted. Cord signal is normal without intracord hemorrhage or obvious edema. There is significant encroachment on the right neural foramen and displacement of the exiting nerve root.

**62**  These results are described by the radiologist as demonstrating disc desiccation involving the majority of the mid and lower thoracic spine discs.

**63**  On October 8, 2009 Dr. Ramesh Sahjpaul, a neurosurgeon, examined Ms. Jokhadar and reviewed the MRI of September 24, 2009. He concluded that she had a soft tissue injury to her neck and that she might have some right shoulder pathology. He was uncertain whether her right arm symptoms reflected the impingement of the disc on the nerve root, because of the absence of radiated pain in the arm. He was concerned there may be some early spinal cord compression symptoms. He recommended a right C6 nerve root block and follow up assessment.

**64**  On October 22, 2009, Ms. Jokhadar underwent a cervical nerve root block.

**65**  At the end of 2009, Dr. Termansen was of the view that Ms. Jokhadar was continuing to struggle with emotional instability, chronic PTSD, and chronic pain syndrome. He felt that she was unable to return to work and this had been a serious obstacle to her rehabilitation. Her mood remained unstable and required constant monitoring.

**2010 to Present**

**66**  Ms. Jokhadar saw Dr. Sahjpaul for a follow-up assessment on January 28, 2010. She reported that there had been no improvement of her symptoms following the right C6 nerve block. Dr. Sahjpaul recommended nerve conduction studies to determine whether the symptoms were related to the impingement of the disc on the nerve root at the C5-6 level. Ms. Jokhadar was then assessed by a neurologist, Dr. John Stewart. He could not identify any sensory motor deficit. Following review of Dr. Stewart's report, Dr. Sahjpaul expressed the view on March 5, 2010, that Ms. Jokhadar was suffering from neck pain and right shoulder and arm pain and weakness which were likely a combination of myofascial pain (pain caused by injury to the soft tissues surrounding the spine) and discogenic pain (pain caused by impingement of the disc upon the nerve root).

**67**  On February 11, 2010, Ms. Jokhadar was again assessed by Dr. Koch. Ms. Jokhadar has continued to see Dr. Termansen and Dr. Schwarz on a regular basis to the date of trial.

**68**  She is now receiving CPP disability benefits. She says she is unable to work because of the combined effect of her physical limitations and bipolar illness. She is working on an exercise program at home. She continues to have pain in the upper shoulder and neck region, occasionally radiating down her arm.

**69**  Ms. Jokhadar's relationship with her husband and her daughters has been rocky over the last couple of years, but has improved with better management of her mania. She and her husband have required counselling to understand her illness and that stress relief, rather than a change in her medication, will lead to improvement. She has advised Dr. Termansen that she would like to go back to school when her concentration improves. Her written English is poor. She has tried to do some upgrading but has had difficulty. She hoped to enter adult education classes at Capilano University. She is now doing housework again but no heavy lifting. She teaches her son Arabic. Her lifestyle is relatively sedentary; she does some light exercise, but her pain has not improved. She habitually massages her neck and shoulder to ease her pain. She says her episodes of depression are not as severe as formerly.

**70**  Ms. Jokhadar's daughter described in painful detail the psychotic episodes that resulted in her mother's hospitalization in 2008 and 2009. She testified that between these episodes her mother continued to be emotionally unstable, lost weight, and became depressed. She believes her mother has been working hard on her recovery in the year since the last Lions Gate admission. She thinks her mother cannot work as a hairstylist; she is too slow and unorganized. Her daughter thinks she is now physically better and Dr. Termansen is helping her a lot, however she says her mother does not engage with her son, does minimal housework, and is very inefficient.

**71**  Ms. Sadik has regularly visited Ms. Jokhadar from April 2009 to date. She says Ms. Jokhadar regularly complains that she is tired and of pain in the shoulder. She cries a lot and appears to be unable to take care of her family. She has not returned to her former household and social activities.

**Expert Opinion**

**Musculoskeletal Injury**

**72**  Dr. Schwarz has provided primary care. In his report of June 29, 2008, he summarised the progress of the plaintiff's back and neck injury to that date. He reported that Ms. Jokhadar had "marked cervical thoracic muscle weakness and wasting". She was tender on palpation on the upper back and upper thoracic and costovertebral joints. After following her progress to early 2010 and reviewing the report from experts and the MRI, Dr. Schwarz concluded:

I believe that the likely cause of the C5-6 findings is the motor vehicle accident as she does not appear to have had any other significant injury to which it could be attributed. It may be that the accident caused the cord compression to become symptomatic.

The relationship between the accident and the right arm pain is such that I believe that the motor vehicle accident is the cause of the right arm pain. Whether this can be attributed to the C5-6 injury or whether the accident caused some other soft tissue injury, which is not apparent on the MRI, I believe the motor vehicle accident is the cause of her right-sided neck pain and arm pain.

**73**  That opinion is consistent with the views expressed by the neurosurgeon, Dr. Sahjpaul, and the physiatrist, Dr. Adrian. Dr. Sahjpaul is concerned that the MRI suggests cord compression, but is not convinced that the plaintiff's symptoms are entirely or even significantly a result of compression. While there is some subtle weakness in the plaintiff's right hand grip strength and a subjective complaint of weakness in the arm, there is no significant neurological component to her injury. Dr. Sahjpaul believes the plaintiff's neck pain and right shoulder and arm pain and weakness is caused by a combination of a soft tissue injury and irritation of the nerve root at the C5-6 level. He says the motor vehicle accident was causative of the plaintiff's symptoms because there is no apparent history of significant neck, back or arm pain prior to the motor vehicle accident; the plaintiff is too young to have primarily degenerative changes; and change at the C5-C6 is focal and pronounced, suggesting that it is a result of trauma at that level, rather than degenerative change. He says there is some prospect that Ms. Jokhadar will require surgical intervention as a result of the obvious and problematic C5-6 herniation seen on the MRI.

**74**  In his February 7, 2007, report, Dr. Adrian expressed the opinion that Ms. Jokhadar was suffering from clinical features consistent with a diagnosis of mechanical neck, mid-back, and low-back pain. He felt that it was somewhat unusual for Ms. Jokhadar to have experienced no improvement several months after her accident. He expected there would be gradual recovery from those symptoms over a period of perhaps two years.

**75**  Dr. Adrian's opinion became more pessimistic over time. In May 2009 he said:

Mrs. Jokhadar will probably continue to experience difficulty performing activities that place physical forces on the painful structures involving her neck and back. Specifically, she will probably continue to experience difficulty performing house work, recreational and employment activities that require prolonged static or awkward positioning involving her spinal column, stooping, repetitive twisting, repetitive reaching, heavy or repetitive lifting or carrying.

**76**  Dr. Adrian acknowledged Ms. Jokhadar was limited by both physical and psychological symptoms and that he did not evaluate the latter. He did not review the patient's work history to determine whether that history would reflect her limitations, or whether the limitations were consistent or progressive. His poor prognosis was based primarily upon the duration of the persistence of the subjective complaints.

**77**  After becoming aware of the results of the CT/MRI in March 2010, Dr. Adrian, in the following words, expressed an opinion very similar to that expressed by Dr. Sahjpaul:

It is possible that the disc protrusion noted at the C5-C6 level and impingement of the adjacent right C6 spinal nerve root is resulting in atypical spinal nerve symptoms, manifested as scapula (shoulder blade) pain. Other potential sources for Mrs. Jokhadar's right shoulder blade symptoms are referred pain from her neck. Referred pain is pain that is experienced at a site distant to the source of pain, but not due to injured nerves.

**Depression, Bipolar Disorder and Post-Traumatic Stress Disorder**

**78**  As noted above, the plaintiff has been assessed by a psychologist, Dr. Koch, who has interviewed her extensively and reviewed the medical records. Ms. Jokhadar has been treated for some time by Dr. Termansen. He has expressed an opinion on her condition and prognosis. She has regularly seen Dr. Schwarz who has monitored her psychiatric care and she has been seen from time to time by Dr. Abdel-Fattah. She has been assessed at the defendant's request by Dr. Solomons.

**79**  There is, of course, a psychiatric diagnosis: Ms. Jokhadar clearly suffers from a bipolar disorder. She is acutely sensitive to changes in her medication. She has had difficulty controlling the disorder over time and has greater difficulty doing so when she is subject to stressors. There is a dispute with respect to the extent to which Ms. Jokhadar's mental illness was aggravated or exacerbated by the 2006 motor vehicle accident as well as the extent to which she should be able to control her mania with appropriate medication over the long term.

**80**  Dr. Koch provided the court with reports dated July 9, 2009, and March 16, 2010, in which he says Ms. Jokhadar has been disabled from employment by bipolar disorder with occasional manic episodes, in remission, by PTSD, and by a specific phobia of motor vehicle travel. He says these conditions have been triggered by a variety of psychosocial stressors including marital discord, problems in social support, and the accident. According to Dr. Koch's assessment of her symptoms, Ms. Jokhadar does not meet the stringent test for diagnosis of PTSD. Notwithstanding that fact, Dr. Koch believes that she demonstrates the symptoms of the disorder and that the diagnosis is appropriate. In response to the suggestion the trauma was not such as to generate a significant psychological disorder, he says the relationship between magnitude of the trauma and PTSD is a modest one. The severity of a patient's physical injury is not highly related to the development of PTSD. This patient related to Dr. Koch that she feared for her life and that upon the occurrence of the collision she felt her spirit leave her.

**81**  Her bipolar disorder was considered by Dr. Koch to be a pre-existing condition, primarily biological in nature, symptoms of which were triggered and aggravated by the stress caused by the motor vehicle accident in conjunction with her fears about her foetus. Bipolar disorder is recognized as a constitutional condition - one that is contributed to by genetic and personality factors - that causes patients to be affected by cyclical periods of clinical depression and mania. It is recognized that psychosocial stressors increase the risk of relapse of periods of depression.

**82**  During Dr. Koch's assessment of Ms. Jokhadar on June 1 and June 18, 2009, she was very distractible and severely depressed. She had some difficulty with self-assessment, but she did not endorse unusual symptoms. This led him to accept as accurate her description of her then-current symptoms. Dr. Koch felt that sedatives had contributed to her fatigue and low mood. He concluded that her fatigue and distractibility were the greatest impediment to returning to work.

**83**  At the time of his most recent report in March 2010 Dr. Koch was of the view that Ms. Jokhadar was primarily disabled by depression, a problem which has been difficult to treat pharmaceutically because of her underlying bipolar disorder. She appeared to be more depressed than previously and related some marital strain. Pending litigation was also recognized by Dr. Koch as a psychosocial stressor. He recommends that an allowance be made to permit Ms. Jokhadar to attend 50 hours of psychological therapy, but is of the view that even with that therapy there is a poor prognosis for the long term.

**84**  Dr. Termansen, who is the expert most familiar with Ms. Jokhadar's condition and treatment, says she is suffering from a rapidly cycling disorder which will require long term monitoring and intense treatment and supervision. Chronic neck and shoulder pain limits her ability to work. Inability to work worsens her depression because work gives her social opportunity and self confidence. Her prognosis for recovery is therefore guarded. The prognosis worsens with the number and severity of episodes of depression, as episodes beget each other. He describes Ms. Jokhadar as being very determined to stay out of hospital because she has had very difficult mental experiences when psychotic. He has agreed to see her regularly to prevent such episodes. He is of the view that Ms. Jokhadar would have been hospitalized twice since 2009 if she had not been actively participating in the outpatient programme.

**85**  Dr. Termansen believes she is suffering from PTSD that is aggravating her pre-existing bipolar condition:

Comorbid PTSD is associated with two of the four indices of bipolar severity, namely inter-episodic depression and quality of life. It is believed that the re-experiencing of the trauma in the form of intrusive images and nightmares is stressful and increases the vulnerability to relapse. In summary, there is indeed a correlation between post-traumatic stress disorder and aggravation of a pre-existing bipolar condition. The understanding of this correlation is based on the acute stress of the trauma as well as the ongoing stress of persisting post-traumatic symptoms precipitating more frequent episodes.

**86**  Dr. Termansen cautions, however, that Ms. Jokhadar's fairly severe psychotic problems make chronic pain and PTSD difficult to assess. His prognosis is expressed in the following terms:

Given how her illness has affected her since her accident, my prognosis for the future is very guarded indeed. It is always difficult to predict what the future may hold but it is my opinion that her prospect for emotional stability has declined significantly since the accident. In addition, a significant impairment in emotional, social and occupational functioning has seriously impaired her role within and outside the family. It is in [*sic*] my opinion that the marital and family situation has become increasingly destabilised and stressful because of Mrs. Jokhadar's instability.

**87**  From his initial examination of Ms. Jokhadar's records it was clear to Dr. Termansen that she had a long history of regular mood disturbances that were symptomatic of bipolar disorder, a spectrum neuropsychological disorder with its usual age of onset in the late teens. It is difficult for him to say how severe those disturbances were. While she appears to have been minimally impaired; he is unaware of any psychiatric disturbance prior to the 2001 hospital admission in Ottawa. He believes her level of functioning at the time of his involvement to be significantly lower than that prior to the motor vehicle accident. Dr. Termansen therefore concludes Ms. Jokhadar could have looked forward to significant stability and that the prognosis for her mental illness would have been much improved had the accident not occurred.

**88**  This opinion is, at least in part, based upon Dr. Termansen's opinion that if she was significantly impaired Ms. Jokhadar would have been hospitalized prior to 2006. He was aware in general terms of the 2001 Ottawa admission and says that Ms. Jokhadar described her 2002 manic episode to him but he knew little of the St. Paul's admission in 2002. He was not aware of Ms. Jokhadar's pre-accident problems at work. He acknowledged that if she reported anger at work that could have been a symptom of mania. He acknowledged her pre-accident condition may have been more fragile than he appreciated.

**89**  Dr. Termansen was not particularly familiar with Ms. Jokhadar's work or her attempts to return to her job. Given that he did not specifically address the limitations in her physical capacity and knew little of the physical demands of her job, little weight can be placed on his view that she is physically incapable of work. He did not know how many hours she had worked since her 2006-07 pregnancy. It was only on cross-examination that Dr. Termansen noted that Ms. Jokhadar complained she could not concentrate and her mental impairment alone would preclude a return to work. In my view that question was not closely addressed by Dr. Termansen and cannot be regarded as a considered opinion on her capacity to work.

**90**  Dr. Schwarz testified with respect to the medications prescribed for Ms. Jokhadar over the years. He knew that she occasionally refused to take Seroquel, an antipsychotic prescribed as a mood stabilizer, because it made her feel lethargic and depressed. He believes that he probably counselled her on the importance of using her medication as prescribed. Psychotropic drug use is, however, a hard sell. Antipsychotics make patients feel depressed, lethargic and hypersomnolent.

**91**  Dr. Abdel-Fattah, as noted above, considered the symptoms resulting in the April 2008 and March 2009 hospital admissions to be a result of non-compliance with drug therapy. He had closely reviewed the medication record and, on that review, established that for a period in 2008 Ms. Jokhadar was prescribed gabapentin as a result of a medical error. She appears to have been prescribed Noroxin (an antibiotic) by a Dr. Heyward on May 5, 2008, and to have received Neurontin (also known as gabapentin, a drug prescribed for nerve pain) by mistake. That error was perpetuated when she renewed her prescriptions.

**92**  Dr. Solomons, a psychiatrist with significant experience treating patients with mood disorders, including bipolar affective disorders and PTSD, examined the plaintiff on June 19, 2009, and then prepared a report on July 3, 2009, summarizing his observations and his review of the records. He prepared a supplemental report on August 19, 2009, in response to the reports of Dr. Koch and Dr. Termansen. In his first report, Dr. Solomons expresses the view that Ms. Jokhadar did not develop any emotional, psychological, or psychiatric sequelae as a result of the accident. He says:

This view is reinforced by the fact that in the first reference in her medical records to emotional symptoms, which occurred seven weeks after the accident, there were no details of her emotional state, nor was any cause given for her symptoms or state. When details of her emotional state were first provided, 18 months after the accident, no cause for her condition was given and no reference to the accident was made. No attribution to any cause for her emotional state was offered at all, whether to the accident or to other more compelling factors such as the nature of her long-standing, unstable psychiatric illness or the ongoing stresses in her relationships, particularly with members of her family.

Her detailed account at this assessment of emotional symptoms following the accident is not replicated in any of her medical records, and this further reinforces my view that she did not, in fact, develop any psychiatric complications as a result of the accident.

**93**  In his report of August 18, 2009, Dr. Solomons disagrees with the diagnosis of PTSD for the following reasons:

Dr. Koch arrives at the diagnosis of a post-traumatic stress disorder (PTSD) and an associated motor vehicle phobia without considering the preconditions for the diagnosis of PTSD which includes a traumatic event that is severe enough to be life or limb threatening and response at the time that includes intense fear, helplessness or horror. Neither of the preconditions was met in the accident. Dr. Koch also appears to ignore the absence of documentation of any emotional symptoms following the accident as well as the absence of any exacerbation of her pre-existing bipolar disorder in the immediate aftermath of the accident.

My reading of Dr. Termansen's report reveals a similar ignoring of the nature of the accident that does not meet the diagnostic criteria for a PTSD diagnosis, as well as a ignoring [*sic*] of the absence of the reports of psychiatric symptoms following the accident. He records in her report that she constantly relives the accident, although no mention of this is made in her family doctor's records.

**94**  Dr. Solomons does not take issue with the diagnosis of bipolar disorder or its disabling effects on Ms. Jokhadar, but disputes the diagnosis of PTSD and attributes all of the plaintiff's bipolar disorder to biologic as opposed to traumatic factors. His conclusion that Ms. Jokhadar does not suffer from PTSD is based in part on his characterization of the accident as a "minor incident" and in part on his understanding that there were no emotional symptoms following the accident. When he met the plaintiff she demonstrated composure and showed no signs of psychiatric illness. She was very engaging and appropriately reactive. He says discussion of the accident is usually a trigger for emotional reaction in patients with PTSD. Seeing none in this case was significant to his assessment. He says Ms. Jokhadar didn't volunteer any flashbacks and only claimed to be troubled by them when prompted.

**95**  In cross-examination he acknowledged that the leading diagnostic text, the DSM-IV, does not describe the nature of the event that must precipitate PTSD.

**96**  On the question of the emotional impact of the accident, Dr. Solomons agreed that when he interviewed Ms. Jokhadar she said she thought she was going to die in the accident and cried recounting it. She told him she was depressed following the accident and was thinking of death all of the time. He believed such an emotional response had not been recorded in the post-accident medical records. For that reason, he concluded that the emotional response is recent and cannot be regarded as a cause of her depression or a symptom of bipolar disorder or PTSD. In cross-examination Dr. Solomons was referred to the October 20, 2006 note that the patient thought she would die at impact and that she was weeping when recalling the incident. Upon reviewing that record Dr. Solomons acknowledged the obvious error on his part. He agreed he had been wrong to reject Ms. Jokhadar's description of her emotional reaction to the accident.

**97**  Further, in coming to his opinion Dr. Solomons ignored or gave no weight to the fact that the patient's mood fluctuated after the accident or that in December 2006 and March 2007 she was referred to Dr. Misri, a psychologist, for bipolar symptoms.

**98**  Dr. Solomons says that although there is reference in the GP's records to emotional symptoms on March 4, 2008, there is no cause for those emotional symptoms identified. Dr. Solomons acknowledged on cross examination that was also incorrect, insofar as the return to work is identified in the records of Dr. Schwarz as a possible cause. Dr. Solomons also acknowledged that he was wrong to say that Dr. Pankratz made no reference to the motor vehicle accident in his records and did not identify the accident as a contributing cause of emotional problems.

**Functional Capacity**

**99**  Ms. Jokhadar has been assessed by Mr. Tim Winter and Ms. Jodi Fischer; both are occupational therapists and work capacity evaluators. Mr. Winter saw Ms. Jokhadar at the request of her counsel, on June 9, 2009. Ms. Fischer saw her on February 2, 2010, for assessment at the request of the defendants. Both experts prepared detailed and helpful reports and testified at trial.

**100**  When Mr. Winter examined Ms. Jokhadar she had recently been released from the hospital and had only recently begun to work with Dr. Termansen. Mr. Winter noted numerous and significant indicators of inconsistent effort on Ms. Jokhadar. Despite those indicators of poor performance, he concluded that his evaluation provided a reasonable functional baseline for assessing Ms. Jokhadar's physical capacity. I reject that conclusion. Mr. Winters noted that Ms. Jokhadar appeared to be relatively fit and there were no indications of deconditioning. In work-like simulations, however, she demonstrated pain mannerisms, she cried as she worked and she demonstrated inconsistent and inexplicable limitations. Questioning demonstrated that Ms. Jokhadar perceived herself as very functionally disabled, to an extent not borne out on testing.

**101**  Despite the fact Ms. Jokhadar reported no significant improvement in her physical condition between June 2009 and February 2010, her performance on testing by Ms. Fischer was substantially improved. In the interval Ms. Jokhadar had reported some lightening of her mood. She had remained out of the hospital and on consistent medication. I regard Mr. Winter's assessment as having been conducted at or near a low point in her bipolar disorder, and conclude that it was affected by poor effort on her part. Mr. Winter's conclusions stem from testing limited by subjective complaints of pain, and the patient's own unreliable description of the emotional difficulty a return to work would entail.

**102**  Ms. Jokhadar saw Ms. Fischer eight months after the Winter assessment. She observed behaviour on the part of Ms. Jokhadar suggestive of significant effort on her part. She was consistent and competitive, starting tests early and using enough effort to raise her heart rate. There was no evidence of an attempt to mislead the examiner by intentional underperformance. To the contrary, performance on testing was good. Through a series of tests of her tolerance for work related and household tasks, Ms. Fischer found Ms. Jokhadar to demonstrate greater tolerance for such tasks than she reported. While Ms. Jokhadar reported increasing levels of pain as the testing progressed, her performance levels were maintained. She performed many tests of her physical capacity within the norms for women of her age.

**103**  Ms. Fischer concluded:

During testing she demonstrated sufficient grip strength, reaching, dexterity, handling and strength tolerance to attempt to resume part time work as a hairdresser. She was able to perform repetitive and sustained reaching postures associated with the demands of her job as a hairdresser. Her neck/right upper back region also responded well under load ... There are no difficulties observed during testing with functional cognition ... She was pleasant, sociable and her behaviour was appropriate throughout testing. There was no emotional response to testing ... when engaged in functional tasks or when reporting increased pain.

**104**  Ms. Fischer noted that Ms. Jokhadar's performance on testing had improved dramatically since the testing by Mr. Winter. Referring to Ms. Jokhadar's emotional response to testing by Mr. Winter - the testing was abandoned after she started crying and performing poorly - she noted that her mental health status might have affected testing. She observed:

From a physical perspective, work capacity findings indicate that Ms. Jokhadar demonstrated sufficient function to manage the physical demands of work as a hairdresser; however whether she can psychologically manage the demands of this occupation (or other forms of work) is out of my area of expertise to comment. If psychological experts determine that she is psychologically fit to return to work, given that she described fear of failing again and a loss of self esteem, I would recommend that she receive the support of an occupational therapist with return to work. Given also low confidence in her physical function and findings of deconditioning, I am supportive of Mr. Winter's recommendation for an active interdisciplinary rehabilitation program to maximize her chances at a successful and durable return to work.

**105**  The strength requirement for working as a hairdresser is light. Ms. Fischer says Ms. Jokhadar has that capacity. She increasingly complained of pain during the day but that was not accompanied by a significant deterioration in her performance. Ms. Fischer says Ms. Jokhadar is less disabled than she considers herself to be.

**106**  Ms. Fischer does not disagree with the opinions of Dr. Adrian and Dr. Koch that Ms. Jokhadar's pain can bring on emotional symptoms that could make her manic and cause her to be sent to hospital again. She could not dispute that there is a relationship between returning to work, suffering stress, experiencing pain, and relapsing into a manic state. She is not qualified to address the extent to which a psychiatric condition precludes Ms. Jokhadar from returning to work. That is a psychiatric issue.

**Applicable Law**

**Causation**

**107**  The plaintiff bears the burden of establishing a causal link between the defendant's ***negligence*** and the onset or worsening of her pain and suffering, loss of enjoyment of life, and the reduction in her income or income earning capacity. She must establish, first, that the negligent act caused or materially contributed to the damage she has sustained and, if she can do so, prove the measure of damages. The causation case is met by establishing that but for the negligent act or omission the plaintiff's injury would not have occurred. The parties jointly refer the court to the principles enunciated and restated by the Supreme Court of Canada in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=); *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=); and *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=).

**108**  Causation issues may be difficult in cases where the plaintiff suffers psychiatric symptoms or chronic pain contributed to by multiple causes. In *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.), Taylor J.A., considering a claim for damages arising out of chronic benign pain syndrome, in a frequently cited passage wrote, at para. 15:

... there may be cases where a chronic benign pain syndrome will attract damages. That will happen where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

... With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.), repeating his observations in *Butler v. Blaylock* [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=) (October 7, 1981, Vancouver B781505 (B.C.S.C.)), put it thus:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

These principles were recently affirmed by the Court of Appeal in *Mariano v. Campbell*, [*2010 BCCA 410*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2P7-00000-00&context=).

**The Crumbling Skull**

**109**  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=), a judgment pronounced in the interval between *Athey* and *Resurfice*, our Court of Appeal addressed the distinction between weighing evidence of causation and considering evidence going to the measure of damages. The distinction is important, particularly in cases where the plaintiff is alleged to have had a "crumbling skull":

16 The crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendants' conduct. Major J. addressed this issue in *Athey* when he wrote, at paragraph 35, that damages should be adjusted only when 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***." Such a risk of harm need not be proved on a balance of probabilities, which is the appropriate standard for determining past events but not future ones. Future or hypothetical events should simply be given weight according to the probability of their occurrence. At paragraph 27, Major J. wrote that "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." In the same paragraph, he went on to say that a future event should be taken into account as long as it is a "real and substantial possibility and not mere speculation."

**110**  The defendants must, therefore, if they seek to establish that the plaintiff's bipolar illness would have in any event disabled her or reduced her income from employment, show 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***. Contingencies must be taken into account, as the court noted in *Zacharias*:

17 Because in *Athey* the Supreme Court found that there was no basis for finding a "measurable risk", it is of limited assistance when applied to cases in which there is not clearly an absence of a measurable risk. A number of decisions in this Court have struggled with that issue. 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.), the plaintiff suffered a relapse of her multiple sclerosis after a car accident. Newbury J.A., for the Court, held that it was a "thin skull" case, but that, nonetheless, it was appropriate to reduce the plaintiff's damages in recognition that she might have relapsed anyway. At paragraph 6, Newbury J.A. contrasted the standards used to assess liability and damages:

Of course, the judgment as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award, as opposed to the "all or nothing" choice that must be made with respect to causation.

The trial judge reduced the damages to reflect the risk of relapse that pre-existed the accident. Newbury J.A. held that the trial judge was entitled to make such a reduction, even though there was only a weak evidentiary foundation on which to conclude that the plaintiff would have remained symptom-free for just five years.

**111**  In the case at bar the plaintiff clearly suffered from a manifest pre-existing condition that was likely to have affected her whether or not the motor vehicle accident had occurred. That condition must be taken into account in measuring damages. Any measurable risk established by the evidence that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence*** must be considered: see *Pryor v. Bains* [*(1986), 69 B.C.L.R. 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G39N-00000-00&context=) (C.A.); *T.W.N.A. v. Clarke*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=); *McKelvie v. Ng*, [*2001 BCCA 384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63KX-00000-00&context=).

**Non-Pecuniary Damages**

**112**  As Russell J. noted in *Smusz v. Wolfe Chevrolet Ltd.*, [*2010 BCSC 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-2019-00000-00&context=):

[85] The purpose of non-pecuniary damage awards is to compensate the 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; see also *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=), [*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=); and *Kuskis v. Tin,* [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) [*Kuskis*]. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis*, at para. 136.

[86] There are a number of factors that courts must take into account when assessing this type of claim. Madam Justice Kirkpatrick, writing for the majority, 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=), outlines the factors to consider, at para. 46:

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

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

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

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

**113**  The parties have referred to numerous helpful authorities on the quantum on non-pecuniary damages. I will describe them briefly. In *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=), the plaintiff, a 57 year old office administrator/supervisor suffered soft tissue/musculoskeletal injuries to her low back and neck, with secondary headache, soft tissue injuries to the left forearm, and a nerve entrapment of the lateral femoral cutaneous nerve of the thigh. The nerve entrapment resulted in numbness and pain over the thigh. The medical evidence was that she had a pre-existing spinal condition that might have become symptomatic (to an uncertain extent) in 10 to 15 years' time, but she was otherwise in excellent health prior to the first of two accidents. As a result of both accidents, the plaintiff's life had changed drastically. She was in constant pain and suffered from clinical depression and from PTSD. Mr. Justice Shaw held that her essential identity had been taken from her. Her prospects of improvement were uncertain. Non-pecuniary damages were assessed at $120,000. The case is a helpful benchmark in assessing moderate injuries with longstanding and life-changing psychiatric consequences. Mrs. Ashcroft, however, was not suffering from evident and significant pre-accident psychiatric problems. The functional impact of her injuries was more significant than the impact of the injuries suffered by Ms. Jokhadar.

**114**  In *Maillet v. Rosenau*, [*2006 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S32G-00000-00&context=), a 38 year old trailer park manager suffered a significant concussion and depression, affecting her concentration and attention, as well as a musculoligamentous strain of the neck and shoulder region which caused tightening of the shoulder girdle and thoracic outlet, and paresthetia in the right arm. Mr. Justice Powers found that the weight of the evidence supported the plaintiff's position that her injuries were caused by the motor vehicle accident, and that she continued to suffer from them and would do so in the future. Non-pecuniary damages were assessed at $110,000.00. Again, this was a case of a person not otherwise affected by mental illness and unlikely to have been disabled but for the accident.

**115**  In *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=), the plaintiff suffered from musculo-ligamentous strain to the neck, mid-back, and low back. She went on to develop a chronic myofascial pain condition involving the upper neck musculature, mid back and low back. This, in turn, contributed to depression. Her treating psychiatrist expressed the following opinion, quoted at para. 62:

Ms. Marois has had significant anxiety and depressive symptoms for over five and a half years. Despite further treatment and the passage of time, Ms. Marois will likely continue to have anxiety and depressive symptoms and not return to her premorbid level of emotional functioning. Ms. Marois will likely continue to be emotionally vulnerable and at risk of developing PTSD in future if she is exposed to further trauma.

In general, patients who have a chronic pain disorder for more than two years in duration continue to be symptomatic. Ms. Marois, however, has had a lessening of her pain during the past year since she started seeing Dr. Foran and I will defer the prognosis regarding her physical symptoms to physical medicine specialists. As long as Ms. Marois has significant pain, anxiety, depression, insomnia, tinnitus and fatigue she will likely continue to have cognitive difficulties. Given Ms. Marois' age and the nature and extent of her physical, cognitive and emotional difficulties, it is unlikely that she will be able to return to competitive employment in future.

**116**  Mr. Justice Smart held that the plaintiff had lived a full and busy life but that had been lost over the six years following the accident and that her life would continue to be impacted in the future. After considering the decision of Shaw J. in *Ashcroft* he assessed general damages at $130,000.

**117**  In *Shapiro v. Dailey*, [*2010 BCSC 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-222V-00000-00&context=), Grauer J. assessed the claim of a 23 year old student who suffered soft tissue type injuries that developed into persisting chronic pain syndrome, fibromyalgia, myofascial pain, anxiety/panic disorder, depressive symptoms, PTSD, thoracic outlet syndrome, and associated physical, emotional and cognitive difficulties as follows:

[60] I have considered the authorities to which counsel referred me, including *Dikey v. Samieian*, [*2008 BCSC 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=); *Alden v. Spooner*, [*2002 BCCA 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60KK-00000-00&context=), [*6 B.C.L.R. (4th) 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60KK-00000-00&context=); *Prince-Wright v. Copeman*, [*2005 BCSC 1306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1GR-00000-00&context=); *La France v. Natt*, [*2009 BCSC 1147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6276-00000-00&context=); *Pelkinen v. Unrau*, [*2008 BCSC 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1DY-00000-00&context=); *Whyte v. Morin*, [*2007 BCSC 1329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X45D-00000-00&context=); *Niloufari v. Coumont*, [*2008 BCSC 816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G31K-00000-00&context=), varied [*2009 BCCA 517*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24T1-00000-00&context=); and *Unger v. Singh*, [*2000 BCCA 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21S-00000-00&context=).

[61] Each case must, of course, be assessed on its own facts. Considering all of the circumstances, including her age at the time of the accident (23), the toll her injuries have taken on her, and her prospects for the future, I consider Ms. Shapiro's plight to be considerably worse than that of, for instance, the older plaintiff in the recent decision of *La France* ($80,000) and worse than the older plaintiff in *Prince-Wright* ($100,000). I have considered as well the very recent decision of the Court of Appeal in *Poirier v. Aubrey*, [*2010 BCCA 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-2211-00000-00&context=), where the 38-year-old plaintiff's non-pecuniary damages were increased to $100,000. I assess Ms. Shapiro's non-pecuniary damages at $110,000.

**118**  In *Smusz*, Russell J. described the damages suffered by a 43 year old woman injured in a motor vehicle accident as follows:

[87] ... She suffered injuries which, although not requiring more than a brief visit to the hospital, were nonetheless significant. The medical evidence was mostly consistent: her physical injuries include moderate right paracentral disc herniation at C3-4 on the right side and moderate paracentral disc protrusion at C6-7 on the left causing irritation of the left C7 root; and a bulging lumbar disc irritating the lumbar roots, all of which result in chronic left-sided neck, arm and low back pain, dizziness and headaches. She suffered from PTSD, now substantially resolved, but still suffers from insomnia, occasional nightmares, depression and chronic pain some three years after the accident.

[88] The chronic pain caused by the injuries received in the accident has resulted in depression, no doubt complicated by her difficult financial situation, but the plaintiff was happy and energetic before the accident notwithstanding the fact that she had very little money.

[89] She was able to work in a job which did not require great skill and which did not pay well but in which she could have continued for the indefinite future. It gave her some income and gave her the sense of participating in her family's finances.

**119**  General damages were assessed at $100,000.

**Loss of Income Earning Capacity**

**120**  The leading British Columbia cases on the assessment of loss of income earning capacity were recently reviewed by the Court of Appeal in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=). Garson J.A., for the court referring to the decision of the trial judge,[2008] B.C.J. No. 1563, wrote:

[7] Despite his conclusion that the plaintiff had not demonstrated a real possibility she would suffer a loss of income, he awarded the plaintiff damages for loss of earning capacity, in reliance on this Court's judgment in *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), [*53 B.C.A.C. 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), in which Finch J.A. [...] found [...] that the loss of future earning capacity was suffered, even though the plaintiff continued to earn the same wage from the same employer, as he had before the accident.

[8] The trial judge carefully reviewed the jurisprudence on this point in not only *Pallos*, but also *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (C.A.); *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=); *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=), [*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=); *Chang v. Feng*, [*2008 BCSC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), [*55 C.C.L.T. (3d) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=); and *Djukic v. Hahn*, [*2007 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2416-00000-00&context=), [*66 B.C.L.R. (4th) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2416-00000-00&context=), and held that he could not reconcile the judgments in *Steward* and *Pallos* on this question of whether an award for loss of future earning capacity should be made in the absence of proof of a substantial possibility of future pecuniary loss.

**121**  The debate was addressed in the following terms:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), and *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=). These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*, [*[1985] B.C.J. No. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-FBFS-S14B-00000-00&context=). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

**122**  For the purposes of this case that is sufficient elucidation of the guiding principles.

**Analysis**

**The Physical Injury**

**123**  Liability for the accident giving rise to this claim has been admitted. The description of the accident is significant only to the extent that it assists in weighing the emotional and psychiatric impact of the accident. Having accepted Ms. Jokhadar's evidence with respect to what she saw and experienced I conclude the impact occurred with enough force to cause her physical injuries and produced sufficient fear to cause her emotional reaction.

**124**  The defendants say the plaintiff is entitled to non-pecuniary damages to compensate for a mild to moderate soft tissue injury and special damages relating to pecuniary losses in the months after the accident but argue that the plaintiff has not proven any more significant loss.

**125**  The plaintiff says there is uncontroverted evidence that Ms. Jokhadar has suffered a soft tissue injury causing back, neck, and arm pain and a disk protrusion resulting in the prospect that she will develop further neurological symptoms, as a result of nerve root impingement, and may require neurosurgery.

**126**  I accept the evidence of Ms. Jokhadar's treating physicians that she sustained injury to the musculoligamentous structures of her right neck and shoulder area and that she now suffers from a disk protrusion at the C5-C6 level that may become increasingly symptomatic. Dr. Sahjpaul, the witness most qualified to address the cause and effect of the disc protrusion believes the MRI suggests some cord compression but is not convinced that the plaintiff's symptoms are entirely, or even significantly a result of that cord compression. I accept his conclusion that the plaintiff has neck pain and right shoulder and arm pain and weakness which is a combination of a soft tissue injury and some irritation of the nerve root at the C5-6 level. I further accept his conclusion that the motor vehicle accident was causative of the plaintiff's symptoms.

**127**  I find that since the accident she has suffered mechanical neck, shoulder, mid-back, and low back pain, weakness, and tenderness. Despite that pain and weakness, she has demonstrated on examination by her physicians that she has relatively normal range of motion. Only minimal back muscle wasting has been noted.

**128**  Ms. Jokhadar perceives that her persistent back pain limits her ability to engage in tasks that require prolonged static or awkward positioning, including twisting, reaching, or stooping. It is noted, however, that Ms. Jokhadar has difficulty with self-assessment and is prone to overestimate the extent of her disability.

**129**  I accept the opinion of Dr. Adrian that Ms. Jokhadar will probably continue to experience difficulty performing activities that place physical forces on the structures involving her neck and back, but find that Ms. Jokhadar is limited as much by psychological as by physical symptoms. While her pain has been chronic there is some indication that with therapy the psychological component of her symptoms is at least temporarily improving.

**130**  I accept the evidence of Dr. Adrian and Dr. Sahjpaul that there is a risk that the C5-6 disc will cause increasing pain over time. Ms. Jokhadar may require surgical intervention as a result of the obvious and problematic C5-6 herniation seen on the MRI.

**Psychiatric Illness**

**131**  Ms. Jokhadar suffers from a bipolar disorder with occasional manic episodes. She is primarily disabled by depression, which has been difficult to treat pharmaceutically because she is acutely sensitive to changes in her medication. I accept Dr. Termansen's opinion that her emotional, social, and occupational functioning has been seriously impaired and her marital and family situation has become increasingly destabilised and stressful because of her symptoms. She now suffers from a rapidly cycling disorder which will require long term monitoring and intense treatment and supervision.

**132**  Ms. Jokhadar has now made some partial recovery from the severe depression and cyclical mania that affected her in 2008 and 2009. Ms. Jokhadar says that Dr. Termansen's counselling resulted in some lifting of her depression. Dr. Termansen describes her as being very determined to stay out of hospital and has agreed to see her regularly to prevent recurrent psychotic episodes.

**133**  While Ms. Jokhadar had a long history of regular mood disturbances prior to the accident she was clearly less impaired in the period from 2002 to 2006 than she has been in the years subsequent. From 2006 to date she has been subject to significant stress due to the motor vehicle accident and the injuries sustained in that accident, her pregnancy, problems at work and at home arising from pronounced symptoms of her bipolar disorder, and this litigation. Bipolar patients are sensitive to stress, and may decompensate easily. Stressful events often precede an episode of depression or mania. I accept Dr. Termansen's evidence that Ms. Jokhadar's reaction to pregnancy would not have been the same, her bipolar illness would not have been as pronounced, and the prognosis for her mental illness would have been much improved had the accident not occurred.

**134**  The defendants do not dispute the opinion that manic or depressive episodes may be triggered by a variety of psychosocial stressors. Nor does there appear to be any question that as individuals have more episodes of depression they become less emotionally resilient. However the defendants say, relying upon the opinion of Dr. Solomons, chronic family stresses, non-compliance with treatment, and a pregnancy all represent more compelling influences on the course of her chronic psychiatric illness. In doing so the defendants address the wrong causation question: "which causes are more compelling?" rather than "but for the accident would the plaintiff have been as ill?"

**135**  Further, there is no reason, in my view, to regard stressors other than the car accident as more compelling or predominant. Dr. Solomons, in reaching that conclusion, ignored clear evidence of the significance of the accident. He erroneously concluded that Ms. Jokhadar had not described the traumatic effect of the accident and its emotional consequences to her physicians, or sought psychiatric help. In cross-examination Dr. Solomons acknowledged deficiencies in his review of the records and misunderstanding of Ms. Jokhadar's history and treatment. While he expressly describes pregnancy as a factor contributing to the increase in symptoms of bipolar illness he does not consider the fact that Ms. Jokhadar's one specific worry during the pregnancy was the possibility of a miscarriage or birth defect due to the motor vehicle accident.

**136**  It is not helpful in the causation analysis to attribute the exacerbation of the plaintiff's bipolar disorder to non-compliance with treatment. Although Dr. Abdel-Fattah and Dr. Schwarz concluded that Ms. Jokhadar had occasionally refused to take Seroquel, despite counselling on the importance of using her medication as prescribed, the evidence was that non-compliance occurred because antipsychotics made her feel depressed, lethargic and hypersomnolent. Ms. Jokhadar's reluctance to take antipsychotic medication is not blameworthy conduct but, rather, an aspect of her pre-existing condition, a factor contributing to her susceptibility to events destabilizing her bipolar illness.

**137**  I accept the evidence of Dr. Termansen that the motor vehicle accident precipitated a prolonged depressive episode which eventually transformed into a manic episode. I conclude that episodes of mania and depression between 2006-2008 were in part triggered by the motor vehicle accident and in part triggered by her concern about her foetus, her increased anxiety, her physical injuries, and difficulty she had returning to work. I accept the evidence of Dr. Koch and Dr. Termansen that the accident was a significant cause of the worsening of that illness.

**138**  In the result, I must turn to a consideration of the contingencies referred to in *York v. Johnston* so as to describe the probable course of Ms. Jokhadar's bipolar disorder had an accident not occurred and compare that with the position she now occupies and the future she faces. In doing so I bear in mind the injunction of Newbury J.A. that "the judgment as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award".

**139**  There is evidence of significant pre-accident symptoms. As Dr. Koch noted, there is a medical record of complaints of depressive symptoms (particularly low energy and hypersomnia) throughout the 2001-2006 period and a long history of intermittent impairment from bipolar episodes. Dr. Termansen acknowledged on cross-examination that Ms. Jokhadar's pre-accident condition may have been more fragile than he appreciated when he drafted his opinion. Speaking of Ms. Jokhadar's post-accident course both he and Dr. Koch noted that stressors are cumulative and that episodes of depression beget each other. The inability to work worsens Ms. Jokhadar's depression because work gives her social opportunity and self confidence. The prognosis worsens with the number and severity of episodes of depression.

**140**  Ms. Jokhadar's symptoms became so pronounced that she required hospitalization in 2001 and 2002. She required close supervision thereafter. When she went off medications in 2005 she suffered symptoms that disabled her from work. In 2006 she was complaining of significant continuing symptoms at work, even while on medications. Ms. Jokhadar learned she was pregnant days after the accident. She soon began suffering from nausea and vomiting. She stopped taking antidepressant medication. Given her history, pregnancy certainly contributed to the difficulty she experienced controlling her bipolar illness. She would, in any event, have been subject to the stressors associated with that pregnancy and caring for a newborn. She is likely to have suffered depression off medication during her pregnancy. According to the psychiatric evidence, that would have had an impact upon her long-term prognosis. For this reason I find that even in the absence of the accident Ms. Jokhadar would still have suffered from increasing symptoms of bipolar disorder after October 2006.

**141**  The plaintiff claims to have suffered PTSD as a distinct and compensable condition. The defendant says that the plaintiff does not suffer from PTSD. There is no question the plaintiff had some complaints of emotional issues after she became pregnant and leading up to and after the birth of her son. She was shaken up by the accident, according to the defendant, but there is no mention of her having flashbacks or of disabling mood fluctuation arising from memories of the accident. The defendant says PTSD did not become an issue until the plaintiff engaged Dr. Koch to produce a medical legal report assisting the plaintiff with her litigation.

**142**  I accept Dr. Koch's opinion that the accident, as described to him, was an event capable of causing post-traumatic stress, particularly in a person affected by bipolar disorder. The evidence of Drs. Koch and Termansen to the effect that this incident might have a more pronounced effect upon a person with a mood disorder stands to reason. Given that Ms. Jokhadar's own description of her symptoms does not meet the diagnostic criteria for diagnosis of PTSD, and given the absence of reported symptoms, for example when she was treated by Dr. Abdel-Fattah, I cannot find a sufficient basis for Dr. Koch's opinion that "overall" her symptoms are consistent with such a diagnosis. There is certainly evidence of longstanding depression and mood swings, but from these it is difficult to isolate specific symptoms of PTSD. As Dr. Termansen noted, her fairly severe psychotic problems make chronic pain and PTSD difficult to assess. Despite the fact I reject most of Dr. Solomons' opinion, I share his conclusion that Ms. Jokhadar's description of her "flashbacks" is not a description of that symptom as commonly understood but, rather, a description of an unhappy recollection, more consistent with depression than PTSD.

**Non-Pecuniary Damages**

**143**  I turn then to the functional impact of Ms. Jokhadar's physical injuries and the worsening of her bipolar disorder in order to assess damages for pain and suffering and the loss of enjoyment of life. Although she was working part-time and her bipolar disorder was less disabling prior to October 2006, Ms. Jokhadar was complaining of stress at work and was about to learn that she would have to go off her medication due to her pregnancy. She was suffering from significant illness that required constant monitoring and medication. She had regularly missed work in the years between 2002 and 2006. Ms. Jokhadar told Dr. Adrian that she was working as a hairstylist 4 days per week before her injury and that she had been employed as a hairstylist since 1996. She claimed to have had no physical limitations and to have gone swimming and to the gym regularly. She claimed to have been immediately unable to work due to pain following the accident. All of these claims overstate the level of her pre-accident activity and the impact of the accident.

**144**  The plaintiff says the catastrophic effect of these injuries on her ability to enjoy the amenities of life exceeds that described in all of the cases referred to above and seeks an assessment of general damages at $140,000. The defendant submits that the claim should be qualified as a mild to moderate soft tissue injury with some special damages awarded for the time the plaintiff would have needed medical care which was not otherwise paid for by other entities but does not attempt to quantify the claim.

**145**  The accident in this case has had a significant effect on Ms. Jokhadar's life. I am satisfied on the evidence that she suffered from a significant bipolar affective disorder that required monitoring and medication prior to the motor vehicle accident but that that disorder was significantly exacerbated to the point that she became significantly disabled by her illness from 2006 to 2009. While she is under reasonable control at the moment, her significant depressive and manic episodes have made her more prone to relapse. In addition, she has a physical injury that continues to trouble her and a disk protrusion that may become more symptomatic in the future. Taking into account the likelihood that she would to some extent have suffered from increasing symptoms of bipolar disorder, I am of the view that non-pecuniary damages should be set at $90,000.

**Loss of Income and Income Earning Capacity**

**146**  Dr. Termansen says Ms. Jokhadar is no longer working because of her physical and emotional state. He believes that her current level of functioning is below her pre-accident state but his view that she is now incapable of working as a hairdresser appears to be based primarily upon his understanding of her physical limitations. Although he said, on cross-examination, that Ms. Jokhadar's limited ability to concentrate would preclude a return to work, his considered, written opinion described physical restrictions as the cause of disability, when he says: "Given her persistent neck and shoulder pain her returning to work as a hairdresser does not appear likely in the near or distant future."

**147**  While Dr. Koch also says that the symptoms of depression he has noted, particularly fatigue and difficulty concentrating, disable Ms. Jokhadar, he believes return to work may be possible with some modification of her medication. I accept that view and regard the potential to return to work as a question that will be determined primarily by the state of Ms. Jokhadar's bipolar illness.

**148**  This view is consistent with the reports and opinions of the occupational therapists, specifically Ms. Fischer's conclusion that Ms. Jokhadar demonstrated sufficient function to manage the physical demands of work as a hairdresser. The strength requirement for working as a hairdresser is light and I find Ms. Jokhadar to have that capacity. I accept Ms. Fischer's conclusion that the critical question in relation to loss of income-earning capacity is whether Ms. Jokhadar can psychologically manage the demands of any occupation. Returning to work will be stressful. If the return is not well managed and gradual she may experience some increase in her pain and there is a risk of a relapse into a manic state.

**149**  The plaintiff says Ms. Jokhadar's average reported earnings while working as a hairdresser were $20,452 per annum. The plaintiff says that adding unreported tips to this income would bring her average earnings to approximately $32,000 per annum. The plaintiff says if she had not been injured, she would have worked for the entire period between her accident and the date of trial, but for six months maternity leave following the birth of her son in June 2007. On this basis she advances a claim for past income loss of $66,875.

**150**  This claim does not take into account the fact that the plaintiff's work was inconsistent in the years leading up to the motor vehicle accident, even when she did not have a young child at home. It does not take into account Ms. Jokhadar's own evidence that she regards hairdressing as an enjoyable pastime rather than as full time employment. It does not take into account the 2005 flare-up in her manic symptoms resulting in income in that year being reduced to $9,582, less than $1,000 per month (excluding tips and EI benefits). Nor does it take into account the fact that after she returned to work in 2006 she advised Dr. Schwarz that she was suffering a tremor, a side effect of an antipsychotic.

**151**  Taking these facts into account and making allowance for the contingency that Ms. Jokhadar would not have worked while pregnant and off medication, would have taken maternity leave following the birth of her son, and would, in any event, have suffered from some periods of depression or mania that would have prevented her from working in the years since, I assess the plaintiff's loss of past income over the period from January 2008 (six months after the birth of her son) to trial, a period of 30 months, at $30,000.

**152**  The plaintiff is entitled to interest on that award in 6 month increments assuming the loss to have been evenly distributed over the period commencing six months after the birth of her son.

**153**  The plaintiff's claim for loss of income earning capacity is based upon the argument that physical and psychiatric problems now disable her from work as a hairstylist. The plaintiff says she had 27 years of fruitful income ahead of her and that her capacity to earn income has been significantly impaired. She submits that she has lost a greater part of her potential income earning capacity. That total capacity has been estimated by Mr. Gosling, an economist called on her behalf at trial, as a claim with a net present value of $623,803. The plaintiff seeks a loss of earning capacity in the sum $350,000.

**154**  The plaintiff says it is not clear whether she will ever be fit to return to work again. Mr. Gosling's projection of net present value of the loss of income earning capacity is based on an estimate of lifetime earnings as a hairstylist to age 65. The claim has been discounted to take into account the factors that limited the plaintiff's income earning in the years prior to trial but appears to include some unearned income in 2006. It has not been discounted to take into account real and significant prospect that the plaintiff would in any event been disabled by her bipolar illness. Nor has it been discounted to take into account the fact that Ms. Jokhadar might be able to return to work either as a hairstylist or in some other capacity for some or most of the remainder of her working years. The functional capacity evaluations demonstrate that Ms. Jokhadar is capable of light work. She should be capable of working in some capacity.

**155**  I accept Dr. Termansen's evidence that the prognosis for the future is very guarded and that Ms. Jokhadar's chances of enjoying emotional stability have declined significantly since the accident. I also accept that the effects of the accident are still reverberating within her life and the total effects are not yet known. I must also find, however, that Ms. Jokhadar had a poor prognosis for continuous long-term employment before the accident. The depression and mania leading to her hospitalization in Ottawa in 2001 and in Vancouver in 2002, had already led her physicians to conclude she was likely to require long term medication and close supervision.

**156**  As with the claim for past income loss, I am of the view that the plaintiff has overestimated pre-accident income earning capacity. Using multipliers determined by the plaintiff's expert economist, Mr. Gosling, assuming she would have remained employed, despite her illness to age 55 (13,512) and using her 2005 income ($14,517, including EI) as representative of her income earning potential, the net present value of the whole lifetime stream of earnings before the accident may fairly have been assessed at approximately $195,000.

**157**  Bearing in mind the principles referred to above and considering that the motor vehicle accident has resulted in worsening of the prognosis, but is not the sole factor leading to the plaintiff's relatively pessimistic prognosis for long term future employment, and also taking into account residual income earning capacity, I am of the view that the claim for loss of future income earning capacity should be assessed at approximately one third of that estimate of net present value of the plaintiff's income earning capacity. After adding an allowance for lost tips (said to increase income by 50%) I award $95,000 as compensation under that head of damages.

**Special Damages**

**158**  Dr. Koch recommends 50 hours of psychological therapy. I accept that recommendation. An allowance should be made for ongoing psychological therapy and I award $9,600 in respect of that claim.

**159**  The occupational therapists recommend that Ms. Jokhadar receive the support of an occupational therapist to assist her in returning to work. Given her low confidence in her physical abilities and the findings of deconditioning, the experts are supportive of an active interdisciplinary rehabilitation program. Mr. Winters also recommends continuing vocational consulting and estimates the cost of both the occupational and vocational consulting at an amount in the range of $10,000. I award that amount in respect of that head of damages.

**160**  In addition the parties have agreed to other special damages in the amount of $500.

**161**  The plaintiff has certainly received considerable support from her family in attending to household chores. I find that she is physically able to contribute to the maintenance of the household but that there has been a reduction in her capacity to do housework and that the resulting loss is a pecuniary one, for which damages should be awarded, in accordance with the principles recently canvassed in *Lakhani v. Elliott,* [*2009 BCSC 1058*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6226-00000-00&context=) at paras. 161-66. For reasons set out in the assessment of the loss of income earning capacity, however, I am of the view that the claim under this head must be reduced to take into account the prospect that the plaintiff would periodically have been disabled by symptoms of her bipolar disorder in any event and to reflect the possibility of continuing recovery. I award $15,000 (approximately one third of the plaintiff's estimate of the net present value of additional cleaning costs) under this head of damages.

**Judgment**

**162**  There will be judgment for the plaintiff in the following amounts:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages for pain | $90,000 |  |
|  | and suffering and loss of |  |  |
|  | enjoyment of life |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Income loss | $30,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Income Earning Capacity | $95,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $35,100 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Interest | Pre-judgment interest |  |
|  |  | in an amount to be |  |
|  |  | determined by counsel |  |

P.M. WILLCOCK J.

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[***Lane v. Pedersen, [2014] B.C.J. No. 1469***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: October 21-24, 28, 30, November

4-8, 18-21, 2013; January 16-17, 2014.

Judgment: July 14, 2014.

Docket: M101918

Registry: Vancouver

**[2014] B.C.J. No. 1469** | 2014 BCSC 1302

Between Julie Vera Lane, Plaintiff, and Megan Kendall Pedersen, Defendant

(476 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Soft tissue — Head injuries — Concussion — Headaches — Leg injuries — Nerve damage — Psychological injuries — Cognitive impairment — Third party claims — Persons entitled to claim — Spouse — Recoverable losses — Cost of personal care — Considerations impacting on award — Credibility — Action for personal injury damages allowed in part — Plaintiff struck head when rear-ended by defendant — 59-year-old plaintiff married with two adult children and was school psychologist completing dissertation at time of accident — Plaintiff had tendency to exaggerate but sustained injuries to neck, shoulder, back and sciatic nerve that were still symptomatic, and concussion that caused lingering loss of smell and cognitive issues, and curtailed activities — Plaintiff completed PhD and worked full-time — Plaintiff awarded $11,000 non-pecuniary, $64,902 wage loss, $19,257 special damages, $$70,0000 future care, $45,000 housekeeping, $5,000 in-trust for husband and $90,000 loss earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Extent of incapacity — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Employment income — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Action for personal injury damages allowed in part — Plaintiff struck head when rear-ended by defendant — 59-year-old plaintiff married with two adult children and was school psychologist completing dissertation at time of accident — Plaintiff had tendency to exaggerate but sustained injuries to neck, shoulder, back and sciatic nerve that were still symptomatic, and concussion that caused lingering loss of smell and cognitive issues, and curtailed activities — Plaintiff completed PhD and worked full-time — Plaintiff awarded $11,000 non-pecuniary, $64,902 wage loss, $19,257 special damages, $$70,0000 future care, $45,000 housekeeping, $5,000 in-trust for husband and $90,000 loss earning capacity.**

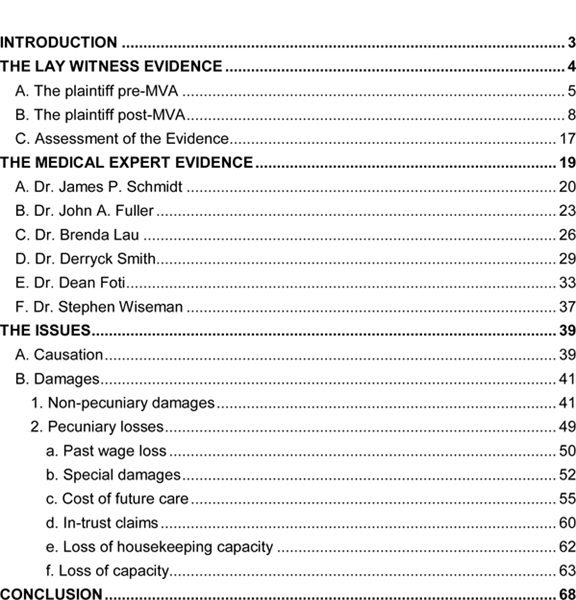
|  |
| --- |
| Action for damages for injuries sustained in a 2009 motor vehicle accident. The plaintiff was preparing to merge when she was rear-ended by the defendant, who admitted liability. The plaintiff struck her head on the side frame, leaving a visible contusion. Over the next few months, it became apparent the plaintiff had neck, shoulder and back injuries and a concussion. The plaintiff was a school psychologist pursuing a doctorate in education at the time of the accident and had a very active social and recreational life. The 59-year-old plaintiff was married with two adult sons. The plaintiff testified she continued to experience fatigue and balance problems, pain in her buttocks, knee, neck, ankle and low back, headaches, irritability and memory and concentration problems. The plaintiff attended physiotherapy, which she found helpful, and worked out at home. The plaintiff had completed her PhD and now earned $86,000 but testified her injuries made it take longer to complete and prevented her from achieving high-level position she otherwise would have. The plaintiff testified she could no longer perform house and landscaping work she used to, could not cook due to loss of sense of smell and could not participate in social and recreational activities like she used to.  HELD: Action allowed in part.  The plaintiff tended to exaggerate her pre-accident capacity for work and socializing, as there were simply not enough hours in the day for her to have done everything she claimed. The plaintiff was not an open witness and exaggerated her loss of memory, which was clearly good enough for her to complete her PhD. The medical experts all agreed the plaintiff had sustained a mild traumatic brain injury in the accident. The plaintiff had substantially recovered but still had cognitive fatigue, reduced sense of smell and residual neck, shoulder and back pain, sciatica and headaches. The plaintiff was in good health prior to the accident and her injuries had changed her and caused major suffering for the first six months. The ongoing pain and fatigue affected the plaintiff's activities and relationships. The plaintiff was awarded $110,000 non-pecuniary damages. The plaintiff was entitled to recover net past wage loss and stipend, and loss of sick days with a reduction for contingencies. The plaintiff was awarded $64,902 past wage loss. The therapies the plaintiff underwent were reasonable and necessary and helped her to return to full-time work. The plaintiff also incurred some housekeeping costs and delays in completing her PhD, though she would not have completed it as soon as she claimed. Some of the expenses claimed by the plaintiff were not supported by evidence and were disallowed. The plaintiff was awarded $19,257 special damages. The plaintiff's claim for $200,000 cost of future care tended to overreach the nature of the award and include items she was unlikely to use or those not medically supported. The plaintiff was awarded $70,000 cost of future care. The plaintiff's husband was entitled to $5,000 in trust for assistance provided after the accident, but there was no basis for his lost income claim or claim related to ongoing activities the plaintiff could now perform on her own. The plaintiff's housekeeping ability had been reduced, though it was not clear exactly what she was able to do, and contingencies were made for the fact she would require some assistance as she got older, regardless. The plaintiff was awarded $45,000. The plaintiff's injuries were enduring and she would have been able to perform at a more senior level but for the accident. However, her age affected her marketability and she would still have had to work her way up. The plaintiff was awarded $90,000 for loss of earning capacity, plus pension and benefits. |

**Counsel**

Counsel for the Plaintiff: R.B. Webster Q.C., B. Webster-Evans, S. Singh, Articled Student.

Counsel for the Defendant: A.D.C. Ross, M. Straw, Articled Student.

**Table of Contents**



**Reasons for Judgment**

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

**INTRODUCTION**

**1**  The plaintiff, Ms. Julie Lane, was injured in a rear-end accident (the "MVA") on January 14, 2009.

**2**  That day, the plaintiff was driving to work in her Nissan Pathfinder at 7:38 a.m., proceeding northbound on 240th street in Maple Ridge. She looked to her left as she prepared to merge to her right onto westbound Lougheed Highway from the designated merge lane. As she did so, she was hit at speed from behind by the vehicle of the defendant, Ms. Megan Pedersen. The plaintiff's car was stopped at the time of impact.

**3**  Upon impact, the plaintiff hit her head on the side frame of her car. She was left with a visible contusion on her left forehead. After Ms. Lane exited her car following the MVA, Ms. Pedersen took a picture of her. That photograph shows a large bump on the left side of the plaintiff's forehead. The defendant admits the authenticity of that picture.

**4**  The plaintiff and the defendant went to a parking lot and exchanged information. The plaintiff was shaken and confused, but after unsuccessfully trying to remove her dragging bumper, she managed to navigate to a local ICBC office where she was told to seek medical attention.

**5**  Over the next few months, it became apparent that in addition to injuries to her neck, shoulder and back, the plaintiff had sustained what used to be called a concussion, but what is now known as a mild traumatic brain injury.

**6**  At the time of the MVA, the plaintiff was employed as a school psychologist for the Maple Ridge-Pitt Meadows school district, while pursuing a doctorate of Education ("Ed.D."). She also had a very active social and home life. The Court heard substantial evidence about the impact the MVA had on these activities.

**7**  The defendant admits liability. As a result, the lengthy trial, and the evidence of a number of experts, focused on the damages suffered by the plaintiff. These included: damages arising from the pain she suffered in her head, neck, back and leg that interrupted her life style; her past loss of wages and sick leave benefits; interruption and delay to her pursuit of an Ed.D.; loss of opportunity to apply for positions superior or supplemental to her employment; loss of capacity; loss of future earnings; loss of housekeeping ability; and compensation for the supportive work of her husband. In addition, the plaintiff claims a substantial sum for special damages.

**THE LAY WITNESS EVIDENCE**

**8**  The Court heard from a number of lay witnesses, who provided details with respect to the plaintiff's condition before and after the MVA.

**9**  Chief among them, the plaintiff provided evidence with respect to her condition and capabilities before and after the MVA. Evidence from her husband, Mr. James (Sandy) Lane ("Mr. Lane"), and one of her two sons, Mr. Douglas Lane, tended to corroborate that evidence.

**10**  The Court also heard from a number of the plaintiff's friends, colleagues and acquaintances: Mr. and Mrs. Goodman, friends of the plaintiff; Larissa Predy, a colleague; Joy Priestly, an acquaintance of the plaintiff from her Toastmasters Club.

**11**  The Court also heard from witnesses who provided evidence related to the damages the plaintiff claimed arose out of the MVA. Margaret Teyema, a witness from the Maple Ridge school district, provided evidence relating to the plaintiff's absence from work and graduated return to work. Karen Dean, a member of the Support Staff Union at Simon Fraser University, testified about the stipends earned by sessional lecturers and limited term instructors. Deborah Stewart, from the British Columbia Provincial School Employers' Association (known colloquially as BCPC), gave evidence about the salary ranges of senior administrative positions in special education in some local school districts.

**12**  In addition, Mr. Stuart Ladysmith, a now retired but experienced former superintendent of schools, gave evidence of his observations made as a superintendent in particular school districts related to the duties of senior special education specialists. I did not permit him to opine on whether Dr. Lane's qualifications would have persuaded him to hire her as there had not been an expert report served.

**13**  The defendant gave evidence concerning events immediately following the MVA.

**14**  The defendant also called some former and current school administrators. The Court heard from Dr. Dave Carter, a member of the plaintiff's dissertation committee, who has hired candidates for the types of positions the plaintiff planned to apply for before the MVA. The defense also provided evidence from two Simon Fraser University officials: Dr. Steward Richmond, the Director of Undergraduate Programs; and Dr. Robin Brayne, the Director of Graduate Programs. They described the process for hiring sessional instructors to teach undergraduate and post-graduate programs, respectively.

**15**  The defendant also provided the evidence of Mr. Sean McStay, a member of the plaintiff's Toastmasters club.

**A. The plaintiff pre-MVA**

**16**  The plaintiff is now 59 years old. It appears that before the MVA, the plaintiff was an extremely high-energy person who filled the hours of every day to the maximum.

**17**  Before the accident, the plaintiff worked full time for School District 42, Maple Ridge-Pitt Meadows, first as a support teacher and then as a school psychologist. She continues to occupy the position of school psychologist.

**18**  As a school psychologist, the plaintiff assesses students, which includes administering tests to identify problems, meeting with teachers and parents, writing reports on her findings, and developing teaching strategies for students with behavioural and learning issues. She also works to find and create resources that teachers, parents and students can use to assist with issues that interfere with students' ability to participate fully in the school system.

**19**  Before the accident, the plaintiff took an active role teaching her colleagues. She led workshops for them both within working hours and on evenings and weekends.

**20**  She has been married to Mr. Lane for many years. They have two adult sons. The plaintiff and Mr. Lane occupy a five-acre property with fruit trees and gardens in Maple Ridge. Their house is 5,000 square feet.

**21**  The plaintiff and her husband renovated the house after moving into it in 2000. She did many of the initial drawings for the house plans, put in her own flooring and did all the interior painting. She assisted with the application of siding to the exterior of the building, and with the exterior painting of the house by doing all the ladder work.

**22**  In addition to working full-time, the plaintiff says that she did 90% of the housework and cooking. She also claims that she did a substantial part of the gardening, including keeping up flower beds, a vegetable plot and a rose garden, maintaining a large greenhouse, and pruning and spraying numerous fruit trees, all without outside help.

**23**  In season, the plaintiff harvested the fruit and vegetables she grew and canned for her pantry. She kept goats and chickens and did part of the animal care on the farm.

**24**  In addition, the plaintiff attended church regularly and took part in a regular prayer group and bible study.

**25**  She was also a member of the Mission Toastmasters Club, where she enjoyed public speaking, won awards and was sufficiently successful to move up in responsibility in the club. The plaintiff had been Vice President of education and President of her local chapter. She also organized the programmes for meetings.

**26**  The plaintiff also enjoyed some success with her Toastmasters club, placing third in British Columbia in impromptu speaking. Impromptu speaking, known as Table Topics, requires the speaker to respond to a topic chosen by panel members, and immediately deliver a properly structured speech which is between one minute thirty seconds and two minutes thirty seconds.

**27**  To come third in British Columbia, the plaintiff won at the local and district levels, then competed with the successful candidates from other districts.

**28**  On Friday evenings, the plaintiff would often host or attend dinner parties with friends. She and her husband went to concerts in Vancouver, and attended plays and the opera from time to time.

**29**  For fitness, the plaintiff attended Aquafit twice a week and hiked around their property and in the local research forest.

**30**  Both her educational and vocational histories show the plaintiff is able to focus on her goals and to work to attain them. She has steadily progressed in all the fields of work in which she has been involved.

**31**  The plaintiff's *curriculum vitae* shows the vast range of courses, degrees and diplomas the plaintiff has earned over the years, as well as the many volunteer positions and charitable endeavours she has undertaken. She has not included all of her endeavours in her *C.V.*, but to do so would require an even longer document than the 21 pages provided.

**32**  There is no doubt the plaintiff is an ambitious person. She obtained a Master's degree in Education in 2006, then immediately began a doctoral programme focused on the same area of study as her Master's programme. The plaintiff decided to pursue her Ed.D. as part of her plan to teach at the university level and to apply for more senior positions in her school district or others.

**33**  The plaintiff took her studies very seriously. By rising early and working in the evening, she was able to study about three hours every week day. She states that she studied six to nine hours on Sunday and slightly less on Saturday so she could go to church in the evening.

**34**  While the plaintiff was working on her dissertation, she received a fellowship. This fellowship was awarded to her for her contributions to the field of special education.

**35**  The plaintiff also received a grant from the community since the work she was doing provided some benefit to services for children in the community.

**36**  The plaintiff testified that she hoped to finish her dissertation and defend it by the end of the 2008/2009 school year, in the spring of 2009. At the time of the MVA, she was in the midst of writing her doctoral dissertation and claims to have substantially finished her dissertation. However, her dissertation committee had not yet been formed. Dr. Carter roughly estimates that she had about 20% left to complete, and I accept that this was the case.

**37**  The plaintiff says that she was contacted by Fraser Valley University, Simon Fraser University and by Athabasca University and encouraged to make application for positions with them once her dissertation was completed and she had succeeded in her defense.

**38**  No one was called from these institutions and there was no documentation to substantiate this claim. The plaintiff also has not made application to any of the institutions she named.

**B. The plaintiff post-MVA**

**39**  The plaintiff recalls very little about the MVA. She says that she does not remember exiting her car and exchanging information with the defendant. She recalls having a pink object in her hands, which she later determined to be the defendant's cell phone number.

**40**  She also does not recall trying to remove the half-dragging bumper from her Nissan Pathfinder before she drove off.

**41**  She has learned from others that she went to an ICBC office near her husband's former place of work.

**42**  At some point, the plaintiff called her friend Donna Goodman, who accompanied her to the office of her family doctor, Dr. Robert Grist. Ms. Goodman did not go into the office with the plaintiff.

**43**  The plaintiff does not now recall how she got to Dr. Grist's office, but she remembers he asked her to do a balance test.

**44**  The plaintiff initially suffered from pain in her neck, shoulders and back. She also had severe headaches, pain down her entire left side to her ankle, stomach pain from seatbelt bruising, difficulties with her sight and her balance as well as interference with her cognitive abilities. She was forgetful and occasionally confused.

**45**  For the first few days following the accident, Mr. Lane stayed home from work to provide care for the plaintiff.

**46**  The plaintiff spent a good deal of time on the sofa at first, since she found her bed uncomfortable. She recalls listening to daytime television, although she could not watch it due to her visual disturbances. She felt exhausted and to this day, the fatigue she suffers means she requires a nap on her return from work in the afternoon. If she intends to go out in the evening on a weekend, she must prepare by napping.

**47**  The plaintiff recalls having difficulty finding words and struggling with ordinary conversation.

**48**  The plaintiff's sight was interrupted and blurry at first. Her visual disturbances resolved, although she is not certain when this happened. She did continue to suffer from light sensitivity for a period of time, although this condition also appears to have resolved.

**49**  The plaintiff's balance remains occasionally problematic, and she still has pain through her left buttock and into her knee and down to her ankle. Her headaches have decreased in frequency but still occur. If she has one, she leaves work early.

**50**  The plaintiff continues to use a low dose of nortriptyline to help reduce her pain.

**51**  Despite receiving more than 100 physiotherapy sessions, the plaintiff continues to have pain in her back and neck, but according to the history she provided to Dr. Derryck Smith, a psychiatrist who assessed her in 2010 and 2012 and provided an expert report, her low-back pain seems to have improved.

**52**  The plaintiff still finds relief from physiotherapy, which she attends once every two weeks. She finds she becomes stiff without it. She says the physiotherapy "keeps her moving".

**53**  The plaintiff's physiotherapist also offers the services of a kinesiologist. The plaintiff has attended with the kinesiologist to develop an exercise routine that she knows is both helpful and safe for her sensitized back and neck. She has followed the exercises at home.

**54**  The kinesiologist allows drop-ins for those using physiotherapy services at the same clinic. She charges $5 for the use of the gym and while her services in that situation are not one-on-one, she supervises the user. In the months before trial, the plaintiff dropped in to exercise when she was attending for physiotherapy.

**55**  At the same facility where the plaintiff attends physiotherapy, the plaintiff also received acupuncture and massage therapy. She obtained relief from both modes of therapy. The plaintiff continues to receive acupuncture occasionally.

**56**  The plaintiff uses a Wii home video game console for balance and yoga exercises. She also uses Thera-Band resistance bands to build arm and shoulder strength.

**57**  She has also purchased a treadmill that she uses fairly regularly.

**58**  The irritability the plaintiff exhibited early post-injury has improved, but she becomes irritable when she feels fatigued. Both Mr. Lane and Douglas Lane say this is different from how the plaintiff behaved before the MVA.

**59**  One major loss the plaintiff continues to suffer is the loss of smell and taste.

**60**  While the plaintiff has recovered some ability to smell, she remains unable to identify what she smells. In other words, she knows when an odour is present, but is unable to identify whether the scent is that of compost or a rose. The plaintiff has burned food items while cooking because she cannot smell when they become overcooked.

**61**  The plaintiff's loss of smell means that food does not have much flavour. Even coffee is just a hot liquid to her.

**62**  The plaintiff and Mr. Lane do not go to restaurants as often as they did before the MVA because all food tastes the same to her, and gourmet dishes have no special appeal.

**63**  After the MVA, the plaintiff was unable to recommence her work on the dissertation at first because she could not concentrate or understand what she was reading. This prevented her from returning to her work for a period of time.

**64**  Although the plaintiff had serious difficulty resuming her writing, reading and analysis, she found some adaptive strategies that allowed her to read carefully and edit vigilantly so as not to affect the quality of the end product. However, this had an effect on the speed with which she completed her work.

**65**  The plaintiff claims that as a result of this, she paid tuition in 2010 and 2011 while she worked to complete her doctorate.

**66**  The work the plaintiff had left to do on her dissertation at the time of the MVA was not simple. She had to generate conclusions and recommendations that were synthesized from the findings in her research. She also had to check her bibliography.

**67**  However, she persevered, completed the outstanding work on her dissertation, incorporated the changes suggested by her committee, and successfully defended it in April 2011. She was granted her Ed.D. at that time.

**68**  For part of the time she was working on her dissertation, the plaintiff was also working, first part-time and then full-time.

**69**  She says that, but for the MVA, she would have achieved her goals of either teaching at the university level or attaining a more senior position with a school district, and thus would have increased her income over time.

**70**  Currently, the plaintiff earns $86,000 per annum.

**71**  The plaintiff currently believes that she is unable to apply for the kinds of positions that some of her colleagues in her doctoral group of 12 (5 of whom have finished their Ed.D.) have been able to obtain. For example, one member of her cohort, Dr. Julie Parker, now holds the senior position in special education in North Vancouver.

**72**  Of her colleagues in school psychology, many hold down full-time positions in a school district and teach part-time at university, and do private assessments.

**73**  The plaintiff says that her fatigue makes it impossible for her to drive any distance for employment, and reduces her ability to put in the long hours that would be required.

**74**  The plaintiff applied for a more senior position in her own school district after she had completed her Ed.D. The position she sought was the district vice-principal for student support services in Maple Ridge.

**75**  However, the plaintiff was not granted an interview and another employee in her school district, Laura Brandon, a support teacher, obtained the position. The plaintiff did not call evidence to explain why she was not interviewed for this position.

**76**  One of the plaintiff's colleagues, Ms. Larissa Predy, testified that the plaintiff would be a "great" district vice-principal for special education.

**77**  The plaintiff says she did not intend to retire at 65 but would keep working as long as she is able. Currently, she is uncertain how long she will be able to continue working.

**78**  The plaintiff no longer gives 25 workshops a year to her colleagues due to the fatigue she feels at the end of the day. She now holds only three or four workshops per year.

**79**  The plaintiff's ability to socialize has been curtailed because she does not have the energy to participate in social events.

**80**  At work, the plaintiff finds that her memory is not as reliable as it was, and she occasionally forgets meetings. Fortunately, her colleagues are aware of this and call her to remind her if she does not attend.

**81**  After the MVA, the plaintiff has not been able to maintain her former level of success in Table Topics at her Toastmasters club. The plaintiff has noticed that her ability to spontaneously respond to the topics has been compromised. She is no longer able to organize topics in her head, and must use notes.

**82**  Since the MVA, the plaintiff has gone on to become an Area Governor and a District Governor for Toastmasters, but these positions relate more to administrative and ceremonial tasks than to talent in public speaking. However, when she visits clubs in her district, she gives a short speech of encouragement.

**83**  Also since the MVA, the plaintiff has undertaken to organize a new Toastmasters club. That process is underway, but she does not yet have the requisite number of members to be chartered as a new club. She has undertaken this task to complete a step towards obtaining the top qualification in Toastmasters: that of Distinguished Toastmaster.

**84**  The plaintiff began to discuss a graduated return to work with her doctor and as of March 1, 2009, the plaintiff had completed her first part-time week at work, attending one-half day twice a week (35% of a week). She worked at this level for two weeks, then increased her time at work to 40% of a full-time week. This continued until April 16, 2009, at which time she began working 50% of the time. This amount of work increased as of June 1, 2009, when she began working 70% of a full time position.

**85**  The plaintiff continued working at 70% of a full time position until she resumed working full-time hours commencing April 16, 2010. She has continued to work full-time since April 2010 and has not taken any sick time since her return to work.

**86**  The plaintiff is a member of the British Columbia Teachers' Federation ("BCTF"). An occupational therapist employed by the BCTF saw the plaintiff and recommended ergonomic adjustments to the plaintiff's work station, including obtaining a made-to-fit chair for her main office, raising her desk level and obtaining an under tray, and arranging for comfortable chairs at each of her work sites and rolling carts to place her materials in. The occupational therapist also suggested that identical rolling tables be placed in an enclosed space at each of the plaintiff's work sites to create consistent locations for her materials and a consistent environment for her work.

**87**  These measures have helped the plaintiff to minimize distraction and discomfort during her day. The plaintiff also has some flexibility to work from home or rest and make up lost time later if her symptoms are severe.

**88**  As a school psychologist, the plaintiff is required to maintain her qualifications. Because she was unable to write a timed examination to update her qualifications before 2011, she is now required to take some additional course work to qualify. Until she re-qualifies, she must have a second signature on her reports.

**89**  The plaintiff is taking about one course each year for her qualifications since that is all she feels she can manage.

**90**  Since the MVA, the plaintiff no longer performs housework. She was not able to vacuum after the MVA and has still not resumed this task. From doing 90% of the housework before the MVA, she now puts laundry into the washing machine, but Mr. Lane puts it in the dryer. She says she is "comfortable" with allowing others to take up the housework she no longer does.

**91**  Mr. Lane tried to take over with the housework, but was not able to keep up with all the work. When Mr. Lane indicated he could not carry on with the housework, the plaintiff hired a cleaner who comes to clean every two weeks. There is no evidence of how long Mr. Lane managed the housework before the Lanes made other arrangements.

**92**  Between cleaning sessions, Mr. Lane might vacuum a little. The plaintiff leaves the house as it is until the cleaners come.

**93**  The plaintiff no longer cooks because her lack of small makes her a danger in the kitchen. Douglas Lane, who lives with the Lanes while attending university, is a trained chef and has taken over the cooking.

**94**  The gardening the plaintiff did to maintain their substantial property included pruning fruit trees and growing roses and dahlias. She cannot do these tasks and the trees have been left to grow without pruning. This affects their productivity. Mr. Lane is acrophobic so cannot take over duties that involve the use of a ladder.

**95**  The flower gardens added to the beauty of the property but take time and physical effort to maintain. Mr. Lane assists with some smaller gardens but the majority of them have been abandoned.

**96**  Mr. Lane has taken over the care of their farm animals with some assistance from Douglas Lane.

**97**  Mr. Lane and Douglas Lane do most of the grocery shopping. Douglas Lane stated that if he asks his mother to pick up a grocery item as she is on her way to shop, she will forget to buy it unless she writes it down.

**98**  Driving was not possible for the plaintiff at first. The plaintiff began driving again in early April 2009, and gradually increased the distance she could tolerate. Now she and Mr. Lane drive together, and she is capable of driving by herself to local communities.

**99**  The plaintiff continues to be fearful of driving, and relies on Mr. Lane to do a large portion of the driving. Since unfamiliar road are confusing for the plaintiff, if she and Mr. Lane travel to the US, the plaintiff drives to the border and Mr. Lane takes over once they cross the border.

**100**  When travelling to Edmonton to see their older son, the plaintiff takes a neck pillow and ice packs to help with her neck pain. She is able to assist Mr. Lane with some of the driving.

**101**  The plaintiff testified that after the MVA, she started to lose weight and went from a size 16 to a size 6 over the course of about a year.

**102**  She was forced to acquire a new wardrobe to accommodate her change in size. She has regained most of the weight she lost, and the wardrobe is no longer useful to her.

**103**  The fate of the useless wardrobe was not revealed.

**104**  The plaintiff has claimed for the cost of the clothing that she required but can no longer use.

**105**  The plaintiff believes her weight loss occurred because her loss of ability to smell and taste resulted in a loss of appetite. There was no medical evidence to explain why the plaintiff endured a rapid weight loss. Nor is there any evidence of the plaintiff's weight before the accident, of her weight after the weight loss, or her weight after she regained sufficient weight that her new clothes no longer fit.

**106**  The plaintiff testified that the intimate relationship she has with her husband has been affected by the MVA.

**107**  The plaintiff can no longer sleep in the marital bed, and sleeps on the couch. Because of her residual pain, she cannot tolerate being touched.

**108**  For several months following the MVA, the plaintiff saw her family doctor, Dr. Grist. Dr. Grist retired in June 2009, and the plaintiff began seeing Dr. Virindir S. Bhatti, who took over treatment of the injuries from the MVA. Dr. Bhatti remains the plaintiff's family doctor today.

**109**  The plaintiff says she does not recall much about her visits to Dr. Grist or her description of symptoms to him. She says that her short term memory is "patchy" and even today she must write things down lest she forget them.

**C. Assessment of the Evidence**

**110**  While I found the plaintiff's evidence to be reasonably credible during the course of the direct examination, I was of the view that she tended to exaggerate her pre-MVA capacity for work.

**111**  There are simply not enough hours in the day to maintain a 5,000 square foot house, substantial gardens, a small farm operation, make meals, do minor renovations, keep up an active social life, go to church two nights a week (Saturday and Wednesday), go to Toastmasters one night a week and Aqua fit two nights a week while studying three hours daily (a "mean" of three hours a day on weekdays), seven hours on Saturday and nine hours on Sunday, all while working full time.

**112**  Nevertheless, I accept that before the MVA, the plaintiff was able to accomplish a substantial number of tasks in the ordinary day.

**113**  I was also somewhat taken aback by the plaintiff's attitude to her cross-examination. While I have no doubt she was advised by her counsel not to volunteer any answers to cross-examining counsel, her refusal to respond to counsel's questions was an obvious attempt to block any question that would somehow moderate her claim. She was, quite simply, not the candid and open witness she had been on direct.

**114**  I note that at no time during what must have been a frustrating cross-examination did the defendant's counsel lose his patience with the plaintiff or treat her with disrespect.

**115**  It also seemed very strange that in cross-examination, the plaintiff could remember very little about her treatment post-MVA, and indicated that she could not remember the sequence of her recovery when she was able to give a medical history to her own medical-legal experts.

**116**  I understand that the plaintiff has had some interruptions in memory caused by the MVA but it is my view that she tends to exaggerate them. I do not accept that her ability to give her medical history is only based on what others have told her.

**117**  Her memory is somewhat affected by the MVA but this problem has not interfered with her successful dissertation completion and defense, and I believe her memory is only mildly affected.

**118**  Cognitively, the plaintiff has substantially recovered, although she has lost some of her ability to synthesize ideas quickly.

**119**  I accept that the plaintiff continues to suffer from cognitive fatigue caused by her post-concussion syndrome, and that she continues to suffer from a reduced sense of smell and taste. She has some residual pain in her neck, shoulder and back, and occasional sciatic and sacroiliac pain and occasional headaches that have been proved to my satisfaction.

**120**  However, I have been left with the impression that I must consider with caution the extent of the plaintiff's claims.

**121**  The evidence provided by Mr. Lane and Douglas Lane was of some minor assistance, but was not particularly remarkable.

**THE MEDICAL EXPERT EVIDENCE**

**122**  There were a number of expert medical witnesses for the plaintiff: Dr. James Schmidt, a neuropsychologist; Dr. Smith, a psychiatrist; Dr. John Fuller, an orthopod; Dr. Brenda Lau, a pain specialist; and Dr. Dean Foti, a neurologist. Dr. Foti was originally a defense witness, but the defendant chose not to call him and the plaintiff did.

**123**  The plaintiff also called her family physician at the time of the MVA, Dr. Grist, who retired at the end of 2009. He did not prepare an expert report and was limited to his direct observations. As he did not recall much, his direct observations from the time of the evidence are of very limited assistance.

**124**  The plaintiff is now cared for by a Dr. Bhatti who did not give evidence but whose clinical records formed part of an exhibit at trial.

**125**  Dr. Grist's records were entered as business records and in the course of the trial I ruled that certain of the statements contained in Dr. Grist's records made by the plaintiff to Dr. Grist were contemporaneous utterances of bodily sensation and thus could be accepted in evidence for proof of the truth as exceptions to the rule against hearsay.

**126**  While these utterances supported the plaintiff's evidence respecting the pain, confusion and interruption in memory she suffered following the MVA, I did not find them to deviate from the evidence she had given in direct or to the experts she called.

**127**  Her memory issues resulted in somewhat patchy evidence about her recollection of the timing of symptoms most specifically within the first six months of the MVA, and on that particular issue, these utterances were of assistance.

**128**  The plaintiff's injuries are well-documented; this case rather turns on the duration and effect of her injuries.

**129**  I therefore do not find it necessary to consider the plaintiff's submissions requesting that I admit Dr. Grist's clinical records in their entirety as proof of the truth of the plaintiff's conditions. Dr. Grist only treated the patient for several months following the accident, and did not provide an expert report. His records are of little assistance with respect to the duration and long-term consequences of the plaintiff's injuries.

**130**  The defendant intended to call a neurologist, Dr. Morton Knazan, but sadly, he died suddenly well before the trial.

**131**  The defendant applied to admit Dr. Knazan's expert report in any event, but due to the fact that Dr. Knazan's notes could not be produced and no cross-examination was possible, I declined to admit the report.

**132**  I did permit the defendant to put certain of the statements from Dr. Knazan's report to the plaintiff in cross-examination despite the complaints of plaintiff's counsel. However, I ruled that if the plaintiff did not adopt the statements, no further use could be made of them.

**133**  The plaintiff did not agree with or remember many of the statements Dr. Knazan recorded in his report and therefore, they could not be relied upon as evidence.

**134**  The defendant called Dr. Stephen Wiseman, a psychiatrist, but did not call any other medical evidence in response to the plaintiff's case.

**A. Dr. James P. Schmidt**

**135**  Dr. Schmidt provided two reports on which he was cross-examined. The first is dated April 13, 2010, and the second June 21, 2012.

**136**  Dr. Schmidt is an expert in neuropsychology, clinical psychology, the interpretation of neuropsychological and psychological test results and the effect of injury on function.

**137**  The defendant did not challenge his qualifications.

**138**  In his second report, Dr. Schmidt found the plaintiff had improved significantly with respect to many of the difficulties she was experiencing when he examined her in September and October of 2009 in connection with his April 2010 report.

**139**  However, after interviewing the plaintiff and performing tests on her to analyze her cognitive function and her emotional issues, he concluded that she was still suffering from a number of problems.

**140**  His conclusions in his second report synthesize his assessment test results, his interview findings and his records review, including his review of certain of the other expert reports. Chief among his conclusions are the following (at 7):

1. . . . some of her problems have improved [but] she does continue to have significant problems with pain, fatigue, reduced cognitive functioning and loss of sense of smell. The problems with cognitive functioning appear to be at least in part related to her problems with fatigue and pain . . .
2. . . . improvements in simple focused and sustained attention . . . No improvement was seen in processing speed. . . scores were even more notably weak in tests of learning and memory. . . . weaknesses were most likely associated with fatigue. ... some improvement in cognitive functioning but it has not yet returned to normal . . . [and] significantly impacted by pain and fatigue. . . . profound loss of sense of smell. . .
3. . . . some improvement in her overall emotional functioning over time. . . . I would agree with the diagnosis of Dr. Smith that she is suffering an Adjustment Disorder with features of anxiety.
4. . . . although there has been improvement it has by no means led to a full recovery with respect to cognitive, emotional and behavioral functioning. It is very difficult to determine the exact cause of these problems. On the one hand, the traumatic brain injury she suffered in the accident in question was fairly mild, and . . . one would expect to see her recover fully from it. On the other hand, her age at the time of the accident is a negative prognostic indicator, as is the loss of her sense of smell. . . . she does continue to show cognitive difficulties that are most likely a result of the combined impact of her fatigue, her pain, her somewhat reduced frustration tolerance, her increased anxiety, and, possibly, the effects of the traumatic brain injury. Differentiating the relative contribution of these factors is impossible.
5. . . . it might be appropriate for Dr. Lane to receive psychological intervention aimed at reducing her general levels of frustration and anxiety, as well as helping her to learn adaptive strategies for dealing with her pain and fatigue. . . . this treatment would not be to eliminate her pain and fatigue, but rather to help her deal with it more effectively. . . . Dr. Lane is obviously motivated to continue on with her career and I believe she will be able to do that, barring the occurrence of further injuries or complications to her recovery.
6. . . . Dr. Lane's condition . . . [is] most likely . . . plateaued.

**141**  Dr. Schmidt adds that if the plaintiff's pain problems persist, it is likely that her other problems will persist as well and would likely do so in any event if they are neuropsychological in origin.

**142**  There is also the possibility that if treatment for her pain and fatigue assist her, the accompanying problems might also improve.

**143**  Dr. Schmidt explained cognitive fatigue in a way that I found helpful. He stated that this kind of fatigue means that the subject has a more difficult time maintaining brain arousal at a maximal level, resulting in the brain operating less efficiently.

**144**  Dr. Schmidt also pointed out that fatigue has a disproportionate effect on neuropsychological performance.

**145**  It is this kind of fatigue from which the plaintiff suffers and which likely affects her test results.

**146**  The source of this fatigue is, as his report states, impossible to determine. But he is clear that the plaintiff indeed suffered a mild traumatic brain injury as a result of the MVA.

**147**  I found Dr. Schmidt to be a very credible expert witness. He was helpful and responsive to cross-examination without any hint of defensiveness. His report was readable and comprehensible with the minor exception that he found some of the plaintiff's test results on the second battery he administered to be significantly improved and well within "expected ranges", but not up to "expected ranges given her level of intellectual functioning".

**148**  This confusing conclusion indicated to me that Dr. Schmidt was conducting tests of Dr. Lane with certain assumptions in mind related to her academic achievements.

**149**  I point this minor inconsistency out not to detract from Dr. Schmidt's overall findings but to indicate the difficulty in assessing the plaintiff objectively in the face of her many accomplishments, and in particular, the completion of her doctoral degree post-MVA.

**150**  With that cavil in mind, I accept the conclusions in Dr. Schmidt's report.

**B. Dr. John A. Fuller**

**151**  Dr. Fuller is an expert in orthopedic surgery and medicine, with an interest in chronic pain. He estimates he has seen several thousand patients with problems similar to those suffered by the plaintiff.

**152**  The defendant did not challenge Dr. Fuller's qualifications.

**153**  Dr. Fuller examined the plaintiff on November 9, 2011. His report is dated November 16, 2011.

**154**  Dr. Fuller was forthright in acknowledging that he had not seen the plaintiff prior to the MVA and saw her for the first time two years and ten months after the MVA.

**155**  Dr. Fuller observed that on physical examination, the plaintiff demonstrated balance instability when standing with her eyes closed, trigger points in the musculature between the shoulder blade and the mid-spine, tenderness at the base of the skull, restricted range of motion of the cervical spine, and marked asymmetry in the sacroiliac system with right anterior rotation.

**156**  In his report, Dr. Fuller considered the circumstances of the MVA and potential causation of the plaintiff's physical symptoms.

**157**  In Dr. Fuller's opinion, the impact of the defendant's car placed an overload on her musculoskeletal system in extension (backward bending) and then into flexion (forward bending), which the seatbelt cannot protect against. The fact that the plaintiff's head was turned to the left would exacerbate these strains because the cervical spine was positioned to reduce the degree of movement available to it.

**158**  As a result, Dr. Fuller concludes that there was musculoligamentous trauma to the cervical spine.

**159**  Dr. Fuller opines that the way in which the seatbelt holds the pelvis in place can cause an additional load to the pelvis affecting the sacroiliac system and causing its inherent instability to shift slightly.

**160**  In Dr. Fuller's view, the impact of the MVA caused the movement of the plaintiff's body and resulted in the complex of symptoms she now has in her cervical spine and neck and the lumbosacral spine and low back.

**161**  The particular diagnoses Dr. Fuller made were: headache and neck pain following from the residual musculoligamentous trauma to structures supporting the cervical spine; and low back pain located in the sacroiliac complex and buttock resulting from a very slight dislocation of the sacroiliac joint.

**162**  Dr. Fuller's opinion of the plaintiff's prognosis for further improvement is poor.

**163**  Dr. Fuller's view is that in most cases, symptoms generally improve naturally over a two-year period. He has seen further improvement occur over as long as four years. Dr. Fuller notes that two years and ten months had passed since the MVA, and a number of conservative interventions had been employed without resolution of the plaintiff's neck symptoms. Dr. Fuller therefore opines that the plaintiff had reached the endpoint in her clinical status.

**164**  With respect to her sacroiliac complex, Dr. Fuller is of the view that there is little that can be done, as the area is resistant to treatment.

**165**  In Dr. Fuller's opinion, the plaintiff will likely continue to suffer limitations on her ability to function at home, and will not be able to maintain her home or yard. He also concludes that she will only be able to continue to function at work with the assistance of her adaptive techniques, such as curtailing her activities, ergonomic chairs and office arrangements. Even with these adaptations, he observes that the plaintiff often has occasional bouts where her symptoms are exacerbated.

**166**  Dr. Fuller does not recommend the use of prolotherapy (the injection of an irritant solution into a joint space, weakened ligament, or tendon insertion to relieve pain) to assist with the plaintiff's symptoms. He has tried this technique in the past without success and no longer regards it as having any efficacy in the relief of pain.

**167**  Dr. Fuller also commented in passing on the plaintiff's post-concussion syndrome, but since he acknowledges this is beyond his expertise, I have not considered those brief remarks.

**168**  On cross-examination, it was put to Dr. Fuller that the plaintiff had not had the benefit of physiotherapy, and experienced increasing pain between May 2010 and January 2012, and then resumed physiotherapy and found that her pain and headaches had largely resolved as reported to Dr. Smith in July 2012. Dr. Fuller agreed that if this was the case, then it was possible that physiotherapy had resulted in a significant improvement that he had not predicted was likely to occur.

**169**  Dr. Fuller stated that if Dr. Smith had recorded that the plaintiff had reported this later improvement, he had no basis to disagree.

**170**  Dr. Fuller also agreed that if the plaintiff had reported in 2009 that her back pain had "mostly resolved" and that her headaches were better, then in view of the results of his clinical examination, the differences between reports demonstrate a highly variable pain picture.

**171**  Dr. Fuller was also unable to say whether a 1998 accident in which the plaintiff was hospitalized and suffered injury to her right hip/pyriformis could have been the precipitating factor to cause the shift in her sacroiliac complex with the resulting current low back pain.

**172**  I have no doubt that as the plaintiff stated, she has good days and bad days but I find Dr. Fuller's report to be substantially more pessimistic than the more recent report by Dr. Smith and the earlier report (April 2010) and later report (June 2012) of Dr. Schmidt.

**173**  Since Dr. Fuller acknowledges he has no basis to disagree with Dr. Smith's findings, I have concluded that the more recent report of Dr. Smith in July 2012 is a more accurate picture of the degree of improvement enjoyed by the plaintiff.

**174**  I do not mean in any way to suggest that Dr. Fuller did not accurately record his findings. He did say that he has observed limited improvement in patients like the plaintiff to continue for up to four years post-accident.

**175**  At the same time, his comments on causation of injury are informative and helpful.

**C. Dr. Brenda Lau**

**176**  Dr. Lau is a doctor qualified to practice in British Columbia, and a specialist anesthesiologist with extensive training and a Master's Degree in pain management. She is a fellow of the Faculty of Pain Medicine of the Australia and New Zealand College of Anesthetists.

**177**  Since 2005, Dr. Lau has run a practice focused on pain management.

**178**  Pain management has only as recently as August 2013 been recognized as a subspecialty in British Columbia. That it has been recognized is largely due to Dr. Lau's efforts.

**179**  Dr. Lau's qualifications were not challenged.

**180**  Dr. Lau conducted an independent medical examination of the plaintiff on November 6, 2012. She prepared a report dated March 6, 2013, and an addendum dated July 15, 2013, after receiving information from the plaintiff's counsel concerning the plaintiff's attendance at physiotherapy and marked improvement in her symptoms of pain and headaches.

**181**  Dr. Lau sets out a number of pain symptoms that she found the plaintiff suffered from. She opines that those symptoms are typical of Whiplash Associated Disorder ("WAD").

**182**  WAD often causes myofascial contractures resulting in the development of painful trigger points, which in turn cause the plaintiff pain in her neck, upper and lower back.

**183**  According to Dr. Lau, the headaches from which the plaintiff suffers are generated by the pain in her upper back and are classified as cervicogenic headaches.

**184**  In turn, the persistent pain from which the plaintiff suffers causes fatigue and interferes with her ability to function and concentrate.

**185**  While Dr. Lau does find that the plaintiff had some restrictions on range of motion in the neck and spine, and the plaintiff continued to experience a reduced sense of smell, Dr. Lau notes the plaintiff's view that her post-MVA symptoms such as photosensitivity and dizziness had improved. The plaintiff's low back pain had improved to the point that the plaintiff rated it at one to three on a scale of ten.

**186**  It is Dr. Lau's view that the plaintiff's headaches, low-back pain, fatigue and cognitive issues are likely permanent.

**187**  Notwithstanding all of the above, Dr. Lau finds the plaintiff has continued to improve since the MVA and has not yet reached maximum recovery. She also reports that the moderate impairment from which Dr. Lane suffers may be temporary.

**188**  Dr. Lau recommends a number of interventions that she believes will afford the plaintiff relief, including Intra Muscular Stimulation ("IMS"), or dry needling, which is somewhat similar to acupuncture but aimed at the muscles and sensitized cutaneous nerves. To assist with the use of the dry needling process, Dr. Lau recommends use of cannabinoids rather than opioids to reduce pain.

**189**  Dr. Lau also recommends neural prolotherapy, which involves the injection of a dextrose solution as an irritant to cause the ligaments and tendons to lay down new tissue in response. I have already observed that Dr. Fuller disagreed with this recommendation.

**190**  In the addendum to her report, Dr. Lau was asked to respond to six points raised by counsel for the plaintiff related to the plaintiff's successful results from her return to regular physiotherapy (30 sessions) and the significant improvement she had in the range of motion in her neck, frequency of headaches and fatigue.

**191**  Dr. Lau comments that her opinion remains unchanged, and that the interpretation of the six points was better left to the physiotherapist. She closes the addendum by repeating the conclusions she had reached in her first report.

**192**  There are several factual inaccuracies contained in Dr. Lau's reports. For example, Dr. Lau indicates that the plaintiff did not report any variation in her weight since the MVA other than a 10 lb. gain. She also refers to a "graded return to work at 2.5 days a week" but does not report the plaintiff's return to full-time work in April 2010.

**193**  Along with those inaccuracies, Dr. Lau's failure to reconsider her conclusions given the improvement noted by the physiotherapist, Mr. Moffitt, somewhat undermines my confidence in her report.

**194**  I note as well that under "Prognosis", Dr. Lau states that:

At the time of our interview [November 6, 2012], Ms. Lane regained her ability to drive, to work. . .

**195**  I find this recital of the evidence somewhat disingenuous since the plaintiff was only restricted from driving for approximately two weeks following the MVA. Well before November 2012, the plaintiff had been driving without difficulty at minimum in her own community, and had helped her husband drive to Edmonton.

**196**  I also note that the plaintiff returned to full-time work in April 2010 while Dr. Lau's report makes it sound as if her return to work was not full time and she had just returned to work as of the time of the interview.

**197**  I found Dr. Lau's report helpful in a general way but cannot give it substantial weight.

**D. Dr. Derryck Smith**

**198**  Dr. Smith is a long-time psychiatrist in British Columbia who has assessed well over 1,000 patients over the course of his career.

**199**  He has testified as an expert witness in psychiatry in the Supreme Court of British Columbia many times.

**200**  His qualifications were not contested.

**201**  Dr. Smith's first report was based on an independent medical examination that took place on June 20, 2010. That report is dated June 20, 2010.

**202**  Dr. Smith's first report details a number of concerns, including the diagnosis of an adjustment disorder with features of anxiety for which he recommends treatment.

**203**  Based on his re-examination of the plaintiff on June 26, 2012, Dr. Smith opines in his second report dated July 16, 2012, that these issues had resolved.

**204**  In his second report, Dr. Smith lists the problems with which the plaintiff had presented at the first independent medical examination, and reassessed them as he saw them at the second independent medical examination.

**205**  Dr. Smith states that the plaintiff's sleeping difficulties had resolved and she was sleeping well at this point.

**206**  While the plaintiff's appetite was reduced due to her lack of smell and taste, Dr. Smith observes that she had gained 10 lbs. due to lack of exercise.

**207**  The plaintiff reported that her balance problems continued and she could not ride a bicycle or use the treadmill without holding on the siderails. However, I note that she told Dr. Fuller she could ride a bicycle but only on a quiet street. She also told her physiotherapist that she could use a treadmill without holding on and regarded this as a major victory.

**208**  I accept that any medical examination considers the plaintiff's condition on the day she is examined. It may be that the plaintiff was failing to recall the minor steps forward that she had reported to others.

**209**  Dr. Smith relates that the problems the plaintiff had experienced with speech had become "fine", but the plaintiff had not returned to her pre-MVA capacity at Toastmasters.

**210**  He also recounts that the plaintiff has been able to return to reading, and calls her ability "fine" without qualification.

**211**  Dr. Smith notes that the plaintiff's earlier emotional ability had improved so that she had no problems except when she grew fatigued.

**212**  The plaintiff also reported to Dr. Smith that her pain had mostly resolved.

**213**  The plaintiff told Dr. Smith that she believed her earlier problems with executive functioning were due to pain and did not trouble her when she had had a good night's sleep and awoke feeling refreshed.

**214**  Her photosensitivity was also reportedly no longer a problem.

**215**  Dr. Smith relates that the plaintiff's cognition had improved, with the qualification that she continued to have trouble during meetings where a number of different people spoke. Dr. Smith also comments that the plaintiff occasionally had problems keeping track of the topics they were discussing during the examination.

**216**  The plaintiff reported that she had begun driving more widely, and drove herself from Maple Ridge to her appointment with Dr. Smith on West Broadway in Vancouver. The plaintiff also reported that she helped with the driving to Edmonton when she and her husband visited their son.

**217**  Dr. Smith notes that the plaintiff's stamina for socializing remained decreased because of fatigue. I take this to mean the plaintiff no longer meets friends for dinner or hosts dinners because the plaintiff's own evidence is that she is still attending church and Toastmasters during the week.

**218**  The plaintiff told Dr. Smith that she could no longer manage Aquafit because of dizziness.

**219**  The plaintiff reported to Dr. Smith that she was continuing to perform shopping and cooking but could not do heavy chores around the house, and was using a hired housecleaner for those tasks.

**220**  Other than those heavy chores, the plaintiff did not report any limitations on other activities of daily living.

**221**  The plaintiff reported that she was uncertain if she had experienced changes in her personality. But her husband says she is more perseverative, which relates to the tendency to repeat a word or phrase after the original stimulus has ceased. I take this expression to mean that the plaintiff tends to repeat herself unnecessarily.

**222**  The plaintiff reported a significant loss of marital intimacy.

**223**  The plaintiff's loss of smell and therefore of taste remained a major loss that interfered with her enjoyment of eating.

**224**  The plaintiff characterized her main problem as chronic low-grade pain from sitting too long with resulting pain in her neck that caused headaches. These problems were caused by too many meetings and writing long reports, but the plaintiff was working with her physiotherapist and acupuncturist to assist with those issues.

**225**  Dr. Smith opines that recovery from brain injury occurs within the first two years following the injury. At the same time, Dr. Smith observes that if the plaintiff suffers from fatigue and pain, her cognitive abilities may be only temporarily impaired.

**226**  Referring to the Diagnostic and Statistical Manual of Mental Disorders ("DSM") axes, Dr. Smith observes that on Axis I, sub. 2, the plaintiff suffers from Cognitive Disorder NOS (Not Otherwise Specified, meaning her symptoms do not fall within any single diagnostic category) secondary to brain injury. Dr. Smith defers to Dr. Schmidt and presumably to the results of his neuropsychological test results in this regard.

**227**  With respect to Axis III, Dr. Smith diagnoses mild traumatic brain injury, whiplash type injuries to her neck and back, and cervicogenic headaches.

**228**  In connection with Axis IV, Dr. Smith indicates the plaintiff has psychosocial stressors in her life, which have meant she is no longer as socially active, no longer as able at Toastmasters and her libido is flat.

**229**  Turning to Axis V, Dr. Smith states that the plaintiff's Global Assessment of Functioning has risen to 65 from 60, two years earlier.

**230**  Dr. Smith recommends treatment with a neurostimulant, modafinil, to address her fatigue and energy issues, resumption of an exercise programme and treatment of her pain.

**231**  It is Dr. Smith's opinion that all of the plaintiff's problems are related to the MVA.

**232**  Dr. Smith notes that the plaintiff had "been assessed by a physiatrist". No physiatrist testified at trial and no such report appeared in evidence.

**233**  I found Dr. Smith's report to note a mixture of continuing problems and significant improvement in many of the formerly problematic symptoms suffered by the plaintiff. He also indicates that the brain injury's cognitive sequelae may be primarily related to pain and fatigue and thus temporary, a finding that somewhat echoes that of Dr. Schmidt.

**234**  It may be just an example of a doctor "hedging his bets", but I read in Dr. Smith's report some optimism that if the plaintiff's pain and fatigue can be resolved, her cognitive symptoms may also substantially resolve.

**235**  I could not help but notice Dr. Smith's somewhat argumentative and condescending tone on cross-examination.

**236**  Despite the obvious contradictions in his report, Dr. Smith refused to acknowledge that certain "truisms", such as an absolute two-year rule for improvement of brain injury symptoms after which deficits become permanent, is not universally reliable and depends certainly on such matters as the accuracy of the initial diagnosis.

**237**  Dr. Smith would not accept Dr. Schmidt's comment that the two-year rule is overly simplistic and can be misleading.

**238**  This seemed odd when Dr. Smith had already agreed that a course of neurostimulant might effect an improvement to the plaintiff's cognitive symptoms, which by his own definition had become permanent due to the lapse of time of more than two years since the MVA.

**E. Dr. Dean Foti**

**239**  Dr. Foti is a neurologist who was initially consulted by the defendant. He became the plaintiff's expert and was called for cross-examination on his report by the defendant.

**240**  Dr. Foti's expertise is in behavioural neurology, and neuropsychiatry, a subspecialty recognized in the U.S. and U.K., but not in Canada.

**241**  Dr. Foti has studied the cognitive and neurological aspects of psychiatric disease and their syndromes and management. His practice is largely focused on the diagnosis and management of dementias.

**242**  Dr. Foti was tendered as a medical doctor with a specialty in neurology and a subspecialty in behavioural neurology capable of giving opinion evidence on whether the plaintiff presents with any neurological injury and the causes and impacts of that injury.

**243**  His qualifications as a neurologist were, of course, not contested by the defendant, since Dr. Foti had been an expert for her and his report is addressed to the defendant.

**244**  Dr. Foti examined the plaintiff on July 5, 2013. His report is dated August 11, 2013.

**245**  Dr. Foti's report is perhaps the least optimistic of any of the doctors who examined the plaintiff.

**246**  Dr. Foti finds that the plaintiff suffers from prolonged cognitive symptoms that interfere with her simple attention, focus and concentration, and which are mediated by the pain and fatigue she suffers.

**247**  It is his view that as a result of the impact of the MVA, the plaintiff may have suffered a Diffuse Axonal Injury ("DAI").

**248**  Since such an injury often does not cause a brain bleed, imaging may not reveal objective signs of a DAI. Thus, Dr. Foti explains that injuries of this nature are diagnosed based on the kind of impact suffered and the symptoms presented.

**249**  The plaintiff did not suffer any loss of consciousness at the time of the MVA, but Dr. Foti points out that he has seen patients who have not lost consciousness demonstrate DAI on imaging, detected by the evidence of bleeding.

**250**  The plaintiff did not show any evidence of bleeding (hemosiderin) in her brain imaging.

**251**  Dr. Foti bases his finding of DAI (a unique finding among the experts) on the plaintiff's loss of smell, and on her difficulties with simple attention.

**252**  The loss of smell, Dr. Foti opines, results from the shearing of olfactory nerves connecting through the cribriform plate between the eyes to the olfactory bulb in the brain located in the frontal lobe. Essentially, the impact of the plaintiff's head on the inside frame of her car sheared the nerves in the cribriform plates at the top of the plaintiff's sinuses. These nerves communicate smell and taste to the brain. When such nerves are sheared, there may also be more diffuse damage at the level of the axons, with resulting interference with executive functions like attention.

**253**  Dr. Foti notes that the plaintiff's only symptomatic neurological signs were the loss of her sense of smell and a slight balance issue. With those exceptions, her neurological examination was normal.

**254**  I accept Dr. Foti's explanation for how the plaintiff came to lose her sense of smell. However, because of the lack of medical evidence to support the existence of a DAI, it is my view that Dr. Foti's DAI diagnosis is somewhat speculative.

**255**  While I agree there is evidence upon which the other medical experts found that the plaintiff suffered a mild traumatic brain injury in the MVA, I do not accept this unique opinion that the injury can definitively be stated to be a DAI.

**256**  Dr. Foti performed a limited physical examination and noted that the results were substantially normal, with the exception of a slight limitation to the range of motion in the plaintiff's neck as measured by left flexion (putting her ear to her shoulder). The plaintiff also had some tenderness over her left paraspinals and trapezius, but moved easily and did not display any pain behaviours.

**257**  Dr. Foti bases his report on his history and examination of the plaintiff, including the administration of what he calls his "bedside battery".

**258**  In addition to his own results and analysis, Dr. Foti relies on medical records of the plaintiff and other expert opinions.

**259**  In particular, Dr. Foti refers to Dr. Schmidt's neuropsychological test results, and observes that they are similar to his own. But I note that he relies only on the April 2010 report of Dr. Schmidt and not his June 2012 report. The latter report would have been available, but was not provided.

**260**  Neither was the later report of Dr. Smith reviewed by Dr. Foti. That report was dated June 2012 and should have been available to Dr. Foti.

**261**  As a result, Dr. Foti's survey of medical opinions concerning the plaintiff was incomplete. He was denied the opportunity to see that both Dr. Schmidt and Dr. Smith observed considerable improvements in the plaintiff's symptoms.

**262**  I also have some concern with respect to Dr. Foti's willingness to comment on the plaintiff's ability to take on more responsibility due to her ongoing problems with fatigue and pain.

**263**  Dr. Foti did qualify his views somewhat in cross-examination by agreeing he had only spent 2.5 hours with the plaintiff on one occasion, and he would in a sense defer to her thesis committee members. However, he also stated that the plaintiff could likely cope with more senior positions, but at the cost of her social and recreational time and perhaps the return of more serious symptoms.

**264**  The plaintiff is clearly a person who has sacrificed social and recreational time to satisfy her professional and academic goals for years. It seems somewhat presumptuous for a doctor with Dr. Foti's limited acquaintance with the plaintiff to suggest that a more senior position would possibly carry with it the loss of her social and recreational time. From her own evidence, the ability to juggle the pressure of work, family, friends and study is normal for this plaintiff (even after the MVA), and this ability seems to be a normal requirement for anyone who takes on a complex, senior position.

**265**  Whether taking such a position would result in the return of more severe symptoms for the plaintiff is an unknown. It is this issue which is within Dr. Foti's province.

**266**  Dr. Foti is not able to say with certainty whether more severe symptoms would return, but says it is a possibility.

**F. Dr. Stephen Wiseman**

**267**  Dr. Stephen Wiseman is a psychiatrist attached to the Complex Pain Centre at St. Paul's Hospital, where he is the physician lead and medical director.

**268**  Dr. Wiseman was presented by the defendant as an expert in psychiatry with the expertise to comment on the psychiatric and potential brain injury factors that may apply to the plaintiff in this case.

**269**  There was no issue with Dr. Wiseman's qualifications to give this opinion.

**270**  Dr. Wiseman saw the plaintiff on June 25, 2013. His report is dated July 2, 2013.

**271**  The opinion expressed by Dr. Wiseman in his report is comprehensive and clear.

**272**  It is Dr. Wiseman's view that the plaintiff suffered a mild traumatic brain injury and post-concussive symptoms. In his view, her brain injury is likely resolved but the remaining sequelae are more likely mediated by her ongoing pain and fatigue rather than being symptoms of a permanent and serious brain injury.

**273**  If the plaintiff were to have suffered from a serious brain injury, it is Dr. Wiseman's opinion that she would not have been able to resume functioning as soon as she did following her injury, and could not have gone on to finish and defend her dissertation.

**274**  Dr. Wiseman does not agree with Dr. Smith that the plaintiff suffered an adjustment disorder. Rather, he views the indicia of her difficulties at work and home as stressors resulting from her physical impairments and concussion rather than as symptoms of a psychiatric disorder as outlined in DSM. In his view, her initial functional impairments were caused by these stressors, not emotional symptoms.

**275**  It is Dr. Wiseman's view, similar to that of Dr. Schmidt, that the plaintiff's initial symptoms were more related to chronic musculo-skeletal pain than to a diagnosable psychiatric illness, which is what an adjustment disorder is.

**276**  Dr. Wiseman's opinion respecting the plaintiff's current condition is that she continues to suffer from ongoing pain that "mediates" her symptoms. I take this to mean that it forms the background and context for her ongoing difficulties with fatigue, cognitive fuzziness and headaches.

**277**  Counsel for the plaintiff pursued Dr. Wiseman aggressively in an attempt to demonstrate that his opinion that the plaintiff had learned something from her injury experience following the MVA was not appropriately included in an expert report. Counsel also tried to show that Dr. Wiseman had failed to clearly delineate between facts and assumptions.

**278**  In my view, Dr. Wiseman was at all times reasonable in his responses, and was honest about the very difficult distinction between facts and assumptions. As I see it, Dr. Wiseman's comment on the plaintiff having learned that she had overburdened herself before the accident was insightful, and reflected his ability to listen carefully to what the plaintiff had to say to him and to understand her.

**279**  I accept his report and his evidence.

**280**  Quite frankly, I am not satisfied that Dr. Wiseman's report diminishes the plaintiff's claim in any way. The plaintiff did suffer a mild traumatic brain injury that resolved. Resolved or not, she continues to suffer serious symptoms which have impacted her lifestyle and her plans for the future, whether overambitious or not, and whether caused by chronic pain and fatigue or mild traumatic brain injury.

**THE ISSUES**

**281**  Because there is no liability issue in this case, I will organize the remainder of my reasons around causation and damages.

**A. Causation**

**282**  The plaintiff must satisfy the Court, on a balance of probabilities that, but for the defendant's negligent act, she would not have sustained her injury. The "but-for" test is the general test for factual causation. The negligent conduct must be substantially connected to the injury.

**283**  This test was recently affirmed and set out in *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=) (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.]

**284**  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.

**285**  The plaintiff must also establish legal causation, which arises once factual causation is proved. Legal causation is examined at the damages stage of the analysis. The plaintiff's injury must be a reasonably foreseeable consequence of the defendant's ***negligence***. Reasonableness is assessed by examining whether it was foreseeable that a person of ordinary fortitude would suffer the injury at issue: *Mustapha v. Culligan of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=) at paras. 11, 18.

**286**  It is a basic principle of damages in tort law that the defendant need not put the plaintiff in a better position than her original position and should not compensate the plaintiff for any damages she would have suffered anyway. This principle is referred to as the crumbling skull rule. At the same time, the defendant must take her victim as she finds her, known as the thin skull rule: *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at paras. 78 - 80.

**287**  I conclude that the way in which the plaintiff was hit from behind at speed while her head was turned to the left to watch for oncoming traffic contributed to the extent of her injuries.

**288**  There is no doubt among the medical experts that the plaintiff suffered a mild traumatic brain injury (a concussion) as a result of the impact. The impact would not have taken place had the defendant not failed to stop in time. The defendant admits liability for that impact.

**289**  In this case, as a result of reviewing the extensive medical reports which I have summarized above, the plaintiff's evidence, and the evidence of the other lay witnesses including Mr. Lane and Douglas Lane, I find the following:

**290**  I am satisfied that the plaintiff has proved that the defendant's ***negligence*** caused her to suffer the following injuries: mild interference with her memory and attention; a reduced ability to synthesize ideas quickly; cognitive fatigue related to her post-concussion syndrome; a reduced sense of smell and taste; residual pain in her neck, shoulder and back with resulting occasional headaches; and occasional sciatic and sacroiliac pain.

**291**  I find that these symptoms continued to the date of trial. While Dr. Lau opined that the plaintiff had yet to reach maximal recovery, the fact remains that the plaintiff suffers off and on with many of these symptoms. Her evidence, which I accept, was that she has good days and bad days.

**292**  The plaintiff was in generally good health before the MVA. Of course she was ageing as we are all, but she was able to accomplish a substantial number of tasks in the ordinary day. Post-MVA, she is not the same person she was.

**293**  There is no explanation for the changes the plaintiff has suffered except the MVA.

**294**  The blow to the plaintiff's head was not sufficient to fracture her skull. Nevertheless, to this day she has a noticeable bump where the impact of the defendant's car caused her to strike the frame around the window.

**B. Damages**

***1. Non-pecuniary damages***

**295**  Non-pecuniary damages compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. This type of compensation must be fair to all parties. This is done in part by comparing the circumstances at issue with other cases of similar circumstances. A non-exhaustive list of relevant factors for the court to consider when determining an appropriate award for non-pecuniary loss was developed by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) (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=)).

**296**  However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

**297**  The plaintiff was 54 at the time of the MVA, a factor which means that it was likely she was more vulnerable to injury than a younger person would be.

**298**  The injury itself was serious, and caused the plaintiff to face a future that is different from what she had planned. She suffered badly for the first six months and has had ongoing pain and fatigue, which she lives with to the present. Whether it will improve substantially is difficult to say. It has impacted her lifestyle since she lacks the energy to participate in the number of activities she took part in before the MVA.

**299**  Following the MVA, the plaintiff was fearful of driving. Even driving with her husband past the location of the MVA initially caused her some upset. Fortunately, this is no longer a problem. She persevered and began to drive again once her doctor had cleared her to do so.

**300**  The plaintiff is not disabled, but she has changed. She is no longer able to work in her garden and she cannot even smell her flowers as a result of her loss of the sense of smell. This of course impacts on her ability to enjoy food.

**301**  The plaintiff has seen a diminution of her success at Toastmasters. Josephine Priestley's evidence was that the plaintiff was a less effective speaker after the MVA. While the plaintiff has moved up in the administration of her Toastmasters group and division, her success as a speaker is not what it was, and this is a source of disappointment to her. To her credit, she continues to strive to complete her qualifications in the club, but now she must use notes to make her speeches and she has lost some of the spontaneity and wit that made her talks so notable in the past.

**302**  Certainly in the time period immediately following the MVA, for approximately a three-month period, she had vision disturbances, interrupted sleep, continuous headaches, confusion and word-finding difficulties. All of these symptoms must have been worrisome to her.

**303**  Mr. Lane and Douglas Lane point to her increased irritability and ongoing memory issues as having changed their lives with her.

**304**  She is not able to sleep in the marital bed because movement causes her pain. Her ability to be intimate with her husband is reduced.

**305**  Both Donna and Scott Goodman noticed the difficulties she was dealing with when they visited her during the first year following the MVA. In their views, she was greatly changed from the person they had known before the MVA, but this was during the acute phase of her injuries.

**306**  All of the medical experts state that the plaintiff tends to underreport her difficulties because she wants to get on with her life and minimizing her problems makes her able to better control them. That does not mean she does not suffer.

**307**  The plaintiff remains functionally impaired to some degree as a result of her injuries, and while she has developed adaptive strategies like talking to herself when trying to solve a problem or remember a sequence, she must still confront the losses she has incurred as a result of the MVA on a daily basis.

**308**  Both counsel provided a number of authorities on the appropriate range of non-pecuniary damages.

**309**  The plaintiff's books of authorities contain 48 cases, some of which deal with evidentiary issues but the bulk of which deal with non-pecuniary damages.

**310**  I accept that no two cases are alike when considering an amount of non-pecuniary damages, but that looking at the facts and amounts awarded can provide general guidance.

**311**  I have read the cases on non-pecuniary damages referred to in the plaintiff's closing argument. I will provide a brief summary of those cases here since I assume from the fact that counsel raised them in her final argument that she considers them the most helpful and pertinent.

**312**  The plaintiff begins with the case of *Sirna v. Smolinski*, [*2007 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V5-00000-00&context=), a decision of Mr. Justice Macaulay. The case provides a helpful discussion of the consequences of traumatic brain injury.

**313**  Mr. Justice Macaulay awarded $200,000 in non-pecuniary damages to the plaintiff, who had suffered serious injuries when she was hit in a crosswalk. The impact threw Ms. Sirna up onto the hood of the oncoming car, where she hit her head on the windshield, and then fell onto the road where she hit her head again.

**314**  The trial judge found Ms. Sirna had lost consciousness.

**315**  Ms. Sirna suffered more severe injuries than the plaintiff in this case, including what one expert defined as traumatic brain injury in the "complicated mild" category, with damage to her pre-frontal cortex and continuing cognitive difficulties, depression and extensive soft tissue injuries.

**316**  Ms. Sirna was much younger than the plaintiff in this case and thus would suffer loss for a longer time.

**317**  Ms. Sirna was not able to continue with her planned career as a teacher or as a dental hygienist. She also lost her long-term relationship as a consequence of her injuries.

**318**  Here, the plaintiff has been able to maintain her career. I accept that she had ambitions to apply for more senior positions in special education or to teach university, and she feels she is no longer able to act on that ambition. No doubt she is disappointed by that prospect.

**319**  However, I do not find *Sirna* to be helpful in looking for a comparable case on which to base an award of non-pecuniary damages.

**320**  Next, the plaintiff cites *Young v. Anderson*, [*2008 BCSC 1306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3JG-00000-00&context=). In that case, Madam Justice Boyd awarded $200,000 non-pecuniary damages. But Boyd J. makes it clear throughout her judgment, that although she found the plaintiff had suffered a mild traumatic brain injury as a result of being rear-ended, he also had an asymptomatic underlying brain pathology that contributed to the serious, ongoing cognitive symptoms he had suffered and continued to suffer. In addition to those progressive cognitive difficulties, Mr. Young had a severe depression leading to suicidal ideation and personality changes. He also suffered from extreme and intrusive tinnitus resulting in an inability to participate in social conversations, chronic pain and headaches.

**321**  The initial injuries suffered by Mr. Young may well have been somewhat akin to those suffered by the plaintiff in this case, but the trial judge found that the accident had triggered the onset of symptoms of a deterioration of his brain.

**322**  Mr. Young and his wife were no longer able to maintain their sexual or marital relationship. He had had great difficulty in finding and maintaining employment, and would be unlikely to be able to work again in his creative industry. His group of friends had dwindled.

**323**  In the circumstances of that case, an award of non-pecuniary damages of $200,000 seems very appropriate.

**324**  Once again, I do not find this case to be of particular assistance in determining the non-pecuniary damages appropriate to this case. The plaintiff here does not find herself in such dire straits as the plaintiff in *Young.*

**325**  *Roussin v. Bouzenad*, [*2005 BCSC 1719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2SW-00000-00&context=), (Mr. Justice Kelleher) is the next case cited by the plaintiff. Again, Ms. Roussin was more seriously injured than the plaintiff in this case. Ms. Roussin suffered a fractured skull, brain injury, facial lacerations resulting in scarring, a fractured left wrist that necessitated surgery, and soft tissue injuries to her hip, back and neck.

**326**  As a result of the accident, Ms. Roussin lost the ability to continue as a television journalist, her chosen profession. The accident and its consequences strained Ms. Roussin's relationship with her common-law husband.

**327**  Ms. Roussin had ongoing headaches, cognitive difficulties, sleeplessness and fatigue. But her biggest single loss concerned her employability at the level she had previously held in a field she enjoyed.

**328**  She, too, was awarded non-pecuniary damages of $200,000. Because Ms. Roussin's situation was more severe than that of the plaintiff in this case, I do not find this case particularly instructive.

**329**  In *Scoates v. Dermott*, [*2012 BCSC 485*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62J1-00000-00&context=), the plaintiff was involved in four accidents. The first, in which he was hit by a left-turning car while riding his motorcycle, was the most serious. Sometime after the accident, the plaintiff's continuing headaches and cognitive problems led to the diagnosis of a mild traumatic brain injury.

**330**  In a 2009 assessment following the other three accidents, a specialist in physical medicine and rehabilitation summarized Mr. Scoates's condition in this way (at para. 79):

[Mr.] Scoates sustained multiple orthopaedic injuries to his neck, back, pelvis and right wrist as well as severe soft tissue injuries to his neck, back and both knees, and probably a mild traumatic brain injury in the motor vehicle accident of April 26, 2004. He required surgical treatment of his pelvic and wrist injuries, and has subsequently required two discectomies at L4-5 because of a recurrent disc protrusion, undoubtedly related to his injury in the April 2004 accident. He has continued to experience neck and back pain, headaches, and pelvic pain as a result of his injuries. He also has ongoing cognitive, emotional, and behavioural difficulties and a change in his personality, resulting from a combination of brain injury and his emotional response to chronic pain and the loss of his usual physical abilities and activities. He has had appropriate rehabilitation for his injuries. ... [I]t is likely that Mr. Scoates will continue to experience all of his current symptoms and limitations over the long term. His injuries have interfered with his work, home and leisure activities.

**331**  The *Scoates* case involved both more serious injuries and the permanent loss of a career the plaintiff lived for.

**332**  Mr. Justice N. Smith awarded the plaintiff $250,000 for non-pecuniary damages for the four accidents.

**333**  In *Courdin v. Meyers,* [*2005 BCCA 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=), the Court of Appeal reversed a jury's award of $1,000,000 for non-pecuniary damages. I note that the parties had substituted that amount with an award of $292,823, reflecting the rough upper limit of such awards. The Court of Appeal awarded of $200,000 in non-pecuniary damages.

**334**  In that case, Ms. Courdin's vehicle was struck from the rear in a three-car collision. After showing some improvement, her symptoms worsened, resulting in a diagnosis of fibromyalgia secondary to the trauma the plaintiff suffered in the accident.

**335**  Ms. Courdin and her husband separated two months after the accident. The plaintiff related the separation to her inability to contribute to the running of their lawn maintenance business. She said she had intended to work to at least the age 65, but was only able to work three to four hours per day as a landscaper after the accident.

**336**  The plaintiff in that case was no longer able to participate in the tennis, racquetball, cross-country skiing, baseball, skating, badminton, camping, hiking and canoeing that she actively participated in prior to the accident.

**337**  Like the other cases cited by the plaintiff, Ms. Courdin's situation was much more severe than that of the plaintiff in this case. In addition to losing the substantial part of her livelihood and her husband, she suffered fibromyalgia rather than a mild traumatic brain injury. I also note that the plaintiff is able to continue with some of her pre-accident activities, including Toastmasters and church groups, although she is less able than she once was at Toastmasters.

**338**  I find the cases cited by the defendant deal with circumstances more analogous to those of the plaintiff in this case.

**339**  In *Drodge v. Kozak*, [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=), the plaintiff was found to have some degree of cognitive impairment since the accident, including problems with concentration, memory, and difficulties with directions and simple arithmetic. He also had a pre-existing condition of low back pain that was aggravated by the accident, which resulted in his occasional use of prescribed narcotic medications. Mr. Drodge also suffered from severe headaches and cognitive difficulties, although they fell short of a diagnosis of a concussion or post-concussive syndrome. Mr. Drodge found it difficult to drive, and his intimate relationship with his wife was adversely affected. Mr. Drodge had lost the ability to seize upon all job opportunities that might otherwise have been available to him. He was awarded $85,000 in non-pecuniary damages.

**340**  In that case, it appears to me that the finding of the pre-existing back condition led Dardi J. to award the amount of non-pecuniary damages she did. I also note that Mr. Drodge did not suffer from a mild traumatic brain injury or post-concussive syndrome. These factors distinguish the case from this one. The plaintiff in this case did not exhibit any pre-existing condition or "crumbling skull".

**341**  The other case cited by the defendant is *Moukhine v. Collins*, [*2012 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1NK-00000-00&context=), a decision of Madam Justice Watchuk.

**342**  Madam Justice Watchuk awarded $90,000 in non-pecuniary damages to a plaintiff with balance, nausea, headaches and dizziness that reduced his capacity to work as a computer programmer, a job he loved, to 2.25 to 3.25 hours per day. He also exhibited personality changes. His issues were caused by a condition that was likely to be permanent.

**343**  While these latter two cases are instructive, each case is to be assessed on its particular facts.

**344**  I understand the ways in which the plaintiff's injuries in this case have interfered with her enjoyment of life. Notably, she must almost constantly deal with low-grade pain and resulting fatigue that degrades her cognitive abilities and quality of life.

**345**  However, I also find that condition may improve slightly over time, either on its own or with treatment such as a neurostimulant, as suggested by Dr. Smith. Dr. Wiseman likewise agreed that this treatment could be beneficial to the plaintiff. This could open some activities to the plaintiff that she previously did not believe she could perform because of fatigue and lack of energy.

**346**  Even so, I find that it is highly unlikely her condition will ever completely resolve.

**347**  The loss of her sense of smell and taste is another serious loss that has removed an important aspect of pleasure in the plaintiff's life. She has recovered a consciousness of smell but not to the extent she is able to identify the smell.

**348**  In the circumstances of this case, I award non-pecuniary damages of $110,000.

***2. Pecuniary losses***

**349**  With respect to pecuniary losses, the defendant supported its position with the evidence of Dr. Carter, Dr. Richmond and Dr. Brayne. That evidence primarily relates to the plaintiff's claim for loss of future earning capacity.

**350**  In addition to the lay witness evidence of Ms. Teyema, Ms. Dean, and Ms. Stewart, the plaintiff relies on the evidence of two expert witnesses with respect to pecuniary losses.

**351**  Ms. Michelle Hodson is an occupational therapist and certified functional capacity evaluator who has been conducting functional capacity evaluations since 2005. She conducted a functional capacity evaluation of the plaintiff, and prepared a report dated July 22, 2013 addressing the plaintiff's functional abilities and her future care needs.

**352**  The plaintiff also relied on the evidence of Mr. Robert Carson, a labour economist. Mr. Carson provided two reports. His first report dated July 25, 2013 relates to the cost of future care. His second report dated July 29, 2013 sets out his opinion with respect to wage loss.

***a. Past wage loss***

**353**  The parties are close to agreeing on past income loss, with the exception that the plaintiff's claim for past wage loss does not take into account income tax liability.

**354**  I agree with the defendant that the plaintiff is only entitled to recover her net past wage loss. The defendant suggests a nominal deduction of 10% for a net amount of $18,901.14. I award that amount.

**355**  The defendant also agrees that there should be no deduction from the short term disability benefits, known as Salary Indemnity Plan Benefits ("SIP") received by the plaintiff while she worked on a graduated return to work from June 2009 to April 2010 because this benefit is funded by deductions from the plaintiff's salary. (See *Cunningham v. Wheeler,* [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=).)

**356**  I do not have clear evidence on the actual amount the plaintiff received in SIP benefits even after considering Ms. Teyema's evidence. Ms. Teyema is the Manager of Payroll and Benefits for the plaintiff's employer. As best I understand Ms. Teyema's evidence, it appears the plaintiff is entitled to the return of $19,144.53.

**357**  I also understand that the plaintiff is likewise entitled to recover the loss of her stipend over the period of her absence from work in the amount of $1,444.84, and her two percent premium of $411.90. Together, the SIP, stipend and lost premium amount to $21,001.27.

**358**  In the circumstances of this case, the plaintiff's loss of sick pay is best understood as the loss of a contingent future benefit: *Bjarnason v. Parks*, [*2009 BCSC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B104-00000-00&context=). To obtain value from those sick days, the plaintiff must actually use them. She cannot bank them and collect them on her retirement, and they do not vest in the plaintiff.

**359**  As the defendant describes it, there are two contingencies at issue: The first contingency is that the lost benefits may never be used or not all used. The second is that if the lost benefits are to be compensated for, there must be an accounting for the fact that those benefits will be paid for now but if used, will be used in the future.

**360**  Since her return to work, the plaintiff has continued to generate sick leave credit on the basis of 1.5 days per month to a total of 15 days per year. At the time of trial, she had accumulated 63 days. She has not used any of the sick leave that has accumulated since her return to work.

**361**  As well, and as we hope, the plaintiff may never need or use the sick leave entitlement for which the defendant must compensate her.

**362**  Ms. Teyema's evidence shows that the plaintiff took a total of 68.5 sick days as a result of the MVA. These days have a gross value of $28,467.92 (68.5 x $415.59).

**363**  I accept the defendant's argument on the logic of taking a deduction from this unique benefit. I agree that the loss of sick leave must be subject to a deduction.

**364**  In valuing the loss of these sick days, their value as a contingent future benefit must result in some nominal deduction to recognize that they may never or only partially be used.

**365**  In my view, the fair way of calculating that deduction is to look to the newly proclaimed discount rate of 2% per annum for each year the plaintiff continues to work. If she works to age 65, the total discount would be 14%. As a rough approximation of the appropriate deduction, valuing the lost sick leave as suggested by the defendant leaves a total of $25,000.

***b. Special damages***

**366**  The plaintiff underwent a number of treatments which she paid for herself. These included treatments for physiotherapy, kinesiology, massage, acupuncture and IMS.

**367**  I was unable to locate where the plaintiff specified the amount she claims for these services. Based on the total amount of special damages claimed less the amounts claimed for other heads of special damage, I infer that the plaintiff claims $7,630.45 for therapy sessions.

**368**  The defendant claims that the gap in physiotherapy ("physio") treatment between May 2010 and January 2012 is indicative of the plaintiff's recovery from her injuries, and claims that there should therefore be no payment for physiotherapy after May 2010.

**369**  I cannot agree with that argument and do not accept it.

**370**  The period during which the plaintiff did not attend for physio corresponds to the time she was working intensively on her dissertation and returning to full time work. It would have been difficult to fit in physio appointments.

**371**  The defendant benefited from both the plaintiff's completion of her dissertation and her return to full time work.

**372**  I accept that the plaintiff was also finding money a bit short. Since her funding for physio had ended, she decided she would try to do without physio to see if she could manage on her own.

**373**  The plaintiff had benefited in the past from the ministrations of her physiotherapist, Mr. Moffitt, and after her symptoms and pain had recurred, she went back to him after the gap in treatment. The treatments she received from him included physio, kinesiology, massage, acupuncture and IMS.

**374**  It is my view that these treatments were both reasonable and necessary, and helped to keep the plaintiff working full-time at her job. All of the physio charges she incurred to the date of trial will be reimbursed to the plaintiff.

**375**  It is worthy of note that her attending physicians recommended continuing physical therapy.

**376**  I therefore allow the full amount of $7,630.45 for the plaintiff's therapy sessions.

**377**  The use of orthotics at $400.00 (recommended by Mr. Moffitt) does not appear to have any medical justification. Had there been evidence that their use assisted the plaintiff with her balance issues, I would have awarded them. Unfortunately, I do not have such evidence.

**378**  In my view, the housekeeping expenses incurred by the plaintiff were associated with her pain and injury, but also related to her lack of ability to complete her dissertation while keeping house. It is also clear that there was also a benefit to Mr. Lane and Douglas Lane. It seems to me to be reasonable that the plaintiff would have needed some help with her 5,000 square foot house in any event so that she was freed up to work on her dissertation and study for her defense.

**379**  I am aware that Ms. Hodson has stated that cleaning help is available at $15 per hour. I find that figure to be unreasonably low, and accept the figure of $25 per hour as reasonable.

**380**  I would deduct 5% of the $4,275 housekeeping amount claimed to recognize that the plaintiff would have needed some help with housework in any event of the MVA. This would result in an award of $4,061.00 (rounded off).

**381**  The plaintiff claims tuition costs of $12,294.86 [sic] for 6 semesters at $1,891.60 per semester (which should be $11,349.60). These fees cover tuition for all of 2010 and 2011.

**382**  There can be no doubt that the plaintiff was delayed in the completion of her dissertation. Only the duration of the delay is at issue.

**383**  When the plaintiff was involved in the MVA, (January 2009), she had approximately 20% of her thesis left to do, and I accept that some of this remaining work involved time and effort to complete.

**384**  I also note that at that point, her committee had not yet been selected. The plaintiff's dissertation was not sufficiently advanced to take to a committee for review and feedback.

**385**  In my view, it would have been unlikely that the plaintiff could have assembled the committee, completed her draft dissertation to the stage necessary for comment by the committee, met with the committee, and prepared for and completed her defense in spring 2009 but for the MVA.

**386**  As I see it, the plaintiff would have been required to pay tuition for two semesters of 2009 in any event of the MVA. This would have allowed her to complete her work by December 2009, which I accept to be the most plausible scenario. The plaintiff is therefore entitled to be reimbursed for the tuition she paid for the remaining four semesters to compensate her for the additional tuition she paid due to the delay caused by her injuries from the MVA. This amounts to $7,566.40.

**387**  The plaintiff also claims for a new bed and mattress. These items may have been purchased in an effort to help with the plaintiff's discomfort. However, the items were not medically recommended and the evidence was that the Lanes had a satisfactory older bed. I do not allow the expense for the bed of $1,351.84.

**388**  The plaintiff claims for the cost of a wardrobe she bought when she lost a substantial amount of weight following the MVA. The amount claimed is $6,302.00.

**389**  There was no medical evidence of the plaintiff's weight before the MVA, although the plaintiff agreed she had gained weight during the time she was studying and preparing her dissertation. Neither was there any evidence of her weight following the weight loss or of her weight after she had regained weight. I am also lacking evidence of the duration of the weight loss or of the medical reason for it and its connection to the injuries the plaintiff sustained in the MVA.

**390**  I must also assume the plaintiff could have realized some money from the resale of this wardrobe.

**391**  Given the paucity of evidence on this item of special damages, I cannot allow it.

**392**  The plaintiff also claims for a Wii console (to assist with exercise) and IPod touch for its GPS. Both of these items were recommended by Ms. Hodson. However, while their cost is negligible, their medical justification is questionable. The rationale for needing the IPod touch is that it has a GPS, but as pointed out by the defendant, the plaintiff has a GPS in her car.

**393**  I do not allow the $400 the plaintiff claims for the Wii console and IPod touch.

**394**  Special costs will be allowed except as I have indicated above. The total to which the plaintiff is entitled is $19,257.81.

***c. Cost of future care***

**395**  The plaintiff claims $200,000 for cost of future care.

**396**  I appreciate that the cost of future care award is not a precise accounting exercise to determine the strict minimum required by the plaintiff: *Strachan v. Reynolds et al*, [*2006 BCSC 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=) at para. 83.

**397**  According to *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=), an award for the cost of future care must be medically justified and reasonable, using an objective test: what is reasonably necessary to preserve the plaintiff's health. While there must be a medical justification for the claims, medical necessity is too stringent a test.

**398**  I am also guided by the Court of Appeal's judgment in *Penner v. Insurance Corporation of British Columbia,* [*2011 BCCA 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1R6-00000-00&context=), in which Madam Justice Newbury states for the court that "common sense should inform claims under this head, however much they [assistive items] may be recommended by experts in the field" (at para. 13).

**399**  Ms. Hodson's extensive report sets out her analysis of the plaintiff's future needs for care. I found Ms. Hodson's report to overreach on many of the items claimed under this head. To include the value of "one long-handled mop at $3.95 to be replaced every five years to age 70" seems to me to misconceive the nature of damages appropriate under this head.

**400**  In *Penner*, the Court of Appeal for British Columbia quoted with approval (at para. 13) from *Travis v. Kwon*, [*2009 BCSC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B110-00000-00&context=), where Mr. Justice Johnston stated as follows (at paras. 109-111):

[109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta, Ltd.* [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*[1978] 1 W.W.R. 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=).

[110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

[111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-[handled] duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

**401**  In *Penner*, Newbury J. disallowed any award for "cold packs, heating pads, bath mats or safety bars, as I expect these are part of most households in any event" (at para. 14).

**402**  On the basis of the authority in *Penner*, adjuring me to exercise my common sense, I will not allow the plaintiff's claim for assistive devices when she shows no interest in taking up housework any time soon. I will also not consider the claim for ice packs, heating pads and safety bars.

**403**  The defendant disputes a number of the items listed by Ms. Hodson. For the most part, I agree with her position.

**404**  I will first set out the items I will not allow:

1. With respect to the claim for "memory/cognitive aids", I agree with the defendant that the IPod Touch, case, task timer and separate GPS are not reasonable or necessary to promote the plaintiff's recovery or preserve her health.
2. I will not allow an amount for "painting the outside of the house". The last time the plaintiff participated in this exercise was some time before the MVA. I do not accept that she would have stained or painted the exterior at this point in her life.
3. The same is true for "painting the interior of the house". I will not allow an amount for this cost.
4. The plaintiff also claims for "household /environment /management", which relates to caring for garden plots and upkeep of greenhouses. I do not allow these items as being medically necessary to preserve the plaintiff's health. It may be a service required that she can no longer perform, and as such will be awarded under "Outdoor Seasonal Services".
5. Under "positional aids", the power adjustable bed is not reasonable, necessary or medically justifiable. There is no medical recommendation for it and no indication from any caregiver that it would ease the plaintiff's pain.
6. The "occupational therapy service - PGAP" is clearly inapplicable to this plaintiff and is an example of Ms. Hodson's overreaching. This programme is designed to assist a plaintiff to return to work. The plaintiff has been back at work full time since April 2010.
7. "Occupational therapy services - prolotherapy" was suggested by Dr. Lau if other efforts to assist the plaintiff were unsuccessful. Dr. Fuller was unequivocal that he had tried prolotherapy on patients in the past without success, and would not recommend it for this plaintiff. There will be no award for this item.
8. The plaintiff's claim for "household/environment/ management - care of fruit trees" is duplicative. The plaintiff is awarded an amount for outdoor seasonal services, which would subsume any pruning services that the plaintiff can no longer perform.

**405**  The remaining claims are reasonable, necessary and medically justified.

**406**  Therefore, the plaintiff will be awarded the amount claimed for "rehabilitation equipment". The plaintiff benefits from walking regularly, and in our rainy winter climate, she will be able to use her treadmill when she cannot walk outside. The overall amount for treadmills should be reduced as I see this item as being amenable to repair rather than requiring such frequent replacement.

**407**  Since the plaintiff has given evidence she finds pain relief from the use of the ObusForme neck support in the car, she will receive the amount claimed for it.

**408**  The amount the plaintiff claims for kinesiology is comparable to the cost of a personal trainer (which she does not claim), but has the advantage of providing the plaintiff with continuing advice with respect to the kind and form of exercises the plaintiff can and should be performing. It is my view this cost is reasonable and justified and will help to keep the plaintiff mobile and working full time. However, as the plaintiff ages, it is likely she will use this service on a declining basis. Therefore, she will be entitled to attend kinesiology sessions once a month for five years (to age 62) and once every two months thereafter (to age 70).

**409**  The same is true of physiotherapy. The plaintiff gave evidence that physio keeps her mobile and helps to control her symptoms. She will be entitled to attend physio twice a month for five years and once a month thereafter to age 70.

**410**  The amount the plaintiff claims for medications seems to me to be reasonable and necessary to control the plaintiff's symptoms. It is a cost which will likely be incurred for some years to come as a result of the plaintiff's chronic pain.

**411**  I am foreclosed from making an award for homemaking under this head, although it appears to me to be a reasonable item to claim. However, as indicated by the Court of Appeal in *Westbroek v. Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=), homemaking costs are awarded for loss of capacity and are distinct from possible future cost of care claims.

**412**  Madam Justice Garson (for the Court) stated in that case that (at para. 74):

. . . An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as other in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonable expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]

**413**  In the result, I have substantially discounted the amount claimed for the cost of future care.

**414**  In recognition of the fact that this exercise is not a precise accounting but is rather an attempt to provide an amount which will assist the plaintiff to live the life she would have lived but for the MVA (insofar as damages can compensate for her losses), I will award a global amount.

**415**  I award the plaintiff $70,000 for the cost of future care calculated to age 70.

***d. In-trust claims***

**416**  Immediately following the MVA, Mr. Lane stayed home with the plaintiff for three days to assist her.

**417**  I do not have evidence of the value of the loss of these days, nor do I have any indication of whether or not his lost salary was covered by his employer.

**418**  In principle, I would be inclined to award some amount to him for that loss but I have no evidence on which to base it. I have no idea if he is out-of-pocket as a result of staying home with the plaintiff.

**419**  However, it is fair to say that had he been unable to stay at home with the plaintiff, it is likely she would have needed an attendant of some kind to be certain she was coping.

**420**  I will award an amount for this service, which does rise above the ordinary care and devotion he would offer to his wife, the plaintiff.

**421**  Mr. Lane also gave evidence that he took over many of the tasks the plaintiff did in the house and the yard after the MVA. The housework he did until he was no longer able to carry on with it was to replace what the plaintiff said was 90% of the house and garden work she had formerly been doing.

**422**  The bulk of Mr. Lane's claim appears to relate to future costs associated with the fact that the plaintiff prefers that he drive whenever it is possible for him to do so.

**423**  However, the plaintiff is able to drive and has been ever since her doctor cleared her to drive two weeks after the MVA.

**424**  I have no doubt that even after she returned to driving, the plaintiff preferred to have her husband accompany her to doctors' appointments, and take over the task of driving when he could. But I have some doubt that in the absence of Mr. Lane's help with driving, it would have been necessary for the plaintiff to hire help.

**425**  I am prepared to award a small amount to compensate for the driving Mr. Lane did to assist the plaintiff for a short time after the MVA. However, there is no basis in law to award continuing damages as part of an in-trust claim for a service the plaintiff is able to perform for herself.

**426**  It is somewhat difficult to put a monetary value on the time and work Mr. Lane gave to the plaintiff. I am limited by the notion of what would be reasonable in the circumstances. Further, the maximum value of the services rendered is the cost of obtaining the services outside the family. These should be services over and above what would be expected: *Farand v. Seidel*, [*2013 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y4-00000-00&context=) at paras. 99-100, citing *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=)). I have used this general value in coming to my conclusion.

**427**  I find the evidence to support Mr. Lane's continuing claim somewhat vague and I cannot find that it would go beyond what would be expected of a spouse as the case law requires: *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=), 1999 CarswellBC 484 (S.C.).

**428**  Once again, the process of determining an in-trust award is not a mathematical exercise, it is an assessment.

**429**  I award the sum of $5,000 for the services Mr. Lane has rendered to the plaintiff, of which $1,000 represents a fair estimate for his ongoing help since the plaintiff is now reasonably self-sufficient.

***e. Loss of housekeeping capacity***

**430**  It is clear that the plaintiff's ability to perform housekeeping to the same extent that she did before the MVA has been reduced.

**431**  However, the evidence is not clear on what she is truly able to do in the way of housework.

**432**  The plaintiff is not catastrophically injured. She has indicated that she is "comfortable" with giving up housework. She has also claimed both for assistive devices such as the maligned long-handled mop while saying she will not do housework in the future (although she "might" wipe out the tub from time to time).

**433**  In her report on cost of future care, Ms. Hodson listed a number of assistive devices to allow the plaintiff to do some housework, and stated that the plaintiff was able to do housework.

**434**  The plaintiff's physical issues would not keep her from being able to do at least some light housekeeping tasks, although it appears that she would suffer a degree of fatigue that could interfere with her ability to carry on working.

**435**  I do not see the plaintiff's loss of housekeeping ability as one that should result in a substantial award. However, I also note that the plaintiff has lost her former apparently boundless ability to work day and night and look after her household as well.

**436**  It is reasonable for the plaintiff to claim for the loss of a capital asset as measured by an amount for homemaking. However, the amount should be provided for a limited number of years.

**437**  This is so because the plaintiff is now 58-years-old, and would likely have required more assistance to manage her housework as she aged and carried on with her full-time job and other activities. I would award an amount for lost housekeeping capacity of $3,000 per year for the next seven years and reduce it thereafter from age 65 to 70 at a reduction of 20% a year to acknowledge the increasing likelihood that at age 70 the plaintiff would require assistance to maintain her large home in any event of her injuries.

**438**  The amount claimed for seasonal homemaking of $177.30 per year (to age 70) is agreed and for convenience, I have removed it and the following item from cost of future care and have considered it under this head.

**439**  The amount claimed for outdoor seasonal services is agreed at $1,085.00 per year.

**440**  I assess the value of the plaintiff's reduced housekeeping capacity, which I am required to treat conservatively, at $45,000.

***f. Loss of capacity***

**441**  There is general agreement on the principles that govern awards made under this head. Mr. Justice Walker made a useful summary in *Ruscheinski v. Biln*, [*2011 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6275-00000-00&context=) (at paras. 114-116):

[114] For an award under this head of damages to be made, Ms. Ruscheinski must demonstrate a "substantial possibility that lost capacity will result in pecuniary loss": *Perren v. Lalari,* [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) . . . *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=) . . . A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Perren* at para. 30.

[115] If the plaintiff discharges the burden of proof, then he or she may prove quantification of that loss by an earnings approach or by a capital asset approach: *Perren* at para. 32; . . .

[116] Garson J.A. wrote in *Perren* at para. 11 that where the loss cannot be measured in a pecuniary way, "the correct approach [is] to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=). In *Brown,* he said at para. 8:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**442**  In *Perren*, Madam Justice Garson distinguishes between the two approaches to the assessment of future loss of earning capacity. She states that where there is a demonstrated pecuniary loss which can be quantified, although it is still a loss of capacity which is being quantified, it is a measure of the real possibility of loss (at para. 12).

**443**  She goes on to say that where a loss of future capacity is proven, but it is not measurable in a pecuniary way, then the second approach, the loss of a capital asset, is an appropriate way to quantify such a loss (at para. 12).

**444**  Madam Justice Garson goes on to set out the principles governing the determination and measure of an entitlement of an award for loss of income earning capacity at para. 32:

[32] A plaintiff must always prove . . . that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach . . . or a capital asset approach . . . . The former approach will be more useful when the loss is more easily measurable . . . . The latter approach will be more useful when the loss is not as easily measurable . . . . A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her employment. . . . [Emphasis in original.]

**445**  Once causation is proven on the balance of probabilities, future or hypothetical events can be factored into the calculation of damages according to degrees of probability: *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 475.

**446**  The plaintiff's injuries are enduring. She remains afflicted with pain and fatigue and cognitive issues. It is my view she has proved she would have been able to perform at a more senior level from the position she holds now but for the injuries suffered in the MVA.

**447**  There are of course negative contingencies which must be considered: the fact is that her age somewhat affects her marketability.

**448**  The plaintiff seeks an award based on the earnings approach as she says that, but for the MVA, she would have completed her doctorate by 2009 and have obtained a more senior position in special education as her colleague in the Ed.D. programme, Dr. Julie Parker, did when she became the director of special education for the School District of North Vancouver.

**449**  But Dr. Parker did not give evidence and I do not know what her career path was. As well, her age is not known to me. I cannot give any weight to the general comparison of Dr. Parker offered by the plaintiff.

**450**  The plaintiff points out that during her programme, she was awarded a fellowship that recognized her particular talents, suggesting that she would have been highly marketable once she completed her doctorate.

**451**  Had she obtained a position in North Vancouver, she would have earned $40,000 more per year, with substantial additional benefits worth up to 16%.

**452**  As set out in the report of Mr. Carson, had the plaintiff completed her doctorate in 2009, based on statistical averages, she could have been earning $13,000 more per year from 2009 forward.

**453**  The plaintiff argues that had she finished her Ed.D. in 2009, she would have been undertaking her search for higher level positions at age 55. Nevertheless, the plaintiff is not like Dr. Carter, who obtained his qualifications much earlier in his life, and retired at the age the plaintiff was when she finished her doctorate.

**454**  Counsel for the plaintiff advised that if I were to find there was a real and substantial possibility that the plaintiff suffered the loss of such a position as the North Vancouver job as a result of the injuries she suffered in the MVA, I must also consider that the plaintiff's pension benefits would also have increased over her years of work, and award an amount for that loss.

**455**  Plaintiff's counsel also argued that I should consider the possibility that the plaintiff's high energy, but for the MVA, could also have led to her being able to not only take on a senior position in special education, but also teach at a university in the evenings.

**456**  I reject this argument for the simple reason that the evidence of the former senior school administrators (Dr. Brayne and Dr. Carter, and Mr. Stewart Ladyman) indicated that a director of special education position or its equivalent requires long hours and substantial stress. The plaintiff would not have been entering such a position as a young woman. As I have noted, she was 54 years old at the time of the MVA, a reality which impacts a person even with her former level of energy.

**457**  It is my view that the plaintiff could not have performed in both positions.

**458**  I am also not convinced that the plaintiff is unable to perform such additional income-earning jobs such as doing educational assessments during the summer, as Ms. Predy does.

**459**  I also note that the plaintiff returned to full time work in her capacity as a school psychologist on April 16, 2010, and despite some continuing difficulties with her fatigue, she has not missed one day of work even while working on her dissertation and its defense.

**460**  I do not accept that the plaintiff's failure to obtain the job as District Vice-Principal for Student Support Services in her own School District is related to the injuries she suffered in the MVA. I do not have any evidence to suggest that there is a connection between the two events, notwithstanding the fact that the plaintiff knew who was responsible for the decision not to grant her an interview and chose not to call that person as a witness.

**461**  In the result, I am left with an admission from the plaintiff that she feels she is capable of performing the job she was not awarded and this is corroborated by her colleague, Ms. Predy.

**462**  However, the plaintiff has not applied for other positions as she feels she is unable to travel long distances from her home in Maple Ridge due to her fatigue and she is concerned she will not be able to perform at the level required due to her cognitive issues.

**463**  Before the MVA, the plaintiff did not have experience in administration in her school district and she had only entered the position as School Psychologist in 2005.

**464**  It is likely she would have spent some time in an entry level administrative position before being able to move on should a suitable position have become available.

**465**  In summary, I do not share the view that the plaintiff's loss is as substantial as that claimed by her counsel. I find that it is entirely speculative to say that the plaintiff would have obtained the most senior position in special education in a school district.

**466**  Nonetheless, I remain of the view that there was a substantial possibility she would have moved up had she not suffered the MVA.

**467**  It seems reasonable to me that she would have had to work her way up.

**468**  It is my view she would likely have found an entry level administrative position by 2010, resulting in an increase in salary.

**469**  If I consider that her earnings would have been comparable to those of Ms. Shearer, the District Principal, from 2010 forward, than her loss can be assessed over time at about $7,000 - $10,000 per year to age 65 with a corresponding increase in benefits and pension which I will leave to counsel to calculate.

**470**  With the passage of time, it is my view that the plaintiff may also be able to undertake some assessment work or move into administration should a suitable position become available, and I have deducted a contingent amount of 20% for that possibility.

**471**  I accept her evidence that she would work until age 70, and assess her loss of capacity at $90,000 based on working to that age.

**CONCLUSION**

**472**  The plaintiff will be awarded damages as follows:

1. Non-pecuniary damages of $110,000;
2. Past loss of wages of $64,902.41;
3. Special damages of $19,257.81;

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|  | iv | Cost of future care of $70,000; |  |

1. Loss of housekeeping capacity of $45,000;
2. In-trust award to Mr. Lane $5,000;
3. Loss of capacity $90,000 (plus an additional amount for pension and benefits).

**473**  Counsel for the plaintiff assured me that she and counsel for the defendant could deal with the calculation of pension and benefits on the loss of capacity award. I will also leave it to counsel to calculate any required deductions or discounts.

**474**  I have already mentioned that I inferred the amount for which the plaintiff is out of pocket for therapy sessions due to the absence of a figure. I have tried to be as accurate as possible. However, if I am in error due to the gap in the evidence, counsel should first attempt to agree on the correct figure based on my decision to allow all of the plaintiff's therapy sessions. They may come back before me if they are unable to agree on the proper amount.

**475**  I am advised by counsel that they wish the matter of costs to be reserved and to make submissions before me. If necessary, the parties may also make submissions with respect to a tax gross-up.

**476**  They may request a time to appear before me from the Registry.

L.D. RUSSELL J.

**End of Document**

[***Loveys v. Fleetham, [2012] B.C.J. No. 491***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-628C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.C. Armstrong J.

Heard: June 6-10 and 13-17, 2011.

Judgment: March 12, 2012.

Docket: M109551

Registry: New Westminster

**[2012] B.C.J. No. 491** | 2012 BCSC 358

Between Karen Loveys, Plaintiff, and Beverly Fleetham and Bridge Transport Ltd., Defendants

(339 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Fibromyalgia or chronic pain — Psychological injuries — Emotional and mental distress — Depression — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant who was driving erratically — Post-accident, plaintiff involved in other events which caused stress and she experienced return of depression and bulimia — As result of accident plaintiff suffered soft tissues injuries to neck, shoulders and back which evolved into chronic pain — Plaintiff's psychiatric symptoms not caused or exacerbated by accident — Plaintiff entitled to non-pecuniary damages of $65,000, damages for past income loss of $47,000, future income loss of $100,000, special damages of $6,622 and costs of future care of $1,000.**

**Damages — Types of damages — General damages — Categories of — Loss of enjoyment of life — Loss of income — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Expenses and expenditures — Medical — Medications — Therapy or rehabilitation — Transportation — Non-pecuniary loss — Pain and suffering — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant who was driving erratically — Post-accident, plaintiff involved in other events which caused stress and she experienced return of depression and bulimia — As result of accident plaintiff suffered soft tissues injuries to neck, shoulders and back which evolved into chronic pain — Plaintiff's psychiatric symptoms not caused or exacerbated by accident — Plaintiff entitled to non-pecuniary damages of $65,000, damages for past income loss of $47,000, future income loss of $100,000, special damages of $6,622 and costs of future care of $1,000.**

**Damages — Assessment of damages — Limiting factors — Pre-existing conditions — Thin or crumbling skull rule — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Plaintiff was struck by defendant who was driving erratically — Post-accident, plaintiff involved in other events which caused stress and she experienced return of depression and bulimia — As result of accident plaintiff suffered soft tissues injuries to neck, shoulders and back which evolved into chronic pain — Plaintiff's psychiatric symptoms not caused or exacerbated by accident — Plaintiff entitled to non-pecuniary damages of $65,000, damages for past income loss of $47,000, future income loss of $100,000, special damages of $6,622 and costs of future care of $1,000.**

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| --- |
| Action by a motorist for damages for injuries sustained in a motor vehicle accident. The plaintiff was driving southbound on a city street when a large truck, driven erratically by the defendant, struck her van, pushing her vehicle off the road and causing her injury. As a result of the accident, the plaintiff suffered a soft tissue injury to her neck and upper back and shoulders, which caused her pain. The plaintiff later received medical treatment, attended chiropractic and massage therapy and saw a dentist in relation to her injuries. In addition, the plaintiff alleged that as a result of the accident, she suffered a chronic pain disorder, emotional trauma which developed into an anxiety disorders and exacerbation of a pre-existing depression and bulimia. After the accident, the plaintiff was involved in several incidents which caused her stress including a dispute with the strata council of the building where she lived, an audit by Revenue Canada, a bankruptcy and her parents' failing health. Prior to the accident, the plaintiff suffered from arthritis in one toe, low back pain, depression and bulimia. She was very active and had a background in fitness and aquatics. She previously worked for the police and the armed forces and later became a fitness instructor and trainer and a real estate salesperson. She was a competitive dancer and enjoyed running, skiing, swimming and motorcycle riding. Post-accident, the plaintiff reduced her dance training because of pain and declined dance competitions. She participated in social outings, but was unable to ski or climb. For four or five months after the accident, she was less productive as a real estate agent and sought the assistance of others to service her clients. When she returned to work she limited her activity to three or four hours per day. She alleged she lost 22 sales because of her physical inability to do the work required. The plaintiff sought damages including general damages, past loss of income, impaired earning capacity, special damages and future care costs. The defendant admitted liability, but disputed the extent of the plaintiff's injuries and argued that he depression and anxiety were not caused or exacerbated by the accident but related to other issues in the plaintiff's life. In addition, the defendant alleged that the plaintiff failed to mitigate her damages.  HELD: Action allowed.  As a result of the accident, the plaintiff suffered soft-tissue injuries to her neck, back and shoulder which evolved into a chronic pain disorder. However, the plaintiff's psychiatric symptoms were not caused or exacerbated by the accident, but were triggered by non-accident related events, although they might have had an impact on her chronic pain. The plaintiff was entitled to non-pecuniary damages of $65,000 for the significant suffering and inconvenience that resulted from the accident and the impact that her chronic pain had on her life. The plaintiff was also entitled to damages for past income loss of $47,000 as she experienced some limitations on her capacity to fulfill her duties as a realtor which affected her income. As the plaintiff was less capable overall of earning income due to her compensable injuries, she was entitled to damages for future income loss of $100,000. The plaintiff was also awarded special damages of $6,622 for therapy, prescriptions, mileage and car rental expenses, and costs of future care of $1,000 for future chiropractic treatments. |

**Statutes, Regulations and Rules Cited:**

Law and Equity Act, *RSBC 1996, CHAPTER 253*,

Supreme Court Civil Rules,

**Counsel**

Counsel for Plaintiff: P. Buxton.

Counsel for Defendants: C.J. Watson.

[Editor's note: A corrigendum was released by the Court April 24, 2012; the corrections have been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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

**Introduction**

**1**  On November 24, 2006, Karen Loveys was driving southbound on 192nd Street between 32nd Avenue and 36th Avenue in Surrey, B.C. when a large truck, driven erratically by the defendant, Beverly Fleetham, struck her Ford Windstar van. As a result of the collision Ms. Loveys' van was pushed off the road and she was injured.

**2**  Liability is admitted by the defendant and this trial concerns the measure of her damages resulting from the accident. Her claim includes:

1. general damages;
2. past loss of income;
3. impaired earning capacity;
4. special damages; and
5. future care costs.

**Positions of the Parties**

**3**  The plaintiff argues that the car accident caused a chronic pain disorder associated with psychological factors and a general medical condition. She argues that she suffered emotional trauma following the accident and she developed an anxiety disorder and an exacerbation of a pre-existing depression and bulimia. She argues that her anxiety and depression have decreased her pain thresholds and increased her perception of pain. She argues that the effects of the injuries are permanent and will interfere with her ability to earn income until age 65.

**4**  The defendant argues that the accident caused a mild soft tissue injury to her neck and upper back and shoulders with objective evidence to support claims of a continuing injury as a result of her accident. They argue that the effects of these injuries lasted for 3 to 6 months and that the plaintiff's depression and anxiety were not caused or exacerbated by the auto accident but relate to other issues in the plaintiff's life, unrelated to the accident.

**5**  The defendants argue that the plaintiff suffered very little, if any, past income loss and no long-term damage to her future income earning ability. They argue that her claims for special damages are excessive and for future care costs are unsupported by the evidence.

**6**  Finally, the defendant argues that the plaintiff failed to mitigate her losses.

**Issues**

**7**  The issues in this trial are:

1. Has the plaintiff proven that the car accident caused soft tissue injuries to her neck, shoulders, upper back and shoulder girdle region?
2. Has the plaintiff proven that the car accident caused chronic pain in her neck, shoulders, upper back and shoulder girdle region?
3. Has the plaintiff proven that the car accident caused an exacerbation of the plaintiff's pre-existing major depression and bulimia, chronic pain disorder, and acute stress disorder?
4. Is the plaintiff's ongoing neck, shoulder and upper back pain a chronic pain disorder resulting from anxiety and depression associated with emotional trauma resulting from the car accident?
5. If the accident is the cause of the plaintiff's past, present and future symptoms, what damages should she receive?
6. Has the defendant established on the balance of probabilities the requisite evidence to prove the plaintiff failed to mitigate losses?

**Background**

**Pre-Accident**

**8**  Ms. Loveys was born April 3, 1962, in Kitchener, Ontario. Her father was an electrical engineer and her mother a nurse. She had two siblings. She was a highly accomplished athlete and student throughout her teenage and early adult years.

**9**  Between ages 13 and 19 Ms. Loveys was a successful aquatic athlete and competitive swimmer. At age 13 she achieved the fastest times for a person to swim across Lake Ontario from the United States to Canada.

**10**  In her teenage years she was a babysitter and earned a bronze lifesaving certificate and St. John's ambulance qualifications with CPR training. She was a junior lifeguard in Kitchener, Ontario and a camp counselor. By age 15 she achieved her junior lifeguard qualification and earned a national lifeguard certificate; she qualified to become a water safety instructor. Between ages 16 and 19 she was employed by the Kitchener parks department as a lifeguard and swimming instructor and volunteered as a candy striper at a local hospital.

**11**  Between 1979 and 1981 Ms. Loveys was a volunteer coach for a synchronized swimming team. At age 17 she achieved a Red Cross instructor certificate with first aid qualifications and taught first aid. She became a certified St. John's ambulance instructor.

**12**  Between 1976 and 1980 she was a synchronized swimmer and also a synchronized swimming instructor. By age 18 she became a ski instructor and worked with the local ski patrol. Between 1978 and 1980 Ms. Loveys was a Cub Scout leader and was becoming a certified YMCA aquatic fitness instructor.

**13**  She graduated from high school in 1980 and for the next three years worked part-time at the YMCA as a lifeguard and aqua fitness director. She also attended Conestoga College in Kitchener, Ontario.

**14**  At age 20 she took up scuba diving and from 1981 she worked as an aquatics director, lifeguard and swimming instructor.

**15**  In 1983 she was the valedictorian of her class at Conestoga College, graduating in criminology and law enforcement. She became a ski instructor for visually impaired people. She was a volunteer ski instructor and worked in the ski patrol at Blue Mountain in Collingwood, Ontario.

**16**  From 1984 to 1986 she was employed by the Metropolitan Toronto police force as a civilian member. She also was an instructor at the Justice Institute. At that time she also worked part-time at the Vaughn recreation center in adaptive aquatics teaching disabled people to swim.

**17**  In 1986 Ms. Loveys left the Toronto police department and went to work in the armed forces at Camp Borden. She worked with the military police and volunteered to teach swimming to new recruits; she received a commendation for this work.

**18**  At Camp Borden she was a lifeguard, swimming instructor and water safety instructor. She had a background in fitness and developed aquatic programs to help injured servicemen recovery from injury.

**19**  In 1987 and 1988 Ms. Loveys attended Georgian College where she studied business and communications. In 1988 she volunteered as a first aid and CPR coordinator in Barrie, Ontario. She was a representative for the Canadian Armed Forces and worked to develop public programs for fitness.

**20**  In 1988 Ms. Loveys became a national lifeguard instructor trainer, teaching candidates to become lifeguard instructors.

**21**  In 1989 Ms. Loveys moved to British Columbia and took up lifeguarding duties and water safety instructing in Delta. In 1991 and 1992 she worked at the WC Blair pool in Langley as the aquatics director in the facility. She was responsible for planning programs and supervising lifeguards.

**22**  In 1990 and she passed an intensive 16-week course to achieve her Workers Compensation Board certification in first aid.

**23**  From 1988 to 1990 Ms. Loveys became a B.C. fitness instructor and trainer and managed her own aqua swim business. In 1990 she became a member of the B.C. Corp. of Commissioners where she was involved in by-law enforcement.

**24**  In the early 1990s she completed an assertiveness training program to improve her ability to positively project herself in business situations. She completed a modeling course to improve her physical presentation in the business world.

**25**  From 1996 to 2006 Ms. Loveys volunteered with Langley Emergency Services with an interest in disaster evacuations. During the Kelowna fires she worked in that community as a food coordinator.

**26**  Ms. Loveys is a competitive dancer in partnership with her companion, Daniel Brunt. She started competitive dancing in 2002 and has won several dance competitions. She has had opportunities to dance internationally. Prior to the accident she and Mr. Brunt would train six days per week.

**27**  In 1992 Ms. Loveys passed the UBC Real Estate and Mortgage Brokers course and qualified to become a real estate salesperson. This was a 16 week course aimed at teaching all aspects of the real estate business. After qualifying, she held positions at several real estate agencies including Realty One where she worked at the time of the accident. Currently she is employed at Grey Friars Realty.

**28**  As early as 1993 she received an award for the highest volume of sales in her area. Her real estate work involved visiting clients in their homes, marketing and door knocking, with less than 1% of her time at the real estate agency offices. Before the accident she would spend approximately 20 hours per week driving and 20 to 30 hours per week with clients in their homes or in the field.

**29**  In the years before the accident she was able to run, ski, swim, dance, climb Grouse Mountain, and enjoy long motorcycle rides. In regards to her motorcycle, she would normally drive two to three times per week between April and September with some multi-day trips out of the province.

**The Accident**

**30**  On November 24, 2006, Ms. Loveys was driving south on 192nd Street in Surrey when she observed the defendant's vehicle weaving back and forth across the highway as it came towards her car, which had come to a stop on the west side of the road. A collision became imminent as the defendant approached; she covered her face and turned away from the left side of her minivan. The defendant's vehicle struck the rear of Ms. Loveys' vehicle causing her to move back and forth with her upper body bending backward over the right armrest. The left rear of her minivan was pushed westbound off the road surface resulting in modest damage to the back left corner.

**31**  She described the force of the collision as moderate to severe; she was jostled inside the vehicle on impact. She recalled sitting in the minivan after the collision and lying on the right armrest. She felt pain in her upper right side of her body halfway from her belt to her armpit. She had pain in the part of her back resting on the armrest in addition to pain up to the shoulder and neck area. Her jaw and left toe were sore. She felt nauseated, confused and dazed.

**32**  Ms. Loveys went to speak to the defendant who yelled at her. She felt intimidated and nervous. Police and fire personnel attended at the scene but she did not require immediate medical attention. She left the scene of the accident with the tow truck driver. Her vehicle was towed to an impound lot and the tow truck driver gave her a ride home.

**Pre-Accident Health**

**33**  Before the accident Ms. Loveys suffered arthritis in her left toe, which had been troubling her for some months. This toe was worse after the accident. She also had a history of low back pain, depression and bulimia dating back many years.

**34**  Ms. Loveys acknowledged having difficulty sleeping prior to the accident but did not believe she suffered from insomnia or bulimia. She obtained sleeping pills on January 27, 2006, which coincided with her attendance at her doctor's office when she reported the return of her bulimia. She received 30 sleeping pills and repeated the prescription on August 8, 2006. Her sleep problems caused her some difficulty but she did not miss any work due to lack of sleep.

**35**  Between 2000 and 2001 Ms. Loveys' depression resurfaced. Dr. Bola-Reebye prescribed medications for eight to nine months leading to improvement in those symptoms. She said she had no depression in the year before the accident but appeared to have had symptoms of bulimia in March 2006. She also had pain in her toe before the accident.

**After the Accident**

**36**  In the aftermath of the accident Ms. Loveys described pain in her upper back and in her neck. This pain was more noticeable when she moved her arm or neck. She felt pain in the mid-back in the area between her waist and her armpit.

**37**  Some of her areas of discomfort improved within a few weeks after the accident but others areas remained problematic. She did not have any upper back pain prior to the accident nor was she experiencing any lower back pain, although she had a history of lower back pain. Ms. Loveys had been seeing a chiropractor for many years prior to the accident, but those treatments were aimed at ongoing lower back pain and for regular maintenance adjustments. Her last visit had been six months prior to the accident.

**38**  Ms. Loveys returned home after the accident and was nauseated; there was a worsening of her headache, pain in her upper back, shoulders, neck and jaw.

**39**  The next day she saw a locum physician at her family doctor's office. She informed him of the pain in her back, neck, shoulders, and jaw and described her headaches. She was nauseated and reported an increase in pain and swelling in her toe.

**40**  She saw her dentist for an assessment and treatment of her jaw pain.

**41**  The minivan she was driving at the time of the accident was declared a write-off and she was provided a rental vehicle from November 27 to December 10. She attended appointments with her chiropractor, dentist and a massage therapist. She does not recall working but did visit with her insurance company.

**42**  She could not perform her work duties at the time and made arrangements for others to assist in taking care of her existing clients. She could not remember but speculated that Mr. Brunt or a work assistant, Patricia Simpson, might have driven her rental car at this time. At some point Ms. Simpson was paid to drive Ms. Loveys for work purposes and do some of the lifting associated with her business. She was paid $100 for five hours work in December 2006 and $100 for work in April 2007.

**43**  The records disclosed that between November 27, 2006 and December 13, 2006, Ms. Loveys' rental car travelled 1,074 kms and she was the only authorized driver. Ms. Loveys recalled one occasion driving to Abbotsford to give some documents to one client; she was paid a referral fee for clients that were transferred to other realtors.

**44**  Her nausea and fatigue were resolved within several days of the accident. She described continuing sharp pain in her neck, shoulder and upper back pain; she said it was like being kicked in the back. One week after the accident she felt the pain was gradually improving. The range of motion of her neck improved and her arms did not feel as painful when she used them. The pain was not constant and it diminished in intensity from time to time.

**45**  Four months after the accident there were times when the pain decreased such that she did not notice discomfort but it continued to fluctuate.

**46**  Her pain worsened in the middle of the nights when she would wake up with upper back pain and tingling down her arms to her fingers. She had some numbness in her shoulders with pins and needles. Her improvement corresponded with treatments by her chiropractor and massage therapist.

**47**  There was continuing gradual improvement in her symptoms during 2007 and 2008; sometimes she was pain free. She could not identify a pattern for this improvement although at times she could go for two weeks without a problem. Good posture did not generate pain but when she maintained a fixed posture while dancing (called "framing") she experienced pain.

**Post-Accident Difficulties**

**48**  There were several events in Ms. Loveys' post-accident life that caused her significant stress. In 2007 and 2008 Ms. Loveys was involved in a fractious dispute with the strata council in the building where she lived. She was under an audit by Canada Revenue that started in late 2005. This was a very stressful event that led to an unsuccessful appeal after the accident. Ms. Loveys eventually became bankrupt, in part, as a result of the outstanding taxes.

**49**  Several months after the accident Ms. Loveys experienced a recurrence of her bulimia.

**50**  Ms. Loveys' parents were elderly and their failing health led to a stressful and difficult time for her in 2009.

**51**  In 2007 and 2008 Ms. Loveys was engaged in a legal dispute with the strata owners where she lived. In February 2008 she reported concerns about suicidal ideation to her family doctor and was referred to a psychiatrist. It appears she reported that Mr. Brunt had been abusive and that the strata litigation was becoming overwhelming. The details of her circumstances at this time are important and will be expanded upon.

**Strata Dispute**

**52**  Ms. Loveys was engaged in protracted litigation with the strata owners of her building that began on March 16, 2007, when she filed a petition claiming relief regarding management of the condominium. On October 24, 2007, the respondent delivered a motion to strike an important part of her petition.

**53**  Initially she handled this dispute without counsel but eventually engaged a lawyer to represent her when she found the injuries impaired her ability to manage. She later discharged her lawyer because she was unable to pay the legal fees.

**54**  The litigation was moving forward and on December 3, 2007, Ms. Loveys delivered notice of intention to act in person. On December 7, 2007, she applied for an order to cross-examine three witnesses in the strata dispute. On December 31, 2007, the respondents applied to cross-examine Ms. Loveys. Ms. Loveys could not remember if 37 affidavits were exchanged in the strata owners litigation; it appears that the issues were complex. On January 2, 2008, Ms. Loveys delivered a motion to amend her petition to add other parties. On January 10, 2008, Ms. Loveys wrote to counsel for the respondent threatening to advance claims for damages in fraud and ***negligence*** against the Strata Corp. and council members.

**55**  On February 4, 5 and 6, 2008 the strata owners' motion to strike an important part of her petition was heard. Ms. Loveys could not remember the length of the hearing. The substance of this part of her petition was to require the strata owners to ensure that all glass enclosed balconies of the strata be restored to their original condition. She was unsuccessful and an important aspect of her claim was struck out. This unfavorable decision in the strata dispute had a profound effect on Ms. Loveys; she said she felt terrible and could not understand the decision.

**February Attendances at Peace Arch Hospital and Tracy Conlin**

**56**  The stresses in her life in February 2008 came to a climax and caused her to be treated at Peace Arch Hospital on two occasions that month.

**57**  In early February 2008 the plaintiff was frustrated with her inability to cope and was feeling overwhelmed because of the strata dispute and other issues in her life. She saw Dr. Bola-Reebye, her family physician, because she was depressed and wanted help. She was referred to Peace Arch Hospital for an assessment. She was not admitted but talked to Dr. Zaitzow, a psychiatrist, about her accident and the strata lawsuit. Some of her focus on that date was suicidal ideation related to the strata owners lawsuit. Dr. Zaitzow apparently recommended she begin taking medications; she could not recall if she accepted that advice but Dr. Mallavarapu's (a second psychiatrist seen by the plaintiff) records indicate she did not take the medications suggested by Dr. Zaitzow.

**58**  Ten days after that visit, the Strata Corporation lawsuit was decided against Ms. Loveys. On her way home from that court appearance she was very stressed and upset and confused as to how the Strata Corporation "would survive" in light of the court's decision. Mr. Brunt was driving and they argued in the car. When they were close to home she tried to leave the car intending to walk home. Initially, Mr. Brunt would not let her out of the car; eventually he stopped and she left the vehicle. The police were called on the understanding that Ms. Loveys had indicated an intent to commit suicide. She was taken to Peace Arch Hospital where she was seen by Ms. Tracy Conlin, a psychiatric nurse.

**59**  Ms. Loveys talked to Ms. Conlin about her pain and the strata dispute and was later released to go home. She had told Mr. Brunt she did not want to live in a relationship with all the screaming and arguing they were doing. While in the hospital she was firm in her decision that she did not want to take medications for her distress.

**60**  Ms. Conlin is a registered psychiatric nurse who worked at Peace Arch Hospital on February 20, 2008. At the time Ms. Conlin had been employed with the Fraser Health Authority as a psychiatric nurse since 2000. She possessed a three-year registered psychiatric nurses' diploma from Douglas College and had also completed a bachelor of science in nursing in Saskatchewan.

**61**  Ms. Conlin was employed as a casual nurse in the emergency department at Peace Arch Hospital when Ms. Loveys was treated on February 20, 2008. At that time Ms. Conlin's role was to interview patients who had passed through the triage process. Typically Ms. Conlin would interview a patient and follow a questioning process set out in standard forms. She would record the description of what circumstances brought the patient to the hospital including an evaluation of the mental status of the person and any suicide risk. She was concerned with safety.

**62**  Ms. Loveys and Ms. Conlin were examined and cross-examined about this interview with the plaintiff. In the notes prepared by Ms. Conlin during this interview she recorded the following details of her conversation with Ms. Loveys (including a translation of Ms. Conlin's abbreviations in the document):

Patient is a 45-year-old single female who was brought in by RCMP under section 28 of the BCMHA. Patient attended Supreme Court today after attempting to sue Strata Corporation (property she owns) today in Supreme Court[,] lost first count of 14 counts, lost approximately 60-80 thousand dollars, under stress, feeling overwhelmed and frustrated with outcome of today's court hearing. Driving home from Vancouver with her boyfriend[,] reported he was not supportive and understanding of her stress, felt frustrated and reported she stated would rather die than be in a situation with her boyfriend in car. Reported she took keys out of ignition, car still running as it is a hybrid and was trying to get out of her car. Patient reported felt unsafe with boyfriend in car. Patient denied suicidal intent or plan. Patient responded she has passive suicidal thoughts[,] reported she feels this is related to increase stress or of court case which has consumed her life for the past nine months. Nonsupportive boyfriend. Patient reported her two main problems are: 1. Boyfriend of five years ongoing conflict in the relationship and has been abusive towards her 2. court case and nine months consuming her money and time[.]

**63**  I also noted that Ms. Conlin commented:

Patient reported was working as successful realtor before court case consumed her time and money. Plans to return to work and follow-up with mental health for further support.

**64**  Ms. Conlin could not recall the details of her meeting with Ms. Loveys but was able to identify her signature on this document as well as the handwriting at pages 10 to 13 and remarked that she recorded her conversation in these notes.

**65**  In cross-examination Ms. Conlin noted that the triage nurse had indicated a concern regarding suicide ideation of Ms. Loveys'. In her interview Ms. Loveys denied any intent of suicide. She noted that Ms. Loveys had good insight as to why she was at the hospital, understood the problem, appeared bright and intelligent, and alert to the present. She reported that Ms. Loveys' attendance appeared to have been initiated as a result of the loss of a court case. Ms. Conlin's notes reflect that Ms. Loveys intended to "let go of the court case and move on with her life". She had plans to return to her successful career as a realtor.

**66**  Ms. Conlin pointed out that her notes will usually be a quote of what she hears from the patient. In the final analysis, it appears that Ms. Loveys was not suicidal at the time of her attendance at Peace Arch Hospital; rather she had earlier made a comment that she would "rather die than be in a car with her boyfriend" after learning of the failure of her Strata Corporation lawsuit.

**67**  Ms. Loveys said that the decision of the Court in February was a low point because she lost between $60,000 and $80,000 and would be required to bear the Strata Corporation's costs. She was under stress and overwhelmed because she did not have the money. She acknowledged telling a female at the hospital that her boyfriend of five years had become abusive and that they were frustrated. She also recalls mentioning her court case of nine months had consumed her money and time. She did not recall telling the nurse that she was working as a successful realtor before the court case.

**68**  Later Ms. Loveys negotiated a sale of her strata unit; the transaction completed in April 2008. She discontinued her lawsuit and was eventually required to pay costs, some of which were assessed as special costs.

**Bulimia**

**69**  Ms. Loveys had had a very long history of bulimia which she said resurfaced three to four months after the accident. She testified that since 1995 she had pursued treatment but that the condition had been in remission for five to six years. She said the bulimia returned slowly and intermittently in March 2007. She felt as if she were slipping back into her old behaviors and was frustrated, stressed and angry at not getting better.

**70**  Under cross-examination Ms. Loveys confirmed that as of January 27, 2006, she was still binging and purging. She acknowledged that her evidence in chief was wrong on this point although she professed to not remembering binging and purging in or about January 2006. She was referred to a support group in January 2006 and believed, but could not confirm, she stopped binging after attending that group.

**71**  Ms. Loveys believed that her bulimia was a response to stress which she thought occurred as a result of pain and a lack of money. She denied that the binging and purging that started six months after the accident was caused by the stress of the strata dispute.

**Family Concerns**

**72**  Ms. Loveys described stressful and difficult times because her father was diagnosed with Alzheimer's disease in 2009. Her mother was in the seniors facility and in poor health. In March 2009 a friend was murdered. She agreed that these events caused stress in her life but she denied any of them caused her to lose time from work.

**Canada Revenue**

**73**  Canada Revenue had begun an audit of Ms. Loveys' income tax returns in late 2005. After the accident this process became very stressful as she appealed an adverse ruling by Canada Revenue Agency ("CRA") regarding an unusual tax avoidance system under which she declined to pay taxes as a "natural person". This continuing legal battle caused her significant stress and emotional wear and tear.

**74**  Ms. Loveys filed for bankruptcy in September 2009. That bankruptcy was prompted, in a large part, by her unpaid account at CRA in the order of $178,000. She acknowledged that this was a significant source of stress by September 2009.

**Business Issues**

**75**  Ms. Loveys was cross-examined about a November 14, 2007, statement she wrote indicating that her business was slow because the real estate market was quite slow. She could not remember that remark but did not deny making it.

**76**  On October 23, 2008, she also wrote an e-mail which said, among other things:

To be clear, this market sucks. The Fraser Valley real estate Board had over 12,000 listings in September and only 800 sales. Sales are dropping every month. We had 2700 sales per month just one and a half years ago, and that was one out of three listings sold. Right now we have one out of 13 listings are selling. You need a spectacular price to be that one out of 13. If you need to sell your town hosted by Morehead you need it on the market now, tomorrow is too late.

**77**  Ms. Loveys did not deny sending this e-mail but was vague in her response that it was hard to remember. It certainly appears that the real estate business was not robust for Ms. Loveys in 2008. She appears to have been frustrated by the market conditions.

**Activities Post-Accident**

**78**  After the accident Ms. Loveys reduced her dance training to one day per week. As a result of pain she did not have the strength to practice and when she attempted dancing, said she needed days of rest to recoup. She described dancing as involving a fixed or rigid use of arm and neck muscles ("framing"). She said if she held rigid form for 3 minutes pain developed. She described restrictions in turning her head to the left or to the right which could result in a loss of points during competition.

**79**  After the accident Ms. Loveys declined an opportunity to attend a dance competition in Australia in November 2006. Ms. Loveys has returned to ballroom dancing and has taught dancing classes in Richmond. She dances from 1 to 1.25 hours during which she feels fine and dances without the help of medications.

**80**  Ms. Loveys was a downhill skier prior to the accident. She continued to go to the mountains with friends after the accident but did not ski. In December 2007 she tried skiing once. She had recollections of taking children with her to ski hills in 2007 and 2008 but does not remember much about those events.

**81**  Under cross-examination Ms. Loveys was referred to her regular daily diaries written from November 2006 onward. There were voluminous entries relating to activities and appointments but her memory of the events recorded was not good. The entries indicate that she was quite active in outings if not in the actual physical effort at things such as skiing, climbing and social outings. In June of 2007 Ms. Loveys recorded an event at the Grouse Grind. She said they frequently would climb the mountain but her diary indicates after the accident she rode the trolley up the mountain. One week later, on June 30, 2007, she recorded an entry relating to paragliding. She said she did not go paragliding but went to a Legion to watch a band play. She recorded other paragliding events on July 30 and 31, 2007. She notes that on September 28, 2007 she travelled to Williams Lake. She did not recall that trip.

**82**  Ms. Loveys described her current health as it has been over the six months before trial. Her neck and upper back remain the same and bother her intermittently. She said she can have as many as 4 to 5 days per week without any pain. Her shoulders are not always sore. She can have upper back and neck pain without pain in her shoulders. She visits her chiropractor once or twice per month for relief of the neck and upper back symptoms. She said there has been improvement when she goes to her chiropractor and takes Tylenol.

**83**  She continues to use sleeping pills intermittently after she is awaken with back pain or tingling in her arms. She said pain affects her normal activity. As an example, two weeks before trial she had planned some door knocking (a marketing activity) when pain developed and she stopped for half an hour. The pain resolved and she started back to work but was unable to continue for more than half an hour.

**84**  She walks 45 to 60 minutes before she gets tingling in her arms. She has limited sitting tolerance because of back pain and at home she is able to sit for half an hour before the pain interferes with her work. Before the accident she could sit for six hours at a time. She said she has difficulty carrying a clipboard.

**85**  She said that she was strong and intended to move forward after the accident and had no significant changes to her life during the first six months after the accident. She said as things piled up she was concerned she was not making as much money as before the accident and she felt she was not healing. Beginning in 2005 and into 2007 Ms. Loveys was under the stress of the CRA legal challenge and she was involved in ongoing litigation with her Strata Corporation. She reported that dealing with all of these things was stressful when coupled with her pain. She said she was "not on her game" and not functioning at the high-level of efficiency she achieved before the accident.

**86**  She said that she does not believe she was depressed today but has difficulty in performing her duties. She said she has difficulty carrying a clipboard. Recently she hosted the North Delta realtors tour to 12 listings. Due to pain, she was not able to do all of the things expected of an agent for this kind of an event.

**Credibility**

**87**  The defendants point to significant examples of inconsistencies or embellishments in Ms. Loveys' evidence. They assert that she overstated the force of impact of the collision by suggesting that her car landed in a ditch, crushed a tree, and totalled a fence. The photographs tendered did not reflect her recollection of the scene and aftermath of the collision. I accept that Ms. Loveys was extremely upset at the time of the collision and that her descriptions are inconsistent with the facts demonstrated in the photographs. She confirmed that at her discovery she said that her car completely took down a fence by the road. In cross-examination she agreed this evidence was not true. However, I do not conclude that these inconsistencies or embellishments significantly impact on Ms. Loveys' credibility; rather they reflect evidence that, in her mind, the collision was extremely serious.

**88**  Other examples of shortcomings in Ms. Loveys' credibility include her assertion that she was shaken up and nauseated at the scene and therefore could not take photographs. In cross-examination she admitted that the reason photographs were not taken was that her camera was not working.

**89**  Ms. Loveys told Gerard Kerr, an occupational therapist, that she was taken from the scene of the accident by a friend to Peace Arch Hospital and discharged the same day. This did not happen. She also told Mr. Kerr that she had not been to a gym since the accident when her appointment diaries show frequent attendances at the gym. She told Mr. Kerr that she taken several months off of work after the accident. Her evidence and more importantly her appointment diaries demonstrate that she was doing some work activities several days after the accident. She also reported to Mr. Kerr that she had left her employer, Realty One, because she was unable to perform her former sales duties and had canceled client meetings. In cross-examination she admitted that her departure from Realty One was due to a conflict with an employee at a local credit union.

**90**  Defence counsel focused on the plaintiff's assertion that she had felt pain at the scene of the accident whereas the report to her family doctor indicated that she became aware of pain and stiffness in the right hand, shoulders, neck and upper back on the morning of November 25, 2006.

**91**  Her first attendance at the family doctor was November 25, 2006, and she was prescribed analgesics and ice for soft tissue injuries. She returned to her family doctor December 12, 2006, when analgesia, massage and physiotherapy were recommended but chiropractic treatments were discouraged. Nevertheless Ms. Loveys continued a course of chiropractic treatments that began November 27, 2007 and continued 12 times before her next meeting with the doctor.

**92**  She reported to her family doctor and to Mr. Kerr that she had remained sedentary and in bed for a week or two after the accident. This evidence was inconsistent with the evidence that she drove or travelled some 1,074 km between November 27 and December 12, 2006. Further, her daily diaries indicated ongoing activity inconsistent with a suggestion she was bedridden for one to two weeks after the accident. Although Ms. Loveys explained that others might have driven her to medical appointments and might have been driving her car (notwithstanding that the car rental terms prohibited other persons operating the vehicle) I have concluded she was more active in the month after her accident than she disclosed in her evidence.

**93**  Ms. Loveys obtained a listing opportunity with clients known as Harborne after the accident. The documents relating to the Harborne property indicated that these people had listed their property on the day of the accident. On the basis of the explanation of the listing process, I have concluded that Ms. Loveys did not have a reasonable prospect of obtaining this listing.

**94**  Ms. Loveys' evidence was unreliable on several issues; these shortcomings may be explained by the passage of time, between 2006 and the trial, on her memory. Although I conclude that she has not been entirely reliable, I did not find these inconsistencies, except for the failure to admit to bulimia in March 2006, to have affected her overall credibility. Before this accident she was an accomplished citizen and I do not ascribe dishonesty to her evidence.

**Causation**

**95**  The threshold issue in this case is whether Ms. Loveys has established that the symptoms she has experienced, including both chronic pain and psychiatric symptoms, were caused by the accident. The question of causation is determined by the principle established in *Athey v. Leonati*, [*[1996] S.C.J. No. 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S0MR-00000-00&context=) 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=).

**96**  Smith J.A. summarized those principles 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=) as follows:

[107] Causation in ***negligence*** actions is established by application of the "but for" test, as was recently explained 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=):

[21] [...] 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.

[22] This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=)] at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant". Similarly, as I noted in *Blackwater v. Plint*, [[*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=)] at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, [*[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.

[108] Where indivisible damage would not have occurred but for the combination of multiple tortious causes each tortfeasor is jointly and severally liable with the others for the whole of the damage so long as his acts or omissions made a material contribution-beyond *de minimis*-to the damage: *Athey v. Leonati*, *supra*, para.para. 41 - 44; *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.). The standard of proof of causation is the balance of probabilities: *Athey v. Leonati* para. 13.

[109] "Material contribution", as that phrase was used in *Athey v. Leonati*, is synonymous with "substantial connection", as that phrase was used by McLachlin C.J.C. above in *Resurfice Corp. v. Hanke*. This causal yardstick should not be confused with the "material contribution test". As McLachlin C.J.C. explained in *Resurfice Corp. v. Hanke*, at para. 24 - 29, the "material contribution test" applies as an exception to the "but for" test of causation when it is impossible for the plaintiff to prove that the defendant's negligent conduct caused the plaintiff's injury using the "but for" test, where it is clear that the defendant breached a duty of care owed the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury, and where the plaintiff's injury falls within the ambit of the risk.

**97**  The test for causation for psychological injury is stated in *Chancery v. Chancery*, [*[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=):

In the leading case on causation for psychological injury, Mr. Justice Taylor, in *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.) described the onus on the plaintiff when dealing with causation for psychological injury, in this way (at 134):

To meet the onus which lies on a plaintiff in a case of this sort, and thereby avoid the "ultimate risk of non-persuasion", the plaintiff must, in my view, establish that his or her psychological problems have their cause in the defendant's unlawful act, rather than in any desire on the plaintiff's part for things such as care, sympathy, relaxation or compensation, and also that the plaintiff could not be expected to overcome them by his or her own inherent resources, or 'will-power'.

**98**  In this case the plaintiff alleges both physical and psychiatric injuries were suffered because of the accident and I must consider whether the injuries, if from more than one cause, were divisible or indivisible.

**Is the Injury Divisible?**

**99**  As stated in *B.P.B. v. M.M.B.*, [*2009 BCCA 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-625F-00000-00&context=), the core question is one of divisibility:

[33] In a case such as this where there are multiple causes of a plaintiff's injury, the core question is whether the injury is divisible. If it is, a plaintiff can recover from a defendant only the damages attributable to the injury caused by that defendant. If the injury is indivisible, subject to considerations I shall discuss, a plaintiff can recover 100% from the defendant of the damages attributable to the injury which is caused or contributed to by the defendant regardless of the contribution to the injury by others (*Athey*, paras. 17-20).

[34] In *Athey*, Major J. gave a simple, clear example of divisible injuries: one defendant injures the plaintiff's foot; another injures the plaintiff's arm.

**100**  Divisibility is a finding applicable to both tortious and non-tortious causes (*Athey* at para. 24). A divisible injury is one that is capable of being separated out or having liability attributed to its constituent causes (*Bradley v. Groves,* [*2010 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&context=) at para. 20). Usually cases are not so clear cut, as discussed in *Bradley* at para. 37:

If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of ***negligence***" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

**101**  The correct approach for a divisible injury is to apportion damage to each cause as follows, from *Bradley*:

[33] The approach to apportionment in *Long v. Thiessen*, [*[1968] B.C.J. No. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F06F-223R-00000-00&context=), is therefore no longer applicable to indivisible injuries. The reason is that *Long v. Thiessen* pre-supposes divisibility: *Long* requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.

[Emphasis in original.]

**102**  Indivisible injuries are treated differently. So long as a defendant is a cause of an indivisible injury, a defendant is fully liable to the plaintiff (though tortious defendants can seek contribution and indemnity under the ***Negligence*** *Act,* *R.S.B.C. 1996, c. 333*). As stated in *Estable v. New,* [*2011 BCSC 1556*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22GK-00000-00&context=):

[55] Indivisible injuries are those that cannot be separated, such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate: *Bradley*, at para. 20; see also *Athey*, at paras. 22-25.

[56] If the injuries are indivisible, the court must apply the "but for" test in respect of the defendant's act. Even though there may be several tort[i]ous or non-tort[i]ous causes of injury, so long as the defendant's act is **a** cause, the defendant is fully liable for that damage: *Bradley*, at paras. 32-37; see also *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. 19-23.

[Emphasis in original.]

**103**  Divisibility of injury is finding of fact (*Hutchings v. Dow,* [*2007 BCCA 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46D-00000-00&context=), aff'g [*2006 BCSC 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1YM-00000-00&context=) at para. 13).

**104**  The presence of a crumbling skull affects whether or not an injury is divisible, as discussed below. Many decisions do not explicitly discuss divisibility and instead directly engage in an analysis of "thin skull" and "crumbling skull" principles.

**If Divisible, is the Injury wholly or partially Divisible?**

**105**  It is possible to apportion the damages suffered as both indivisible and divisible. In *E.D.G. v. Hammer,* [*2003 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y9-00000-00&context=), the appellant was sexually assaulted by the school janitor. The assaults by Mr. Hammer ended when she was transferred to another school, but unfortunately she was then further victimized by family members on the reserve. The Supreme Court of Canada upheld the trial judge's factual conclusion at para. 33 that 90 percent of the damage was indivisible (i.e. "caused" by both Mr. Hammer and the subsequent tortfeasors) and 10 percent was divisible (i.e. not caused by the defendant Mr. Hammer). This apportionment was based in part on the opinion of an expert psychologist.

**106**  The foregoing establishes that depression is divisible to at least some degree. However, to determine the degree, one must consider if a thin skull or crumbling skull applies.

**107**  Two decisions by the Supreme Court of Canada illustrate the differences between the thin skull and crumbling skull. *Athey* is an example of the "thin skull" approach, as discussed in *B.P.B.*:

[37] In *Athey*, the Court concluded "there is a single indivisible injury, the disc herniation, so division is neither possible *nor* appropriate". *Athey* was "a straightforward application of the thin skull rule" (para. 47). The plaintiff had a pre-accident predisposition to back injury and the trial judge concluded the accidents, which were caused by the defendants, "contributed to some degree to the subsequent disc herniation" (para. 44).

**108**  *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=) describes the approach to use when a "crumbling skull" is present. In that case, the plaintiff suffered trauma at home. He then suffered further trauma when placed in a residential school, where he was sexually assaulted. The trial judge concluded that the plaintiff's troubled family life prior to the residential school, as well as other experiences at the residential school, made it likely that he would have suffered serious psychological difficulties even if the sexual abuse had never occurred. The trial judge's reasoning with respect to this issue was upheld by the Supreme Court of Canada.

**109**  The plaintiff in *Blackwater* had been psychologically damaged prior to the abuse at the residential school. The trial judge recognized the "thin skull" rule. However, the trial judge held there was no evidence that the plaintiff's family difficulties prior to the abuse at the residential school exacerbated the damage he suffered from sexual assaults at the residential school (para. 82 of *Blackwater*).

**110**  For the presence of a "crumbling skull" to affect damages, the pre-existing frailty of the plaintiff need not be certain to manifest itself. Where there is a measurable chance, but not a certainty, that the plaintiff would suffer the harm regardless of the conduct of the defendant, the ultimate award is reduced according to the weight and relative likelihood of the pre-existing frailty harming the plaintiff (*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=) at para. 48; *Athey* also at paras. 35 and 48).

**111**  At first blush this may appear to contradict the "thin skull" rule, but the reduction of award flows from the concept that a 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 (*Athey* at para. 35). A thin skull suggests the injury was avoidable with careful living. A crumbling skull suggests the injury was either unavoidable or at least there was a chance that the injury was unavoidable, regardless of the conduct of the plaintiff.

**Was there an Intervening Event?**

**112**  In *Athey,* the term "unrelated intervening events" refers to unrelated events that occurred after the plaintiff was injured. This is sometimes called a *novus actus interveniens.* These events are treated similarly to a "crumbling skull" as stated in *A. (T.W.N.)* at para. 36:

[36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* para. 31-32).

**113**  Our Court of Appeal states, "The defence of *novus actus interveniens* is successful when the new act is of sufficient magnitude to break the chain of causation [citations omitted]" (*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. 77). The analysis is conducted so that a defendant is not held liable for objectively unforeseen consequences of his or her actions (*Hussack* at para. 87). The question of whether a subsequent act breaks the chain of causation is a question of fact (*Hussack* at para. 88).

**114**  In the context of mental illness, in *Yoshikawa v. Yu,* [*[1996] B.C.J. No. 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) (C.A.) Lambert J.A. stated the following as a summary of the law:

1. The other important principle, for the purposes of this case, as a principle applicable in dealing with questions of proximate cause, is the principle that a new intervening act, occurring after the defendant's wrongful act, may give such a pronounced new impetus or deflection to the chain of causation that the original wrongful act of the defendant is no longer regarded as a sufficient cause upon which to rest legal liability. That principle is sometimes referred to as involving the occurrence of a novus actus interveniens.
2. The application of the principle relating to intervening acts involves the difficult task of finding the facts correctly on the basis of the evidence. It also requires a very nice judgment in balancing the causes of the psychological symptoms in order to decide whether the causes arising from the plaintiff's own pre-existing subjective state and the plaintiff's own individual conduct as well as from other sources such as the advice and actions of family, friends and healers, have had an independent new impetus or deflection on the existing chain of causation flowing through the defendant's wrongful act, to such an extent that the defendant's wrongful act must be regarded as a cause-in-fact for which no legal recovery is permitted. At that point, the defendant's wrongful act would no longer be a sufficient "proximate cause" in law. An example of a case where the cause-in-fact test was met, but the proximate cause test was not met because the plaintiff's psychological symptoms were brought about by his own new acts after the accident and by his grief, so that the chain of causation was given a new impetus and deflection by his own acts which therefore constituted an intervening causative force, is to be found in *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=).

**115**  The foregoing was recently cited in *MacLean v. Budget-Rent-A-Car of Edmonton Ltd. et al,* [*2006 BCSC 1344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1C8-00000-00&context=), which I will summarize shortly. *Yoshikawa* went on as follows at para. 32:

1. It seems to me that there are two different types of psychological symptoms that may be covered by the principles that are here being discussed. There are those where the psychological symptoms have their origin entirely in the defendant's wrongful act. Clearly they are compensable. And there are those psychological symptoms where the defendant's wrongful act triggers a pre-existing psychological condition so that both the defendant's wrongful act and the pre-existing condition are causes-in-fact of the psychological injury. In the latter cases the psychological injury will be compensable on the basis of a pre-existing thin skull, except only in cases where the psychological problem is so dominant as a pre-existing condition and the injuries sustained in the accident are so trivial that the accident can no longer be said to be a sufficient cause in law to support an award of damages on the basis of proximate cause.

**116**  In *Beecham*, cited above, the plaintiff and his wife were involved in a car accident. The wife suffered a brain injury that made it impossible for her to speak and control bodily functions. After a long interval from the first accident (about three years), he developed "reactive depression". The medical evidence made it clear that the depression was not caused by the shock of the accident or by the shock of seeing the injuries suffered by his wife. Instead, it was due to Mr. Beecham's inability to accept that his wife would not again be the person she was before the accident. The Court of Appeal found that while the reactive depression was reasonably foreseeable, there was no causal proximity between the tortious conduct and the class of persons affected by it (paras. 126-7). There was also a second car accident but there was no evidence it caused the reactive depression.

**117**  In *MacLean* the plaintiff was involved in two motor-vehicle accidents. He was divorced more than a year later. The defendants claimed the divorce was the cause of the depression and an intervening event. The trial judge found as follows:

[83] Considering all of the evidence I am satisfied that the break-up of the plaintiff's marriage was, at the time, an important factor that contributed to the plaintiff's depression, but it was of a temporary nature and was only one of the factors that explains his depressive symptoms. Therefore, the break-up of the marriage was not an event of such a kind and extent that it deflected the chain of causation so that the original wrongful acts of the defendants can no longer be regarded as sufficient causes upon which to rest legal liability. To put it another way, the plaintiff's separation was not sufficient to give the chain of causation a new impetus which constituted an intervening causative force.

**118**  Similarly, in *Yoshikawa* the plaintiff was in a car accident. The Court of Appeal found that the plaintiff had a thin skull and the psychological predisposition (resulting in the thin skull) was not such a dominant cause as to make the tort itself no longer a sufficient proximate cause. The depression would not have happened but for the tort.

**Plaintiff's Medical Evidence**

**119**  There are significant shortcomings in the medical evidence offered to support Ms. Loveys' claims. The difficulties in assessing her claim stem, in part, from the absence of any medical opinions from physicians treating the plaintiff for the first 2 1/2 years after the accident. The three opinions relied on by the plaintiff were very much dependent on the plaintiff's recollection of events, records and opinions created by others in the immediate aftermath of the accident and the intervening 2 1/2 years. There is no opinion from Dr. Bola-Reebye, the plaintiff's initial attending family physician. Ms. Loveys was seen by a physiatrist, Dr. Jaworski, and a psychiatrist, Dr. Zaitzow, both of whom appear to have provided reports which were not tendered at the trial but were referenced in the opinions of Dr. Mallavarapu and Dr. Hirsch. I was not asked to draw any adverse inference from the plaintiff's failure to call evidence from these treating physicians.

**Dr. Ozlins**

**120**  Dr. Laura Ozlins, an expert in family practice medicine, testified about Ms. Loveys' health. Dr. Ozlins was first licensed and began practice as a family physician on July 1, 2009. She first met Ms. Loveys in August 2010.

**121**  Dr. Ozlins' opinion is set out in her February 14, 2011 report.

**122**  Dr. Ozlins confirmed that her training included one month in psychiatric medicine during her residency and that she had attended one mental health conference at UBC in January 2011. During her family practice training she studied mood disorders, diagnosis, treatment and management of most common depressions and anxiety. She acknowledged that if a conflict existed between her psychiatric assessment of the patient and that of the treating psychiatrist, she would defer to the opinion of the psychiatrist.

**123**  Ms. Loveys had been a patient at the Morgan Creek Clinic (and the parent clinic, Hilltop Medical Clinic) for many years before the accident during which time she was treated by Dr. Bola-Reebye. Dr. Bola-Reebye was Ms. Loveys' primary treating physician before and after the auto accident. Dr. Ozlins' opinion was based, to a large measure, on her review of clinical records in Ms. Loveys' file at Morgan Creek family practice clinic and Hilltop Medical Clinic.

**124**  In 2010 Dr. Ozlins succeeded Dr. Bola-Reebye as the plaintiff's family doctor.

**125**  Dr. Ozlins provided a detailed outline of Ms. Loveys' history that she translated from records of Ms. Loveys' attendances at the Hilltop Medical Clinic commencing November 25, 2006, and concluding January 20, 2011.

**126**  Dr. Ozlins' opinions are somewhat cursory and dependent on the views of others. She first saw Ms. Loveys nearly four years after the accident. Although she relied on the clinical notes of various doctors in addition to comments in other specialists' consultation reports in her file she acknowledged in cross-examination that she had read Ms. Loveys' files from 1998 but made no reference to any pre-accident entries which included references to her previous bulimia, depression and symptomatic toe.

**127**  Many of the post-accident entries in the doctor's records recorded conversations between Ms. Loveys and other doctors (other than Dr. Bola-Reebye) as well as opinions of those physicians. These records prepared by her physicians are evidence of what Ms. Loveys was reporting to her doctors on the dates mentioned in the notes; but they are not evidence of the facts reported.

**128**  She confirmed that those pre-accident records reflect that in October 2004 Ms. Loveys presented with a complaint of insomnia for which she was prescribed 100 tablets of Imovane, a sleeping pill. On March 21, 2005, Ms. Loveys was seen again with a sleeping problem and was prescribed 90 tablets of Imovane for sleep disorder. On April 25, 2005, Ms. Loveys was seen for low back pain that had persisted for several years. On September 17, 2005, Ms. Loveys received a further prescription to help her sleep. On November 30, 2005, Ms. Loveys received a prescription for anti-inflammatories and muscle relaxants related to a low back problem that had persisted for many years.

**129**  On January 18, 2006, she was again prescribed 30 sleeping pills. On June 26, 2006 she was treated for a bulimia. She was eating and purging herself regularly and was referred to a support group. On July 10, 2006, she saw the doctor for tenderness over her low back area. On January 27, 2006, she was prescribed additional sleeping medications and reviewed her problems with bulimia. On August 8, 2006, her prescription for sleeping pills was renewed.

**130**  Although not referenced in Dr. Ozlins' report, she testified that Ms. Loveys did not complain of nausea or jaw problems or of nightmares on her first visit with Dr. Bola Reebye. The clinical records record that on the morning of November 25, 2006 (the day after the accident) Ms. Loveys became aware of pain and stiffness of the right hand, shoulders, neck and upper back. She had a reduced range of motion.

**131**  Dr. Ozlins' notes for 2007 indicate as follows:

1. On March 2, 2007, Ms. Loveys was able to sit and work on her computer and do housework for up to 20 minutes before pain became disabling. She had returned to work part-time and was attending physiotherapy and massage therapy. She had a decreased range of motion. This was the last time Ms. Loveys was noted to have a reduced range of motion.
2. On March 27, 2007, she reported difficulty in coping with her return to work and had returned to her bulimic behavior. On that day she was advised to stop work and obtain counseling for her bulimia.
3. On April 11, 2007, Ms. Loveys reported that her bulimia had been under control for about nine months prior to the accident but she had relapsed because of the accident.
4. On June 13, 2007, Ms. Loveys reported steady improvement with her symptoms. She was working 20 to 25 hours per week. There was a mention that Ms. Loveys had pain in her big toe.
5. On October 1, 2007, Ms. Loveys suffered a trauma to her right arm when she was accidentally pulled during a dance. She had pain in the right deltoid and had stopped all of her physiotherapy and massage therapy and chiropractic therapy related to the car accident; she reported improvement.
6. On October 22, 2007, she reported pain the in the trapezius muscles radiating into the right arm with numbness in the right and middle finger. Apparently the treating physician believed she might have an ulnar nerve entrapment.
7. On November 14, 2007, she reported ongoing pain in the right upper limb with tingling. Ms. Loveys reported she was stressed because the real estate market was quite slow at the time but this remark was not included in Dr. Ozlins' report.
8. On November 21, 2007, she first reported a panic attack followed by severe chest pain lasting 10 to 15 minutes. Her symptoms were consistent with anxiety and esophageal spasm.
9. On December 28, 2007, Ms. Loveys reported improvements in her upper back since stopping gym attendance one month previously. She still felt both arms getting numb especially on the right side with tingling in the right finger.

**132**  On February 11, 2008, Ms. Loveys was seen by Dr. Bola-Reebye for active suicidal ideation. Counsel read to the doctor the text of the entry for that day which included a comment that Ms. Loveys was suicidal, in litigation with her strata, in debt and looking at a drug overdose. Ms. Loveys was referred to Peace Arch Hospital and seen by a psychiatrist, Dr. Zaitzow. Although Dr. Ozlins referred to the consultation report of Dr. Zaitzow of February 11, 2008, she did not have the Peace Arch Hospital records from February 20, 2008. These records were significant because Ms. Loveys had attended Peace Arch Hospital under a further suspicion that she was suicidal (even though she denied an intention to harm herself). Those notes indicate she was clearly stressed and depressed as a result of losing an important issue in the litigation with her strata council and as a result of an abusive relationship with her boyfriend. Dr. Ozlins' notes for 2008 continue:

1. On March 10, 2008, Ms. Loveys saw a neurologist who concluded nerve conduction studies of her upper extremities were normal. Her findings of tingling in the arms and hands were thought to be positional nocturnal paresthesia.
2. On July 28, 2008, Ms. Loveys' mid-back pain was reported as okay but was recently aggravated by poor biking technique. She was coping with the combination of chiropractic treatment and Tylenol or Advil as needed. A bone scan was done June 4, 2008, for her low back and problems with her left toe.
3. On October 27, 2008, she was having difficulties with stress and was taking sleep medications for anxiety and insomnia. She was stressed about an incident which occurred at her examination for discovery.On August 26, 2009, Ms. Loveys reported arm numbness and tingling radiating from the shoulders down to the hands. A referral was made to a neurologist. Neurological studies were normal.

**133**  In 2009 the following occurred:

1. On November 25, 2009, her symptoms of depression were worsening and she was prescribed Effexor.
2. On May 3, 2010, Ms. Loveys reported continuing numbness in both hands and discomfort in her upper back and neck. She was seen by neurologist Dr. Singh. His impression was that she did not have a neurological problem.

**134**  By August 4, 2010, Ms. Loveys reported chronic upper and mid-back pain with unchanged paresthesia. She was having daily mild to moderate upper back pain for which she took Tylenol and sleeping medications. She had a normal range of motion in her neck and shoulders but had some muscle tightness. She was achieving relief with yoga and receiving massage therapy. In 2010 other events unfolded in this way:

1. On November 8, 2010, Ms. Loveys was reporting depression, poor concentration, poor energy, disrupted sleep and fleeting suicidal ideation.
2. On November 26, 2010, her left great toe pain was bothersome and had a poor range of motion. It appears she has severe osteoarthritis of that joint.
3. On January 20, 2011, she reported pain and tightness between the shoulder blades which was worse with prolonged sitting and heavy lifting. She said the pain becomes significant enough up to three times per week that she is unable to attend work.

**135**  Dr. Ozlins' opinion is that Ms. Loveys has chronic mid and upper back pain symptoms with intermittent flares since the accident. It is probable that her ongoing upper and mid-back symptoms were triggered by the accident and the prognosis remains guarded for complete recovery. If the conditions remain unchanged the doctor is uncertain whether Ms. Loveys will be able to return to full-time work.

**136**  The doctor opined that it was possible that the pain and restricted work hours negatively affected Ms. Loveys' emotional status. She was encouraged to continue counseling and consider antidepressant medication.

**137**  I note that Dr. Ozlins did not connect the paresthesia to the injuries sustained in the accident. In fact, it appears that this symptom developed after an incident while Ms. Loveys was dancing in October 2007. She suffered a trauma to her right arm and pain in the right deltoid. The pain was in the trapezius muscles with infrequent radiation down the right arm with numbness in the right and ring and little finger. I have concluded that the evidence of paresthesia, tingling and numbness are unconnected to the injuries sustained in the car accident.

**138**  Dr. Ozlins concluded that the plaintiffs' mid and upper back symptoms were probably triggered by the accident. She said Ms. Loveys' "bulimia and depression escalated after the accident. It is possible that the pain and restricted work hours that resulted following her accident negatively affected her emotional status."

**Dr. Hirsch**

**139**  The plaintiff tendered the opinion of Dr. G. Hirsch, a specialist in physical medicine and rehabilitation. Dr. Hirsch provided reports dated April 21, 2003 and February 15, 2011. He was not cross-examined. I have reviewed the facts and assumptions relied upon in the report of Dr. Hirsch. They include:

1. Ever since an accident in 1984 she experienced intermittent localized low back pain for which she received chiropractic and massage therapy treatments. In the year prior to the accident she had pain in the low back for a few hours once per month. She had a low back x-ray four months before the accident which showed degenerative changes.
2. Two weeks before the accident the plaintiff had x-rays showing advanced joint space narrowing and osteoarthrosis in the toe.
3. Ms. Loveys had been diagnosed with depression and an eating disorder but had not been under the care of any psychiatric, psychologist or counsellor in the two years leading up to the accident. (This was not exactly true as Ms. Loveys had been received some intervention for her bulimia in March 2006).

**140**  Dr. Hirsch referred to Dr. Jaworski's opinion but his report was not tendered in evidence by either party. Ms. Loveys was also assessed by Dr. Zaitzow on February 11, 2008 for suicidal ideation of potential suicide plan. Dr. Hirsch referred to Dr. Zaitzow's opinion that suggested the accident had triggered a major depression. Dr. Zaitzow was not called to give evidence.

**141**  In April 2009 Dr. Hirsch opined that Ms. Loveys had myofascial pain and was predisposed to this condition due to loss of strength and flexibility in the neck muscles and shoulder girdle as an incident of her injuries. He notes she has reduced tolerance for postures and acuities that stress the neck and shoulder girdle and develops pain with those activities. He advises against long-term passive treatments such as chiropractic, physiotherapy or massage.

**142**  He expected the plaintiff to make further symptomatic gains and ultimately make a good or very good recovery. It was possible she could be left with some intermittent discomfort or pain.

**143**  He believed that three to six months was a reasonable assessment of her inability to partially and fully perform her duties. He thought she was capable of working full time in occupations which are sedentary, with light to moderate physical demand. He said she is physically fit to resume all of her pre-motor vehicle accident sporting activities but it is possible she may not be able to pursue these activities with the same intensity as before the accident. Dr. Hirsch does not believe the plaintiff requires homemaker assistance, special assistance or any other treatment nor will she develop any long-term or progressive conditions.

**144**  It is clear that the plaintiff had a symptomatic toe prior to the accident and that her toe pain stemmed from severe osteoarthritis. Dr. Hirsch concluded that the onset and persistence of the painful toe is not causally related to the accident. The plaintiff testified that the toe pain was worse after the accident and affected her with her activities.

**145**  Dr. Hirsch doubts that Ms. Loveys will make a full symptomatic recovery and her symptoms may temporarily interfere with her ability to perform tasks that stress her neck or upper back.

**146**  He concluded that Ms. Loveys' injuries sustained in the accident were limited to soft tissue structures and did not involve any significant damage to her neck or back. The neck, shoulder and upper back pain were causally related to the accident. He did not conclude that her headaches were caused by the accident but left open the possibility that they were referred from her neck.

**147**  In his report of February 15, 2011, Dr. Hirsch repeated that he could not identify any musculoskeletal or neurologic impairment to preclude the plaintiff from working full time as a real estate agent or performing all domestic tasks. This was consistent with his first report of April 2009 that her ongoing neck, shoulder and upper back pain reflects pain coming from the muscles and their attachments. This myofascial pain results from a loss of strength and flexibility in the muscles of her neck and shoulder and as a late effect of soft tissue injuries. Her reduced tolerance for postures and activities that stressed the neck and shoulder cause pain.

**148**  The report states she should be able to resume her reasonable recreational activities but may not be able to bring the same vigour to those pursuits as she could before the accident. He notes she may need to take breaks to space out doing physically taxing activities in and around her home.

**149**  He concluded it was unlikely she will make a full symptomatic recovery but she might benefit from trigger point injections performed by a physician taking care of her.

**Dr. Mallavarapu**

**150**  Dr. Mallavarapu examined Ms. Loveys on June 18, 2009 and February 4, 2011; he provided two reports. In the first report he concluded she likely developed a chronic pain disorder associated with psychological factors and a general medical condition. He diagnosed her with a major depression recurrent, in partial remission, bulimia in remission, chronic pain disorder improved, and moderately severe psychological stress.

**151**  Dr. Mallavarapu concludes that the plaintiff has likely developed a chronic pain disorder associated with both psychological factors and a general medical condition. He opined that she experiences increased pain symptoms as a result of severe anxiety and depression associated with the emotional trauma resulting from the collision. She had an acute stress disorder for three months after the accident and an exacerbation of a pre-existing major depressive disorder which would not have occurred but for the accident.

**152**  He said she was emotionally traumatized by the accident and developed symptoms of acute stress disorder by way of severe anxiety, preoccupation with the accident, flashbacks of the accident, fear of driving and sleep disturbance. The symptoms exacerbated her pre-existing major depression but improved over the first three months after the accident. He thought it was also probable that she suffered an exacerbation of a pre-existing bulimia following the accident; the bulimia has improved over the past two years and is in remission.

**153**  He said there was no evidence she would have developed an acute stress disorder, an exacerbation of a pre-existing depression or an exacerbation of pre-existing depression if not involved in the accident.

**154**  In his second report he repeated his diagnosis of major depressive disorder in partial remission, bulimia in remission, acute stress order resolved, chronic pain disorder in partial remission, disorder associated with depression and chronic pain disorder, and moderately severe psychosocial stress. He added a new diagnosis of sexual dysfunction due to pain that was apparently not a problem in June 2009.

**155**  Dr. Mallavarapu relied on the plaintiff's report that she had difficulties with her boyfriend on account of pain symptoms, lack of interest in sex, and an inability to enjoy life. She said that she continues to have problems with her boyfriend. The plaintiff did not testify to these facts, including sexual dysfunction.

**156**  He observed that the plaintiff declined to take antidepressant medication recommended by Dr. Zaitzow in 2008. Apparently she said she was afraid of the side effects.

**157**  Dr. Mallavarapu said that she was at a higher risk of developing recurrence of major depressive disorder and chronic pain disorder when compared to the general population who had not suffered a major depressive disorder and chronic pain disorder as a result of an accident.

**158**  He also said Ms. Loveys' condition has reached a plateau and there is a 10% to 15% chance she will be able to return to her pre-accident level of functioning. He recommended 20 sessions of cognitive behavioural therapy (CBT) through a trained psychologist with expertise in chronic pain disorder, depression and sexual dysfunction.

**159**  Dr. Mallavarapu prepared his reports on the plaintiff after reviewing medical records and reports of other physicians. He references three medical reports, a CL 19 (a report in ICBC's prescribed form) of April 11, 2007, a report of Dr. Bola-Reebye, a report from Dr. Hirsch and a report of Dr. Jaworski dated July 13, 2007. He also reviewed clinical records from the plaintiff's family doctor from March 3, 2004 to January 12, 2007 and from November 25, 2006 to November 26, 2010. Neither the records nor the opinions were put in evidence.

**160**  Dr. Mallavarapu set out the list of documents, facts and assumptions he relied on. These included the following:

Following the motor vehicle accident on 24 November 2006, Ms. Karen Loveys developed symptoms of depression, anxiety, panic attacks, fear of driving and flashbacks of the accident.

Ms. Loveys consulted Dr. Zaitzow for the treatment of depression through the early part of 2007.

Ms. Karen Loveys suffered from bulimia on and off since she was 17 years of age. Her symptoms of bulimia were in remission for many years prior to the motor vehicle accident on 24 November 2006. She experienced an exacerbation of her symptoms of bulimia following the MVA of November 24, 2006.

**161**  He also said:

Ms. Loveys was emotionally traumatized in the motor vehicle accident on 24 November 2006. She developed symptoms of acute stress disorder by way of severe anxiety, preoccupation with the accident, flashbacks of the accident, fear of driving and sleep disturbance. The symptoms improved during the first three months post accident.

**162**  In the first report Dr. Mallavarapu concluded that the plaintiff's pre-existing bulimia was exacerbated following the accident and her pre-existing major depression was also exacerbated from the emotional trauma following the accident. He felt she would not have developed her constellation of physical and emotional difficulties if she had not been injured in the accident. He said:

It is probable that Ms. Loveys would not have developed her present constellation of her physical and emotional difficulties if she had not been injured in the motor vehicle accident of November 24, 2006. There is no evidence that Ms. Loveys would have developed an acute stress disorder and exacerbation of her pre-existing major depression and bulimia if she were not involved in the motor vehicle accident on November 24, 2006.

**163**  In his second report Dr. Mallavarapu relied on substantially the same facts and assumptions and added the following:

After the motor vehicle collision, Ms. Karen Loveys felt anxious, worried and developed fear of driving. Ms. Loveys also experienced flashbacks of the accident and sleep disturbance.

Ms. Loveys felt depressed, sad and unhappy. She felt tired. She had difficulty with her concentration. She also had problems sleeping through the night.

**164**  Dr. Mallavarapu concluded that plaintiff suffered from a major depression which was in partial remission. He noted that she suffered depression off and on in the past but he did not take into consideration other possible post-accident triggers of her depression. He did not have any information about the plaintiff's suicidal ideation in February 2008; the stresses due to abuse in her relationship with Mr. Brunt; the impact of the litigation loss; the death of her friend; the strain of her parents failing health; or her bankruptcy. He confirmed that psychological stressors were necessary to start a major depression and that future depressions are more likely and that these stressors, not caused by the accident, could be factors in the recurrence of psychiatric symptoms.

**165**  I observed that Dr. Mallavarapu relied solely on the plaintiff's report that she suffered flashbacks after the accident in support of some of his conclusions; there was no evidence of this symptom of her injuries. The records of the family doctor contain no indications of flashbacks or emotional disturbances.

**166**  She said that during the first four months after the accident she continued to have pain in her neck, upper back, shoulders and tingling in her arms. Her bulimia surfaced three to four months after the accident. At trial Ms. Loveys described her physical symptoms of nausea and fatigue that lasted for several days after the accident. At this time she forced herself not to be anxious.

**167**  Ms. Loveys said that for six months after the accident she was very strong and trying to move forward. However, she was concerned that her income was not returning to her pre-accident level and she began to slip. Things were piling up and by February 2008 she was feeling overwhelmed and depressed because she was not getting adequate assistance. In response, Dr. Bola-Reebye referred her to Peace Arch Hospital in February 2008.

**168**  This evidence is inconsistent with Dr. Mallavarapu's findings and assumptions. She apparently told him she was fearful of driving, and had flashbacks in the first two to three months post-accident. It is important to observe that the plaintiff did not give evidence at trial that she had experienced flashbacks, panic attacks or a fear of driving.

**169**  Between December 2006 and March 2007 Ms. Loveys' dispute with CRA was continuing and the strata legal dispute had moved into litigation. These events were stressful.

**170**  Under cross-examination Dr. Mallavarapu testified that he relied on the following :

1. the plaintiff had not suffered from bulimia within two years of the accident (contrary to the plaintiff's evidence she had been treated for bulimia in March 2006);
2. she had panic attacks and fear of driving (the plaintiff gave no evidence of panic attacks after driving nor was there any evidence of panic attacks in the plaintiff's clinical records made during the first six months after the accident);
3. the plaintiff's statement that she had had flashbacks (there was no evidence in the plaintiff's clinical records nor in the evidence she gave at trial indicating she had experienced flashbacks of the accident);
4. he noted Ms. Loveys had been treated for depression in early 2007 by Dr. Zaitzow. It appears Dr. Zaitzow actually became involved in early 2008 when the plaintiff presented with suicidal ideation and not 2007;
5. he did not know that the plaintiff was seen twice in February at Peace Arch Hospital suffering significant emotional distress over her lawsuit and abuse of her boyfriend;
6. psychological stress is necessary to start the depression; and
7. he observed that she had sexual dysfunction due to pain and depression (she did not give evidence to support that assumption).

**171**  The defence argued that the factual underpinnings of his report were so flawed as to render the Dr. Mallavarapu's opinion of little value in assessing this case. The shortcomings in Dr. Mallavarapu's report turn on the following observations:

1. Dr. Mallavarapu's opinion is based entirely on the plaintiff's statements made to him almost 2 1/2 years after the accident and the recounting of statements she made to her treating physicians in the interim. The defence alleges Ms. Loveys lacked reliability on important evidence.
2. The doctor confirmed that the best time to diagnose and document the symptoms of the injured person is on their attendance at the hospital immediately after the event. He said this is the best collaborative evidence.
3. He did not have or review the plaintiff's appointment diaries indicating activity incongruent with her stated post-accident limitations.
4. The defence says there is no collateral evidence to support a diagnosis of acute stress disorder.
5. Dr. Mallavarapu relied on the plaintiff's report that her bulimia had been in remission for many years before the accident. This was untrue as the plaintiff confirmed she suffered from purging and binge eating in January 2006 and her condition did not go into remission until after she had attended group therapy. The records indicate that the bulimia became a problem in late March. Ms. Loveys attended a support group to help in overcoming this condition; there was no evidence about the length of time required to overcome her binging.
6. Dr. Mallavarapu did not have the records from Peace Arch Hospital that indicated in 2008 the plaintiff's main problems were ongoing conflict in her relationship with her boyfriend who had been abusive towards her and the court case of nine months consuming her money and time. Both of those accounts to the hospital staff by the plaintiff did not mention any impact of the car accident related injuries on her emotional health. Further, he did not have the record made by Dr. Bola Reebye that Ms. Loveys was stressed because the real estate market was poor in November 2007.
7. Dr. Mallavarapu changed his evidence during cross-examination when he recanted his evidence that not all of the DSM criteria for acute stress disorder were required to be present in order to make that diagnosis. He eventually acknowledged that all of those criteria were required. This is significant because there was no evidence from the first six months after the accident that Ms. Loveys was experiencing flashbacks; this understanding came only when reporting her medical history and were not supported by any of her statements recorded by her family doctor nor in her evidence at trial.
8. As a further example Dr. Mallavarapu relied on the plaintiff's report that her vehicle had landed up in the ditch after the impact. The plaintiff acknowledged this was not true. This discrepancy had the potential of leaving Dr. Mallavarapu with the impression of a more horrific event that actually occurred
9. In his report the doctor attributed statements to the plaintiff that she experienced depression, anxiety, panic attacks, fear of driving, and flashbacks of the accident. He acknowledged that the plaintiff's actual words were that she had been sad, anxious when driving and she felt uncomfortable, nervous and overly cautious. She did not confirm these facts at trial.
10. Dr. Mallavarapu overstated the plaintiff's actual symptoms. In addition, Ms. Loveys did not give evidence of experiencing anxiety, panic attacks, fear of driving or flashbacks.
11. He could not recall if the plaintiff was taking sleep medications before the accident.
12. He said that Ms. Loveys was treated by Dr. Zaitzow in March 2007. This appears to be an error as the evidence confirmed that she first met with Dr. Zaitzow in March 2008.

**172**  On the evidence before me I cannot conclude that the plaintiff suffered flashbacks, panic attacks, sexual dysfunction, fear of driving, or anxiety attacks after or as a result of the accident.

**173**  Dr. Mallavarapu said there was a connection between the plaintiff's anxiety and depression and the lowering of her pain threshold producing an increase in her pain perception. He felt that the increase in pain symptoms was a result of the anxiety and depression associated with the emotional trauma resulting from the motor vehicle collision. He said that she developed acute stress disorder characterized by severe anxiety, flashbacks of the accident, nightmares, fear of driving and avoidance of travel, all of which resolved within three months of the accident. He opined that she has recovered from her acute stress disorder and bulimia but continues to suffer from depression when the pain disorder gets worse. He says her major depression is in partial remission as is her chronic pain disorder.

**174**  The plaintiff told the doctor she had not had any symptoms of bulimia for two years prior to the accident. He said he had no information about her purging and binging within nine months of the accident.

**175**  Under cross-examination he confirmed psychiatric assessments and diagnosis are more reliable when the data is obtained closer to the causative event. An example of the contradiction between his report and the events as they occurred arises from the plaintiff's report that her pain began on the evening of the accident whereas she had reported to her family doctor that she became aware of pain and stiffness the next day. Her failure to advise him of the return of her bulimia reported in March 2006 meant he did not have important information about her pre-accident health. Dr. Mallavarapu clearly placed more weight on the report given to him by the plaintiff than on the facts revealed in the records made at the time of the events.

**176**  Dr. Mallavarapu also confirmed that medications taken as prescribed are likely to be 50 to 60% effective in treating depression. He said CBT can be effective in enhancing improvements. He noted in his report that the plaintiff declined to use the antidepressants suggested by Dr. Zaitzow.

**177**  He reported that the plaintiff was an adult onset trauma victim who would likely improve with medications.

**178**  Dr. Mallavarapu's opinion is the foundation of the plaintiff's claim that her psychological injuries were caused by the accident. I have reviewed Dr. Mallavarapu's evidence and carefully assessed his opinion in light of his assumptions, the relevant omissions in his report, and the results of his cross-examination.

**179**  In addressing the strength of Dr. Mallavarapu's opinion the decision of the Court of Appeal in *Mazur v. Lucas,* [*2010 BCCA 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B31M-00000-00&context=) is apposite. This decision concerned hearsay evidence relied upon by an experts in forming opinions. The Court said:

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

1. An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others - this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
2. An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
3. The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
4. The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[Emphasis added.]

And:

[35] Mr. Justice Sopinka concurred with Wilson J. in the result in *Lavallee*, [*[1990] 1 S.C.R. 852*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6548-00000-00&context=), but made some clarifying remarks which are relevant to the present appeal. In his view, the four propositions from *Abbey*, [*[1982] 2 S.C.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), concerning the admissibility and weight of expert opinion evidence may yield a result which is self-contradictory (at 898-899):

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

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

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

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

[Emphasis added.]

**180**  Portions of Dr. Mallavarapu's assumptions are composed of hearsay and fact which are not in dispute. However, critical portions of his opinion turn on facts reported to him by the plaintiff but which were not given in evidence at the trial. Further, he did not have relevant information about the events affecting the plaintiff's mental health before and after the accident including her history of bulimia in March 2006.

**181**  At trial she testified that her bulimia was not symptomatic in the two years before the accident. Initially she could not recall a recurrence of her bulimia in March 2006 but, on cross-examination, acknowledged that her bulimia likely had resurfaced in March and that she took measures to curb her binging and purging.

**182**  In my view Dr. Mallavarapu relied heavily on Ms. Loveys' self reporting of symptoms without sufficient regard to the clinical notes and observations of others made prior to his involvement notwithstanding his evidence that the most reliable information is that obtained at the time of a patient's actual complaints. He does not appear to have raised with her the differences between her reports to her family doctor and the history she gave to him.

**183**  The doctor had apparently received the Peace Arch Hospital records from February 2008 but did not appear to have read them or incorporated them into his analysis of the plaintiff's diagnosis.

**184**  Under cross-examination Dr. Mallavarapu confirmed that a patient with a history of three or four events of major depression can suffer further depression with minimal stress. The defence argues correctly that the facts proved fall short of establishing that Ms. Loveys would have developed an "acute stress disorder and exacerbation of a pre-existing depression and bulimia if she were not involved in a motor vehicle accident on November 24, 2006".

**185**  I observe that the history reported by Dr. Ozlins contains no reports before November 2007 of diminished mood, depression, anxiety, panic attacks or flashbacks but did include a reference to a December 12, 2006 report that the plaintiff's appetite was down but improving and that she was worried this might trigger her previous bulimic behaviors. There is a reference to bulimic behavior being a problem for her around March 27, 2007. I accept that the plaintiff may have suffered a measure of emotional distress as a result of her involvement in the accidents and the disruption to her life.

**186**  I am satisfied that she likely reported some abuse by her boyfriend, that she was stressed by her financial challenges, the death of her close friend, the stresses from having ill parents, and most significantly the loss of the strata owners lawsuit; these were all more than minimal stresses that could have triggered her depression and bulimia. The fact remains that these non-accident related events coincided with difficulties she had after the accidents and likely contributed to her overall condition.

**187**  The absence of evidence that Ms. Loveys developed a fear of driving, panic attacks, flashbacks, sexual dysfunction, and depression in the first six months after the accident leads me to conclude that Dr. Mallavarapu's assumptions have not been proven.

**188**  As a result of the absence of proof of many of the assumptions in Dr. Mallavarapu's assessment I am not able to rely on his opinions and give them the weight the plaintiff wishes to ascribe to them.

**189**  In addition to the difficulties with his assumptions he was not privy to other important details in Ms. Loveys' life that could be expected to cause a return of her depression and bulimia. I am concerned that Dr. Mallavarapu was offered access to the plaintiff's relevant hospital records from February 2008 but obviously did not review them. The evidence of the plaintiff's crisis in February 2008 pertaining to her lawsuit and her boyfriend were not disclosed to Dr. Mallavarapu nor was he apprised of the issues of her parents' health, her income tax problems or the emotional upset at the death of her friend.

**Conclusion**

**190**  I am not able to rely on Dr. Mallavarapu's opinion regarding Ms. Loveys' psychiatric disorders and I conclude that her acute stress disorder, exacerbation of her bulimia and depression were not caused by the effects of the accident. I do not accept that her symptoms of depression will worsen because of the accident. I am not satisfied on the balance of probabilities that the plaintiff suffered these psychiatric injuries and the exacerbation of her pre-existing major depressive disorder due to the accident.

**191**  I am satisfied that Ms. Loveys suffered soft tissue injuries to her neck, back and shoulder and that those areas of complaint have evolved into a chronic pain disorder. I accept the plaintiff's chronic pain was caused by the accidents. I also accept that she experienced an exacerbation of her pre-existing symptoms of depression and bulimia after the accident; the plaintiff has not proven that "but for the accident" she would not have suffered the recurrent bulimia, acute stress disorder and/or depression.

**192**  Ms. Loveys experienced significant psychological symptoms after the accident but they have not been proven to have resulted from the car accident. On the evidence it is equally possible she would have developed a major depression even if the motor-vehicle accident had not occurred. The history of disputes with CRA, the bankruptcy, the serious tax arrears, the death of her friend, her parents' illness, and the strata owners litigation all indicate she faced serious stressors that would have occurred independent of the accident. She had already had an attack of bulimia in March 2006 and was under stress at the time of the accident.

**193**  In my view Ms. Loveys' psychiatric symptoms represented a divisible injury which is separate from the initial pain and chronic pain complaints that have persisted.

**194**  The plaintiff in the case at bar seems to possess a "crumbling skull" with respect to her psychiatric condition. The situation is parallel to that described in *Hammer.* In this case it has not been proven that her psychiatric condition was caused by the accident and would not have occurred but for the accident.

**195**  I accept that the plaintiff's psychiatric symptoms diagnosed by Dr. Mallavarapu may have had an impact on perpetuation of her chronic pain symptoms. To the extent there was a connection between her continuing chronic pain and those symptoms, the damages caused by the chronic pain are fully compensable. In that respect, the injuries are indivisible. However any other damage caused by the psychiatric symptoms not connected to the chronic pain is divisible and is not compensable.

**196**  I am also satisfied that the plaintiff was suffering from significant symptoms in her left toe and in her low back before the accident. Although Ms. Loveys complained that the toe symptoms worsened after the accident the evidence does not establish that these symptoms were caused by the auto accident. It is unclear what part, if any, these symptoms might have played in the development or persistence of the plaintiff's depression or chronic neck and upper back pain.

**Damages**

**Plaintiff's Position**

**197**  Ms. Loveys argues that her damages should be assessed as follows:

1. Non-pecuniary damages in the range of $85,000-$100,000
2. Past loss of income $115,000
3. Future income loss $385,000
4. Special damages $9,394.98
5. Cost of future care $5,000

**198**  Ms. Loveys argues that she suffered injuries to her neck, back and shoulders resulting in a chronic pain condition. She argues she suffered an exacerbation of a prior condition in her left great toe, headaches, nausea and fatigue. She also argues she suffered an exacerbation of a major depression, exacerbation of bulimia, sexual dysfunction, emotional upset and acute stress disorder and chronic pain.

**199**  In arguing that her non-pecuniary damages should be assessed in the range of $85,000-$100,000 she highlighted Dr. Ozlins' opinion that she has reported neck, upper and mid-back pain since the accident. The plaintiff also reports that the accident triggered a relapse of bulimia and contributed to her depressive symptoms.

**200**  Dr. Ozlins said that it was probable that her ongoing upper and mid-back symptoms were triggered by the accident and that the chronic nature of those symptoms results in a guarded prognosis. Dr. Ozlins also said it was possible that the pain and restricted work hours negatively affected her emotional status including her bulimia and depression.

**201**  The plaintiff also relied on Dr. Hirsch's report wherein he said he could not find any musculoskeletal or neurologic impairment that would preclude the plaintiff from working full time as a realtor or performing all the domestic tasks and reasonable yard-related activities. He said that her symptoms may necessitate breaks and require her to space out her physical activity in and around her home. He opined that it would be unlikely that she will make a full symptomatic recovery; it is more likely she will have permanent discomfort in the areas described in his report.

**202**  Although Dr. Mallavarapu said that the plaintiff has likely developed a chronic pain disorder associated with both psychological factors and a general medical condition, I must deal with the physical injuries that have affected her since the accident. He opined that she experiences increased pain symptoms as a result of severe anxiety and depression associated with the emotional trauma resulting from the collision. She had an acute stress disorder for three months after the accident and an exacerbation of a pre-existing major depressive disorder which would not have occurred but for the accident.

**203**  Dr. Mallavarapu said her condition has reached a plateau and there is a only 15% chance she will be able to return to her pre-accident level of functioning. He recommended 20 sessions of CBT through a trained psychologist with expertise in chronic pain disorder, depression and sexual dysfunction.

**204**  The plaintiff pointed out that Dr. Mallavarapu was not asked if his opinions changed as a result of suggestions made to him on cross examination about the plaintiff's involvement with the Peace Arch Hospital psychiatric department following the setback in her condominium litigation in February 2008.

**Non-Pecuniary Damages**

**205**  Non-pecuniary damages are intended to compensate Ms. Loveys for pain, suffering, and loss of enjoyment of life attributable to the injuries she sustained in the accident. The award is to compensate her for those damages she has suffered up to the date of the trial and for those she will suffer in the future. The overriding principle derived from the authorities is that fairness and reasonableness of the amount of an award for these damages is measured by the negative impact of the particular injuries on Ms. Loveys. The compensation awarded should be fair and reasonable to both parties: *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=); *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; *Kuskis v. Hon Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) at para. 135.

**206**  For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews*; *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; *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at paras. 188-189.

**207**  The relevant factors in assessing non-pecuniary damages were comprehensively summarized by Mr. Justice Voith in *Lakhani v. Elliott*, [*2009 BCSC 1058*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6226-00000-00&context=) at para. 104, citing the majority opinion of the Court of Appeal in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) (see also *Kuskis* at para. 138). In *Stapley* the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

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

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

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

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiffs 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=)).

**208**  Ms. Loveys seeks an award of $85,000 to $100,000 for non-pecuniary damages, arguing such an award is merited on the basis

1. that she will likely experience ongoing chronic pain for the rest of her life and this pain will prevent her from functioning in her role as a realtor at the high level that was her performance before the accident.
2. that she has suffered emotional trauma, anxiety and exacerbation of pre-existing symptoms of bulimia and depression

**209**  Ms. Loveys has not proven entitlement to damages for the psychiatric complaints she argues were caused by the accident.

**210**  I have reviewed and considered the cases cited by Ms. Loveys' counsel on the issue of non-pecuniary damages: *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=) ($100,000 involving a plaintiff with chronic pain, post traumatic stress disorder and depression in partial remission); *Scott v. Erickson,* [*2009 BCSC 1298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62HT-00000-00&context=) ($85,000 psychological injuries preventing the plaintiff from enjoying most aspects of her pre accident life. Her physical pain was short-lived); *Jackson v. Mongrain,* [*2010 BCSC 1866*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2KH-00000-00&context=) ($75,000 for chronic pain of a nagging type, likely to be present for the rest of his life but without psychological symptoms); *Morlan v. Barrett,* [*2010 BCSC 1767*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4MF-00000-00&context=), rev'd on other grounds [*2012 BCCA 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1TW-00000-00&context=) ($125,000 for neck, upper back and shoulder pain coupled with headaches stemming from fibromyalgia); and *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=) ($100,000 for neck, shoulder, and back pain that had become chronic. The injuries affected all aspects of his life).

**211**  The defendant submits that Ms. Loveys sustained mild soft tissue injuries to her neck, upper back and shoulders that lasted for three to six months. The defence says she did not suffer from depression or anxiety after the accident and that the sources of acute stress and psychiatric symptoms were unrelated to the accident and accordingly non-pecuniary damages should be in the range of $15,000 to $25,000.

**212**  I have reviewed and considered the cases cited by defence counsel on the issue of non-pecuniary damages including: *Campbell v. Makela,* [*2003 BCSC 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2XW-00000-00&context=) ($20,000 for neck pain, upper back and mid-back pain), *Lee v. McGuire,* [*2005 BCSC 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3XB-00000-00&context=) ($20,000 for lower back pain and ongoing neck, shoulder and scapular pain); *Bohnke v. Vanderveldt*, [*2006 BCSC 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M1-00000-00&context=) ($20,000 for soft tissue injuries that had largely resolved within 14 months some residual pain and resulting in frustration and depression); *Shum v. Viveiross*, [*2006 BCSC 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1TF-00000-00&context=) ($20,000 for soft tissue injuries to the shoulders, neck and back which persisted for three months followed by stress and anxiety); *Reichennek v. Archibald*, [*2008 BCSC 1304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PB-00000-00&context=) ($22,000 for soft tissue injuries involving the neck, back and headaches. Headaches persisted after 30 months but were expected to resolve); *Job v. Van Blankers,* [*2009 BCSC 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3P3-00000-00&context=) ($25,000 for soft tissue injuries the symptoms which continued at trial. The Court was unsatisfied with the plaintiff's evidence of ongoing complaints but accepted the injury as mild to moderate.); and *Sarowa v. Gill*, [*2010 BCSC 873*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22B9-00000-00&context=) ($15,000 for mild soft tissue injuries the symptoms to the neck and lower back with a substantial recovery after 6 months).

**213**  The difficulties associated with trying to reconcile the awards in such cases are well known. Although the authorities are instructive, I do not propose to review them any further in these reasons. This is an inquiry and these cases serve only to provide guidelines as to the range of damages awarded in cases with some similarities to this case. Ms. Loveys' circumstances since the accident are quite unique to her. The assessment of her physical complaints are difficult because there is considerable interplay between the physical symptoms and the psychiatric symptoms that have altered her life since the accident. The amount of her award will turn on her unique circumstances, having regard to what is fair and just in light of the nature, extent and duration of Ms. Loveys' injuries and the impact these injuries have had on her quality of life.

**214**  I have concluded that Ms. Loveys has endured significant suffering and inconvenience resulting from the injuries from the accident. I observe that she will likely have symptoms of chronic pain for the balance of her life although there is some possibility she may yet achieve some improvement. Although I do not attribute her recurrent bulimia or her depression to the accident I accept that the duration of her physical symptoms and the interference with her very active lifestyle are important factors in this assessment. The presence of chronic pain has, for this very active woman, impacted her work life, her competitive and recreational dance, and the level of enjoyment she achieved from her other recreational choices. The plaintiff had an extraordinary history of physical accomplishments in her vocational and recreational life before the accident and her return to full participation in these activities is guarded.

**215**  Her injuries will not prevent her from returning to most of those activities; she will not be able to perform in those areas with the same intensity and for the same duration she enjoyed prior to her injuries.

**216**  Even on an intermittent basis, chronic pain deprives a victim of the enjoyment of a full and active life. Chronic pain coupled with the limitations on Ms. Loveys' recreational activity and work will play an important part limiting her future enjoyment. I must consider that her low back pain and toe pain will also detract from her enjoyment of life as will her psychiatric health issues. In view of all of these factors I conclude that she is entitled to $65,000 for her non-pecuniary losses.

**Income Loss**

**Legal Principles**

**217**  The governing principle in assessing and income loss is to restore the plaintiff to the position she would have been in if not injured by the defendant: *Lines v. Gordon,* [*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.

**218**  A claim for loss of future earning capacity raises two key questions: 1) has Ms. Loveys' earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time?

**219**  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=); *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=); *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=).

**220**  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.

**221**  The essential task of the Court is to compare the likely future of Ms. Loveys' working life if the accident had not happened with Ms. Loveys' likely future working life after this 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.

**222**  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 and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *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=).

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

**224**  The capital asset approach involves considering factors such as i) whether Ms. Loveys 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* and *Gilbert* at para. 233.

**225**  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:

[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 Ms. Loveys would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; *Ryder v. Paquette*, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79.

**226**  The plaintiff must establish that there is a real and substantial possibility that her earning capacity has been damaged and that this will result in a pecuniary loss. The Court of Appeal settled the principle in *Perren* at para 32:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, [*[2007] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), by Bauman J. in *Chang*, [*[2008] B.C.J. No. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*, [*[1999] B.C.J. No. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=). But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

**Plaintiff's Position**

**227**  The plaintiff argued that, based on the opinion of Mr. Tidball, her past income loss was $115,000. This loss flowed from her inability to work the same number of hours and being less effective during hours worked. She cancelled or missed appointments, referred clients to other realtors, shared listings, and accepted assistance from other realtors immediately following the collision.

**228**  The plaintiff claims a future loss of income also based on the opinion of Mr. Tidball that she will lose $30,000 annually to age 65. The cumulative effect of this loss results in a total wage loss of $385,200.

**Defendants' Position**

**229**  The defendants argued that the accident caused the plaintiff's mild soft tissue injury to her neck, upper back and shoulders that lasted for three to six months. There is no objective evidence to support the plaintiff's claim to continuing injury and the plaintiff's evidence to the contrary is not credible or reliable.

**230**  Key to the defendants' position is their assertion that the plaintiff did not suffer from acute stress disorder, anxiety and depression caused by the accident. They argue that this claim is not supported by the evidence.

**231**  The diagnosis of acute stress disorder was contained in the opinions of Dr. Mallavarapu on the two visits in 2009 and 2011. On the basis of Dr. Mallavarapu's review, the defendants argue that his opinions are not reliable assessments of Ms. Loveys' medical complaints arising from the accident because her evidence was not credible or accurate and Dr. Mallavarapu was not provided full disclosure of her medical history and other psychological stresses existing prior to his assessments.

**232**  The defendants pointed to the opinion of Dr. Hirsch that the plaintiff's musculoskeletal injuries would have taken three to six months to resolve during which time she would have had total and partial restrictions to her vocational activity. They also point to the functional capacity evaluator, Gerald Kerr, where he opined that the plaintiff's tolerance for sustained desk work was limited to 30 to 60 min. Defence counsel added that she could continue desk work if she took breaks and that her tolerance for full-time work is compromised by a combination of pain, fatigue and likely the effects of ongoing depression, anxiety and related mood issues.

**233**  On the basis of these opinions the defence argued that the accident did not cause the plaintiff to suffer a loss of income beyond the six-month post-accident period.

**234**  The defence also argued that the calculation of any future income loss was problematic. They argued that the opinion of Mr. Volpe, the defendants' expert, posited two scenarios; under one scenario the plaintiff suffered no income loss and under the second scenario her income loss for 2007/ 2008 was $22,814 net. They urge the Court to reject the opinion of Mr. Tidball's method of calculating the future wage loss to age 65 that concluded that the net present value of Ms. Loveys' loss is in the order of $385,200.

**235**  In regard to future care costs the defendant pointed to Dr. Hirsch's opinion that he was not averse to a few chiropractic sessions following his report of April 21, 2009. In this regard the defendants reject the suggestion by Dr. Ozlins that the plaintiff requires ongoing massage therapy, chiropractic therapy or other acupuncture. Dr. Mallavarapu recommended some further psychological intervention.

**236**  The defendant accepts the plaintiff's claim for special damages totaling $3,251.37, which include the costs of Dr. Knox, Budget rental car, Peninsula Village chiropractic, White Rock massage therapy, Morgan Creek medical, and ice packs.

**237**  The defendants argue that the plaintiff was receiving chiropractic and massage treatments prior to the time of the accident and that it was reasonable to conclude she would have continued receiving those treatments regardless of the injuries she suffered in the accident. She confirmed that she also received these treatments for pre-existing low back problem after the accident. This pre-accident pattern revealed she took 17 chiropractic treatments per year and 25 massage treatments per year.

**238**  Defendant says there is no medical justification for the plaintiff's laser treatments nor for the purchase of a therapy ball. They say the plaintiff was taking prescription sleeping pills before the accident and that there is no basis to assume that the continued use of these medications after the accident was related to or caused by her injuries.

**239**  Lastly, the defendants say they should not be required to reimburse the plaintiff for the salary of Patricia Simpson. Ms. Simpson was working for the plaintiff before the accident and any increase in her compensation after the accidents should be accounted for in the past income loss claim.

**240**  Ms. Loveys claims that she suffered mid and upper back symptoms which have became chronic since the accident. Due to the chronic nature of the symptoms her progress is guarded. It is uncertain if she will be able to return to full-time work hours as a realtor. Her bulimia and depression escalated after the accident and it is possible that pain and restricted work hours have negatively affected her emotional status.

**241**  Although there is no musculoskeletal or neurologic impairment that would preclude Ms. Loveys from working full time or performing all of her domestic duties, she may need to take breaks and spacing when doing physically taxing activities in and around her home. It is unlikely that she will make a full symptomatic recovery and more likely that she will have permanent discomfort that will interfere with her ability to perform tasks that excessively create biomechanical stresses to her neck or back. She has developed a chronic pain disorder.

**242**  Dr. Mallavarapu said Ms. Loveys' depression was in partial remission, her bulimia was in remission, and her chronic pain disorder was in partial remission. He also said that her depression becomes worse when her chronic pain symptoms recur. The major psychiatric complaints seem to have resolved within six months of the accident. These psychiatric issues would likely have impacted the plaintiff's ability to carry on a real estate business; however the evidence disclosed that her work performance was inhibited mostly by her physical complaints.

**243**  Ms. Loveys argues that the accident caused chronic neck, back and shoulder pain coupled with anxiety and depression that decreased her pain thresholds and increased her pain perception. She says that her ongoing pain symptoms are exacerbated by depression which in turn exacerbates her chronic pain.

**244**  I accept that her educational, athletic and community service histories are a testament to a strong, vital and active person. The accident has dramatically reduced her level of activity and endurance and she is facing a future of long term partially disabling pain aggravated by depression.

**245**  The defendant acknowledges that Ms. Loveys sustained injuries to her upper back and shoulders as a result of the accident. They argue that the effects of these injuries lasted three to six months and there is no objective evidence supporting the claim of a continuing disabling injury.

**246**  The defendant says Ms. Loveys' credibility is crucial to an analysis of this action. In particular, they say that Ms. Loveys' allegation of acute stress disorder and/or depression are not causally connected to the accident.

**247**  The defendants say Ms. Loveys has lost little or no income as a result of the accident and that any income loss following the accident is unrelated to these injuries she suffered.

**248**  The calculation of past and future income loss is properly characterized as a loss of earning capacity. It is the value of work that the injured plaintiff would have performed but was unable to perform because of the injury that is to be measured: *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.

**Analysis of Income Loss**

**249**  During the years Ms. Loveys had been a real estate agent, she had developed a system of business development that appeared complicated and extensive. She described, what I understood to be, a network of people who were previous clients, from her dancing connections, from her Langley Lo Riders organization, friends, families, other realtors (her Circle of Influence), and a group she developed and named the Star Group.

**250**  She described the Star Group as Canada's largest independent referral group in the real estate business. She started this group in 1994 and currently has 50 to 55 members. Her objective starting this group was to connect people from various geographical communities whose clients or potential clients would need the assistance of a realtor in the other's location.

**251**  She described her Circle of Friends as including 750 people and she always targeted a group of between 750 and 1,000 persons. At the time of the accident she had close to 1,000 people in her Circle of Friends list, which is now reduced to 750 people. She described an intensive regularized process of contacting the people on her list which she augmented by door knocking campaigns, advertising papers and distributing feature sheets. It is clear to me that the plaintiff worked very hard to develop a regular clientele and regular referral sources to maximize her income.

**252**  She said that for four or five months after the accident she did not do anything with her Star Group but had help from Ms. Simpson in distributing other marketing material. Similarly, she did not do any door knocking or telephone soliciting for four to five months after the accident. During that time productivity was restricted to seeking help of other realtors to service her clients. She testified that she is currently unable to provide full care for her clients and refers existing clients to other realtors.

**253**  When she returned to work she limited her activity to three or four hours per day. She often took breaks to attend chiropractic treatments. She believed that some of her clients engaged other realtors because she was unable to meet their needs.

**254**  When she started back to work she renewed her solicitation program by sending out birthday cards. After the accident she had not been able to manage door knocking, she did resume those efforts. She said she was uncomfortable driving long distances because her back and neck would stiffen and become painful.

**255**  At this time she has three active listings whereas her expectation was to have eleven on an ongoing basis. She attributes this difference to her ongoing pain; she says she could not service clients as she did not want to overtax herself. She worries that if the client has some marketing needs that she is unable to fulfill, she will let the client down and lose the business.

**256**  The plaintiff referred to documents relating to revenue arising from 22 sales which she lost because of her physical inability to do the work required. In regard to some of these sales, the plaintiff canceled contracts or declined to accept work because of her injuries. Where she had control of the arrangements, the plaintiff was able to refer these clients or potential clients to other realtors. She would be paid a referral fee for that effort. The plaintiff speculated on the reasons she failed to acquire the client or that the client may have abandoned her and retained another realtor. Her evidence relating to these 22 business opportunities was based on hearsay or conjecture.

**257**  I accept that obtaining reliable evidence to establish a loss of income for a realtor disabled from doing all of the activities associated with that career is difficult. I accept that, to the extent the plaintiff was disabled or partially disabled from performing those duties, she likely lost business opportunities that would otherwise have been available to her.

**258**  Ms. Loveys Circle of Influence included former clients and other possible marketing targets. It is hard to estimate the degree to which the loss of one client could affect future prospects of repeat trade. It is sufficient to say that the difficulty in proving the details of her loss should not deprive the plaintiff of recovery.

**259**  Ms. Loveys' historical income was variable. I observed that in 2002 and 2003 her commission income was $79,860 and $96,143 respectively and that those amounts rose significantly by 2005 and 2006. For the purposes of the assessment of the plaintiff's damages I accept that the optimum years for comparison are 2005 and 2006.

**260**  Before the accident the plaintiff's real estate activity was largely accomplished by visiting clients, undertaking marketing initiatives away from her office, working at home and fairly brief attendances at the agency's office. She was active in coordinating the activities of the Star Group.

**261**  The plaintiff would routinely visit predetermined areas and knock on doors of all houses in that location. From this activity she hoped to gain clients interested in buying or selling or both. She was tenacious in pursuing business leads through open houses and door knocking campaigns.

**262**  The real estate sales business requires skill, energy initiative and aptitude. She described her marketing system as "prospecting" which involved ever-expanding connections with people who have social, business, recreational or historical relationships with her.

**263**  She and her assistant, Ms. Simpson, would regularly send out Christmas cards, calendars, birthday cards, and other gifts to encourage new clients to retain her. She worked at continuing this practice after the accident.

**264**  She pursued relationships with other realtors through her Star Group and developed her Circle of Friends. She attributes the reduction in her contact groups to the fact that she has not been able to do her marketing work, develop her referral networks and service her existing clients. During 2007 she worked for clients who were less demanding and believes that her income diminished because she was "not on top of her game". I accept that the erosion of her capacity was largely related to her physical complaints but I also recognize that her psychiatric complaints, lower back and toe may have interfered with her work performance from 2007 to 2009.

**The Experts**

**Ronald Tidball**

**265**  Mr. Tidball was qualified to give expert opinion evidence in the field of income loss determination and accounting. In Mr. Tidball's report dated February 7, 2011, he opines that Ms. Loveys lost net income to the date of trial of approximately $105,000.

**266**  The defence objected to Mr. Tidball's report because of his failure to particularize all of the documents that he reviewed prior to preparing his report. Specifically the defence objected to para. 8 where he described reviewing "miscellaneous income and expense detail of Ms. Loveys." as failing to comply with the requirements of Part 11 of the *Supreme Court Civil Rules*. The defence argued that the vague description of documents in para. 8 of the report prejudiced their ability to properly prepare and instruct their expert

**267**  Although Mr. Tidball's description of the documents was lacking, in my view the shortcomings in the description do not offend the Rules. The documents referenced in para. 8 of Mr. Tidball's assumptions were those documents located at tab eight of exhibit B. They are a compilation of Ms. Loveys' income and expense data that were delivered to Mr. Tidball and relied upon by him. Mr. Tidball confirmed that he examined the contents of eight bankers boxes but did not use or rely on those documents in the preparation of his report. Mr. Tidball did not have documents related to the tax years 2008 to 2009 and estimated the variable expenses by reference to Ms. Loveys' income tax returns for those years.

**268**  Mr. Tidball made an assumption that Ms. Loveys' income for 2010 would have been $24,500; since preparation of his report a copy of her 2010 income tax return has been produced which showed income of $30,319. This increase in income alters Mr. Tidball's opinion; he now estimates her past income loss at $105,000.

**269**  Mr. Tidball assumed that Ms. Loveys lost no commissions in the year 2006. The lag time between achieving a listing and a sale was such that he did not believe she suffered any income loss as a result of her non-attendance at work at during the balance of 2006.

**270**  Mr. Tidball was cross-examined on his use of the pre-injury years statistics to determine her projected losses from the date of the accident. In this case, there is some empirical evidence offered by Ms. Loveys demonstrating lost opportunities to earn commission income. Mr. Tidball mentions those opportunities in his report but did not rely on the details of those sales prospects in reaching his conclusion.

**271**  Instead, Mr. Tidball relied on the sales figures for 2004, 2005 and 2006 to project Ms. Loveys' income for the years 2007 to 2010.

**272**  When doing business valuations Mr. Tidball customarily reviews historical revenues five years prior to the valuation date. He indicated that in this case he estimated the plaintiff's post-injury commissions at $101,000 per year representing the average of the annual commissions earned in 2004 to 2006 reduced by 12% to reflect market conditions. Mr. Tidball testified that in his experience, the market value of real estate in the Fraser Valley has remained fairly constant since 2006. He considered Ms. Loveys' sales income as a percentage of the value of the properties sold and allowing for the fact that the global economic crisis of 2008, there may have been price reductions which would have affected Ms. Loveys' income. This is corroborated by the apparent drop in Fraser Valley real estate sales between 2007 and 2008 when the number of sales dropped approximately 29%.

**273**  Mr. Tidball's calculations relied on an estimate of the variable expenses incurred in the pre-accident years. He said that variable expenses are deducted from income because the plaintiff would have been obliged to continue payment of fixed expenses notwithstanding the intervention of the accident. Further, he said that when looking at Ms. Loveys' home expenses he construed these as all fixed expenses and therefore made no deductions from net income in regard to these costs. In cross-examination he accepted that there may have been variable expenses in the home expenses but seem to suggest that those were minimal costs.

**274**  In concluding that Ms. Loveys' lost income was $102,000 between the accident and the trial date, he did not include any double ending opportunities. Double ending occurs when the listing realtor collects the commission and is not required to share that commission with a buyer's agent.

**275**  Mr. Tidball made an assumption that Ms. Loveys' bankruptcy would have had no impact on her ability to earn income. No evidence was led to support that assumption.

**276**  He noted that an audit of Ms. Loveys' 2003 and 2004 income tax returns resulted in a reassessment by CRA; this was a negotiated settlement of her tax obligations. In 2007 she was also audited for the years 2005 and 2006; he did not know the allocation of expenses flowing from that audit. He was not provided with the CRA audit documents.

**277**  Some years earlier, Ms. Loveys had made the unusual claim of distinguishing herself as a natural person and herself as an income earning realtor and had for several years before the accident purported to pay herself (the natural person) amounts which were not taxable but resulted in a reduction in her professional income by the same amount. This effort at avoiding income tax eventually failed with the CRA audits and reassessments. I understood from the evidence it was part of that reassessment and the resulting tax arrears that caused Ms. Loveys to make an assignment into bankruptcy.

**278**  Mr. Tidball made an assumption that Ms. Loveys worked fewer hours and less effectively after the accident. He assumed that she was continuing to suffer injuries up to the date of his report and that those injuries were limiting her ability to earn income. However, Ms. Loveys did not advise him as to how long she was not working after the accident. He assumed that she had ceased doing open houses and was not aware that she had resumed doing open houses at any time after the accident.

**279**  Mr. Tidball assumed that the Ms. Loveys' Circle of Influence program was discontinued after the accident and that her Star Group activities ceased for the years 2007 and 2008 and restarted in 2009. It appears that he was incorrect in these assumptions as the evidence indicates that the Star Group activities occurred in 2007.

**280**  Further, there is no evidence that the Circle of Influence process was discontinued as a result of Ms. Loveys' injuries.

**281**  Mr. Tidball did not know that Ms. Loveys had given evidence that 30% of her listings would result in sales. It seemed to me he assumed that all listings would result in sales.

**282**  Mr. Tidball's calculations did not take into account contingencies such as voluntary withdrawal from the workforce, involuntary withdrawal of the workforce, or future injury. He considered only mortality and the *Law and Equity Act*, *R.S.B.C. 1996, c. 253* discount rate.

**283**  Plaintiff's counsel argues that Ms. Loveys was engaged in real estate sales for some 19 years prior to the accident. Mr. Tidball used historical data to determine Ms. Loveys' sales prospects for 2004 and 2005. If he had used the years 2002 to 2005, the average sales commissions earned by Ms. Loveys would have been substantially less than the $102,000 as estimated by Mr. Tidball. In reviewing Mr. Tidball's evidence, I have concluded that the average post-accident sales value is inordinately high insofar as it is based on two years historical earnings, does not take into account all contingencies (which he acknowledged could be estimated by an economist) and overstated her variable expenses. As an example, Mr. Tidball reduced the variable expense for automotive from $5,976 in $2006 and $2,296 in 2007; however Ms. Loveys' income tax returns show that her business mileage changed from 24,140 km in 2006 to 15,758 km in 2007. Her total mileage in 2007 was 30,200 km and in 2007 was 20,203 km. In fact, Ms. Loveys business-related auto expenses increased as a proportion of the total expenses whereas Mr. Tidball records a 62% reduction in those expenses.

**284**  The assessment of a future stream of income which is quite uncertain yet based on historical performance is vulnerable to many contingencies. It is not a precise mathematical calculation and in my view the actual loss of income is less than set out in the Tidball report.

**285**  Mr. Tidball assumed that she would have earned average annual post-injury commissions of $101,000 and based on the average annual commissions earned in 2004 to 2006 and adjusted downward because of deterioration in market conditions. He did not take into account the years 2002 and 2003 in which the plaintiff earned substantially lower commissions. He did not take into account the time and distraction experienced by the plaintiff as a result of the Strata Corporation lawsuit or the distraction and time involved in dealing with the Canada Revenue audit and appeals. He did not factor into his analysis the other events causing disruption and stress in her life.

**286**  Mr. Tidball assumed that the plaintiff's proportion of all sales in the Langley area would have been proportional to the overall number of residential units sold in Langley between 2004 and 2010. Under cross-examination Mr. Tidball acknowledged that he reviewed statistics relating to detached homes only and chose not to include statistics dealing with condominiums. He acknowledged that the statistics may be different for condominiums.

**287**  He also mentioned 13 potential transactions lost to the plaintiff because she cancelled or missed appointments with clients. As an example, the plaintiff testified that if she had been able to attend a meeting with the Harbonnes, former clients, she "would have" secured the listing of their property. This is simply speculation by the plaintiff.

**288**  The plaintiff testified that a significant portion of her sales was in the field of condominiums.

**289**  The defendant challenged many of the assumptions relied on by Ms. Loveys.

**290**  Ms. Loveys was extensively cross-examined on her business expenses set out in tab eight. She confirmed generating the documents in tabs 8(a) to 8(h). She said that her practice was to accumulate receipts for business expenses and record those receipts into her computer. She would produce the summaries and give that document to her accountant along with the individual receipts. She confirmed that her income for 2000 was $112,990. Her income for 2004 exclusive of GST was $135,087. She said 8(c) reflected her income and expenses for 2005. She confirmed that the dates shown on the income summary reflected the dates she was paid for the sales for which she was paid compensation.

**291**  Ms. Loveys was also examined on the gas expenses and other automobile related expenses totaling $10,320 for 2005. Client expenses connected to the buyer contracts included incidental maintenance costs Ms. Loveys would pay to ensure home was ready. She also purchased gifts for buyers and in 2005 incurred total of $10,379 for buyer expenses. Listing expenses included expenses related to acting for sellers. Referral expenses included gifts that she might give to others who referred customers to her. She also included expenses under the heading "entertaining clients" where she listed expenses involving restaurants and coffee. If she was showing a house she would frequently take buyers out for coffee and at other times she would take other realtors for lunches.

**292**  Ms. Loveys' records include business expenses for chiropractic costs and massage therapy charges. She also included pharmacy expenses. In 2005 Ms. Loveys' total expenses were $60,633.53.

**293**  In the 2005 expense listing Ms. Loveys recorded payments for assistants including Ms. Simpson and others, composed of staff expenses, cleaning expenses and office expenses. She also confirmed gross income including GST at $110,890. She acknowledged that her expenses for gasoline continued with six charges for gasoline purchases after the motor vehicle accident. She could not recall the details of any of these expenses and opined that she would have put gas in vehicles operated by her assistants and possibly her own rental car. Her memory of the details surrounding these charges was extremely limited.

**294**  Notwithstanding her expenditure of some approximately $250 in gas between November 25 and December 22, she denied driving to earn income. She said the only driving done during those 10 days was to transfer files and take care of her clients. She was asked about the client expenses for buyers from November 27 to December 23. She denied personally purchasing any of the items mentioned in that category of expense adding that people helping her in the business were most likely involved. Under the category "referral expenses", including mostly gifts, she could not remember whether it was she who purchased these gifts or others. Under the heading "vendor or expenses" 10 gifts were purchased from the date of the accident to December 21, 2006. She could not remember the details of these expenses and speculated that some were gift certificates and others were purchased by her assistants. She denied attending any open houses although the "vendor expenses" include references to open house. She used several junior realtors to assist her and she presumed that they had dealt with these costs on her behalf. They would have been reimbursed for those expenses.

**295**  Ms. Loveys' had no recollection of her food and entertainment expenses between December 3 and December 22 but speculated that she may have given money to realtors to go to restaurants. She could not remember if she personally entertained any clients during those dates. Ms. Loveys began operating a new computer program resulting in a different presentation of information in 2007. Her income for 2007 was $59,799. She was asked if the client entertainment expenses listed were personally incurred by her; she could not recall. Her assistant helped in the beginning of 2007 but later that year she ran out of money and was unable to pay for assistance.

**296**  Curiously Ms. Loveys included chiropractic expenses and massage therapy expenses in her 2006 business expenses. After the date of the accident, she did not include those expenses as business expenses but sent their receipts to her lawyer upon his instructions. Ms. Loveys total expenses as altered were $53,853. In addition Ms. Levy's medical expenses were not charged as business expenses for 2006.

**297**  She took a trip to Manning Park where she met other realtors, attending a conference in Seattle, attending a Star Group meeting in February, attending a conference in Cologne and traveling to Ontario to facilitate a property sale with one of her Star Group associates. She confirmed that her gas expense for January 2007 was $763.98 and that she had purchased a replacement vehicle. She could not recall if her employee had driven her rental car or if any of the gas expenses in January 2007 were incurred by staff receiving reimbursement from her. She said she does not use all of the gas recorded in the statements as a business expense. She needed to tell her accountant to apportion the gas used for business as a percentage of the total. She had included gas expenses for "tours". She said that in March of 2007 she had tried to do some work on her own but it was not until May that she was feeling better and took her first listing. She said she was trying to get back to work.

**298**  On April 11, 2007, a note was made in the family physicians records that "Ms. Loveys was not working at this time". She was not sure what she said to the doctor but may have been trying to indicate she was attempting to get back to work.

**299**  Referring to her expenses for 2008, Ms. Loveys confirmed that $4,319.69 reflected her gas expenses. She confirmed that the expenses set out on pages for meals and coffee were for business purposes and that where she has "calculated one half" for the clients who consumed the goods purchased. She does not remember the details of those expenses.

**300**  In 2007 she recorded in her expenses $34,366 as legal expenses to a Mr. McCormack. These costs were for legal fees incurred in prosecuting a lawsuit against the Strata Corporation. She said these accounts were included in her summary and given to her accountant who would decide what was going to happen with them. She attempted to deflect any responsibility for having included those expenses in her business expenses for the year. Those expenses were personal expenses and insofar as they were included in her business records were actually an aggressive attempt to minimize her taxable income.

**Mr. Volpe**

**301**  Mr. Volpe provided an opinion for the defendant. He concluded that the plaintiff suffered no loss based on the evidence that the plaintiff's cessation of work after August 2007 was unrelated to the accident. In the alternative he calculated a potential income loss of $22,814 arising from a reduction in agreements handled by the plaintiff during 2007.

**302**  Mr. Volpe determined that the ratio of the plaintiff's sales from January to June 2007 was .89% of all units sold in Langley. This ratio is in line with her historical market share for Langley which ranges between .63% and 1.06%. For the year 2008 the plaintiff's market share of total units sold in Langley was .77%. On this basis he opines that she did not lose any income from sales in those two years.

**303**  Under his second scenario Mr. Volpe calculated the plaintiff's share of the total units sold in Langley for 2005 and 2006 at .74%. Based on that calculation he concluded that the plaintiff should have earned commission on 23 sales during 2007 compared to her 14 actual firm agreements. He applies an average commission earned by the plaintiff during 2007 to produce a gross commission loss of $38,442. After deducting variable expenses and income taxes Mr. Volpe suggests the plaintiff's lost income to the end of 2007 was $22,814.

**Conclusion**

**304**  The divergent views in the expert opinions illustrates the enormous difficulty in assessing income loss claim dependent on multiple variables including the vicissitudes of the real estate market.

**305**  The defendant points out that the plaintiff's appointment diaries show details of considerable activity in the same time frames during which she could not service existing or potential clients. Further, during the time the plaintiff claims she was unable to work because of the accident, she was experiencing significant distress and disruption in her life from unrelated accident problems.

**306**  I note that total Langley sales for 2008 are 74% of the sales in 2006. The plaintiff's income in 2008 was 76% of her income in 2006. Mr. Tidball's opinion suggests that the plaintiff's actual income rose from 2006 to 2008 by some $6,300. Her income in 2009 was $55,338. There was a demonstrable reduction in her income for 2007 and very little reduction in actual income between the years 2004 and 2005 and between 2008 and 2009.

**307**  I observed from the plaintiff's income tax returns that her total automobile expenses (excluding depreciation) were $8,873 in 2005, $9,387 in 2006, $4,532 in 2007, and $7,159 in 2008. These declared expenses provide some assistance in determining the level of the plaintiff's activity during those years. Interestingly they reflect the fact that her activity was reduced most significantly in 2007.

**308**  On all of the evidence it seems to me that the plaintiff's income loss for the year 2007 is in the order of $23,000. I have concluded that this is a reasonable measure of her loss for that year. With regard to the years 2008 and until the trial, I am not satisfied that the plaintiff's loss can be calculated in the manner suggested by Mr. Tidball or attributed solely to the accident. It seems to me on the plaintiff's evidence and that of her medical advisers she was experiencing some limitation on her capacity to fulfill the duties of a realtor. However, the evidence convinces me that her lawsuit with the strata owners, the bankruptcy, stresses relating to her parents, and difficulties in her domestic life also impacted her ability to perform at the high level she aspired to.

**309**  I must be able to conclude that on a balance of probabilities she has proven loss of income from 2008 until the date of trial as a result of the injuries suffered in the accident. I am satisfied that her ability to earn income was compromised during those years by the effects of her chronic pain but the evidence is inadequate for me to quantify that loss based on the opinions tendered by the parties. Although it is difficult, I assessed the plaintiff's loss for the years 2008 until the trial date at $30,000.

**Future Income Loss**

**310**  The plaintiff claims $30,000 per year as the value of her future loss to age 65. The plaintiff has shown that throughout her teenage and early adult years she was a person capable of enormous accomplishments scholastically and vocationally.

**311**  In my view the evidence of financial loss does not lend itself to a mathematical calculation.

**312**  I conclude Ms. Loveys is less capable overall of earning income due to the compensable injuries I have described. She has not proved on the balance of probabilities that, but for the accident, she would not have experienced the psychiatric problems that occurred after the accident. The evidence establishes that there is a real and substantial possibility that her ongoing chronic pain will impair her future income prospects. It is Ms. Loveys' capacity that has been diminished because of the injuries.

**313**  Although she will be able to perform substantially all of her duties, I conclude that the chronic nature of her physical complaints will limit her effectiveness and durability in the business of real estate sales. I accept the evidence she gave that she is less able to perform a door-to-door marketing campaign on a sustained basis as she did before the accident. I also accept that her ability to attend to office work on a prolonged basis is limited and that she will need to make adjustments in her schedule to accommodate these shortcomings. In the end I am satisfied there is a substantial likelihood that she will earn less commission income in the future. Ms. Loveys related her immediate post-accident losses to specific opportunities she was pursuing in November 2006 but which did not result in sales. Some of the facts focused on were the result of speculation and hearsay as evidence of the lost sales opportunities in 2007. However, I conclude the amount of income loss and duration of that loss is to be measured against medical and vocational evidence.

**314**  In addition to her claim of past income loss of $115,000 she also claims an annual wage loss of $30,000 to age 65. The net present value of that claim is $385,200. This latter claim is also based on her submissions that the injuries from the collision have rendered her less able to work full time hours while being less effective in her performance.

**315**  I accept that the plaintiff's historical earnings patterns are useful in evaluating her future prospects but they are not determinative of the measure of her loss. I do not accept the expert's opinions as to her loss. I will assess her damages for her future losses on the basis of the"capital asset approach". In my view the historical earnings patterns coupled with the non-accident related aspects of her health and the uncertainties of the market preclude a mathematical calculation of her impaired earning capacity. In my view the measure of Ms. Loveys' earnings potential has been diminished by reason of the compensable injuries. Balancing all the evidence, the factors affecting her economic future and the need to be fair and reasonable, I assessed the plaintiff's loss of future earning capacity at $100,000

**Mitigation**

**316**  Ms. Loveys carries a duty to mitigate her losses which includes taking all reasonable steps to minimize her losses caused by the accident. She is not entitled to recover losses that might be avoidable by taking reasonable steps to ameliorate her losses.

**317**  The onus is on the defendant to prove her failure to mitigate her losses. They must establish, from *Janaik 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 para. 32:

1. The steps which she ought to have pursued to avert or lessen the loss;
2. It would have been reasonable to pursue those steps; and
3. The extent to which her loss would have been reduced or avoided if she had taken the steps.

**318**  Preston J. in *Antoniali v. Massey*, [*2008 BCSC 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M34T-00000-00&context=) at para. 31 outlined a framework for review of a claim that a plaintiff has failed to mitigate her damages:

[31] In order to conclude that Ms. Antoniali's damages should be reduced by application of the principle that a plaintiff has a positive duty to mitigate his or her injuries, I would have to find that the defendant has established:

1. that a program of stretching and conditioning under the guidance of a personal trainer would have reduced or eliminated the effect of the injuries;
2. that the reasonable plaintiff in Ms. Antoniali's circumstances would have followed such a program;
3. that Ms. Antoniali unreasonably failed to follow such a program and;
4. the extent to which Ms. Antoniali's damages would have been reduced if she had followed such a program.

**319**  The defendant alleges that the plaintiff's refusal to take antidepressant medications prescribed by Dr. Zaitzow was, in the circumstances unreasonable. Dr. Mallavarapu indicated that 64% of people prescribed the correct medication could achieve recovery within two to six weeks and cognitive behavioural therapy may also boost effectiveness of medications. He recommended she undergo that therapy.

**320**  The defendant argues that if Ms. Loveys' depression is found to have been related to the accident then her damages should be reduced by 64% after allowing for a further six weeks for recovery.

**321**  Although I am satisfied the plaintiff's depression would have been ameliorated if she had followed the advice to take medication in February 2008, I cannot conclude that the plaintiff's chronic pain disorder (the principle reason the plaintiff is functioning at less than full capacity) would have necessarily been ameliorated. Dr. Hirsch states that her chronic pain is likely a permanent condition she will have in the future.

**322**  As a result the measure of the impact of the plaintiff's failure to mitigate is not a simple calculation based on the chance of recovering from the depression if the medications were taken. I accept that depression has been and is a component of the plaintiff's occupational limitations but the measure of that impact is modest.

**323**  Dr. Zaitzow's recommendations were made 14 months after the accident in the midst of the crisis brought on by the adverse result in her strata litigation. In the end, the best I am able to do is a 15% reduction in the plaintiff's damages by reason of her failure to follow Dr. Zaitzow's advice.

**324**  I accept that Ms. Loveys declined to take the medications prescribed by Dr. Zaitzow in February 2008. I also accept Dr. Mallavarapu's evidence that patients who take such medications can achieve substantial chances of recovering from depression.

**325**  However, I have concluded that Ms. Loveys' psychological injuries, including her depression, were not caused by the accident. Her failure to follow Dr. Zaitzow's recommendations did not significantly impact the compensable damages arising from the accident.

**326**  The defendants also argue that Ms. Loveys unreasonably cancelled at least three client appointments because they conflicted with her appointments with treating therapists. She alleged that canceling the appointments resulted in losing the opportunity to service those clients.

**327**  The plaintiff claims each of these lost sales opportunities resulted in lost income of approximately $5,000. I accept that Ms. Loveys acted unreasonably in not making adjustments to her schedule and reduced her chances of obtaining those clients. In order to assess the impact on Ms. Loveys' past income loss I need to make an estimate of how a change in her schedule would have resulted in a reduction in her loss. I have assessed that loss as a loss of capacity to earn more income but for the accident and I cannot fairly reduce that amount based on the ancedotal information relating to those three potential clients without better evidence.

**Special Damages**

**328**  The plaintiff claims special damages $9,394.

**329**  The plaintiff is entitled to recover her reasonable expenses incurred before trial if they were made necessary because of the defendant's ***negligence***. McLachlan J. (as she then was) outlined the principle 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=) (C.A.) 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.

**330**  The defendants argue that by comparing the plaintiff's 2005 and 2006 pre-accident expenses for chiropractic and massage treatments to the post-accident measure of expenses, she did not incur any additional costs due to the injuries from the accident.

**331**  I have observed that on December 12, 2006, the plaintiff was discouraged from taking chiropractic treatments. The plaintiff was taking Advil for pain control and massage and physiotherapy were recommended. Apparently on October 1, 2007, the plaintiff had stopped all physiotherapy, massage therapy and chiropractic therapy in relation to the accident. There was no evidence to support the connection between ongoing therapies and the plaintiff's injuries from October 2007. In February 2011 Dr. Ozlin's recommended the plaintiff to seek treatment via massage, physiotherapy, chiropractic and/or acupuncture therapy as needed. By contrast, Dr. Hirsch recommended against physical abilities, chiropractic spinal adjustments or massage.

**332**  It is clear from the plaintiff's evidence that she was engaged in various therapies to obtain relief from her ongoing pain. The therapies gave her some measure of relief during a time but she was attempting to return to work while working through some discomfort. I accept that some of these expenses would have been incurred if the accident had not happened. On the other hand treatments appear to have been recommended by her attending physicians. While it is difficult to ascertain the exact amount attributable to the car accident injuries I am prepared to accept that certain of the plaintiff's physiotherapy, massage, and chiropractic treatments were made necessary because of the accident related injuries.

**333**  The plaintiff claimed $549.36 for mileage and other out-of-pocket expenses and $859.90 for a rental car.

**334**  The plaintiff will recover $5,100 for therapy expenses, $549.36 for prescription expenses, mileage costs of $113.50, and $859.90 for a rental car.

**Cost of Future Care**

**335**  The plaintiff claims future care costs of $5,000.

**336**  The plaintiff is entitled to be compensated for all expenses reasonably necessary for her future medical care: see *Milina*. The test to be applied when the court considers awarding the cost of future care was set out by McLachlin J. in *Milina* at 84 as follows:

[199] 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.

...

[201] The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health.

**337**  Ms. Loveys asked for an award of $5,000 to offset ongoing treatments for massage, physiotherapy, chiropractic therapy and/or acupuncture as needed. She also sought recovery for psychological interventions. She did not provide a detailed breakdown of these claims. In view of Dr. Hirsch's recommendation there is no medical justification for the treatments the plaintiff claims might be reasonably necessary in the future except for a few chiropractic treatment, I award $1,000 for future chiropractic treatments but nothing for other therapies. In view of my conclusions regarding the psychological injuries I would not allow the plaintiff damages for future psychological interventions.

**Summary**

**338**  The plaintiff will recover the following:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (a) | Non-pecuniary damages | $65,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | Past income loss | $47,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (c) | Future income loss | $100,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (d) | Special damages | $6,622 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (e) | Future Care | $1,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $219,622 |  |

**339**  The parties will have liberty to apply to make submissions as to costs. In the absence of any position the defendant may wish to advance to the contrary, the plaintiff will have her costs and interest of the appropriate rates.

T.C. ARMSTRONG J.

\* \* \* \* \*

**CORRIGENDUM**

Released: April 24, 2012

[1] T.C. ARMSTRONG J.:-- On the cover page of my reasons for judgment released March 12, 2012 (2012 BCSC 358) the name of counsel is corrected to read C.J. Watson.

[2] In paragraph 1 the words "Beverly Fleetham" are added after the word "defendant".

[3] When the term defendant is used in these reasons, it shall include reference to both defendants, except where specifically noted.

[4] In paragraph 28 the word "it" has been removed from the last sentence.

[5] In paragraph 160, first sentence of the third paragraph of quote the word "Mrs." has been changed to read "Ms." and in the second sentence of third paragraph of quote the word "or" has been changed to read "were".

[6] In the last sentence of paragraph 171, Bullet 6, the word "the" before "Ms. Loveys" has been deleted; Bullet 9 the word "and" after the word "anxious" has been deleted; Bullet 10 the word "of" after the word "overstated" has been deleted; Bullet 12, the word "Dr. Zaitsow" has been replaced with "Dr. Zaitzow".

[7] In the last sentence of paragraph 191, the word "not" has been added before the word "have suffered".

[8] In paragraph 208 the number "$80,000" has been replaced with "$85,000".

[9] In the first sentence of paragraph 242, "Dr. Mallavarapu's" is replaced with "Dr. Mallavarapu".

[10] In the fifth sentence of paragraph 290 the word "and" should be replaced with "was".

[11] In the second sentence of paragraph 297 "January 2000" has been replaced with "January 2007"; in the fifth sentence the word "tell" has been added in front of "her accountant".

[12] In the last sentence of paragraph 300 the word "or" is corrected to read "were".

[13] In paragraph 318 the word "established" is corrected to read "failed".

[14] In the last sentence of paragraph 327 the word "potiential" is corrected to read "potential".

[15] The last sentence of paragraph 337 the word "damages" is added after "plaintiff".

T.C. ARMSTRONG J.

**End of Document**

[***McArthur v. Hudson, [2012] B.C.J. No. 1824***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2JH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D. Kloegman J.

Heard: July 9-13, 18 and 20, 2012.

Judgment: August 31, 2012.

Docket: M102589

Registry: Vancouver

**[2012] B.C.J. No. 1824** | 2012 BCSC 1293 | 38 M.V.R. (6th) 246 | 221 A.C.W.S. (3d) 97 | 2012 CarswellBC 2624

Between Robert McArthur, Plaintiff, and Danielle Louise Hudson, Defendant

(97 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Headaches — Arm injuries — Wrist — Psychological injuries — Depression — Considerations impacting on award — Degree of impairment — Temporary total or partial disability — Age of claimant — Pre-existing injury — Cost of future care — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff suffered injuries to shoulder, head, hip, leg, wrist, and ribs — Plaintiff suffered soft tissue neck and shoulder injuries and headaches from accident but these were resolved prior to trial — Accident aggravated plaintiff's bursitis and depression — Back condition and sleep disturbance were not caused by accident — Plaintiff's condition largely attributable to pre-accident condition — Plaintiff awarded $40,000 in non-pecuniary damages and $4,000 in special damages for therapy costs — No damages awarded for income loss or cost of future care.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Loss of earning capacity — Retroactive loss of income — Special damages — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff suffered injuries to shoulder, head, hip, leg, wrist, and ribs — Plaintiff suffered soft tissue neck and shoulder injuries and headaches from accident but these were resolved prior to trial — Accident aggravated plaintiff's bursitis and depression — Back condition and sleep disturbance were not caused by accident — Plaintiff's condition largely attributable to pre-accident condition — Plaintiff awarded $40,000 in non-pecuniary damages and $4,000 in special damages for therapy costs — No damages awarded for income loss or cost of future care.**

**Damages — Assessment of damages — Limiting factors — Intervening cause — Pre-existing conditions — Thin or crumbling skull rule — Action by plaintiff for damages from motor vehicle accident allowed in part — Plaintiff suffered injuries to shoulder, head, hip, leg, wrist, and ribs — Plaintiff suffered soft tissue neck and shoulder injuries and headaches from accident but these were resolved prior to trial — Accident aggravated plaintiff's bursitis and depression — Back condition and sleep disturbance were not caused by accident — Plaintiff's condition largely attributable to pre-accident condition — Plaintiff awarded $40,000 in non-pecuniary damages and $4,000 in special damages for therapy costs — No damages awarded for income loss or cost of future care.**

|  |
| --- |
| Action by the plaintiff for damages that resulted from a motor vehicle accident. The parties were involved in a motor vehicle accident in June 2008. The plaintiff suffered injuries to his shoulder, head, hip, leg, wrist, and ribs. The plaintiff had an extensive history of medical and health issues. He was undergoing rehabilitation, was off work and experiencing pain in the period leading up to the accident. The parties disagreed about the extent to which the plaintiff's medical condition was attributable to his pre-accident state of health. The plaintiff sought damages in the amount of $739,664. The defendant opposed all damages except $25,000 for non-pecuniary damages.  HELD: Action allowed in part.  The damages awarded to the plaintiff must consider the extent to which the plaintiff's pre-existing condition affected his current and future health. Unrelated intervening events that affected the plaintiff's original position adversely in any event of the accident had to be taken into account in assessing damages. The plaintiff's pre-existing trochanteric bursitis was aggravated by the accident, but settled down to a minor complaint by March 2011. The plaintiff suffered soft tissue neck and shoulder injuries as a result of the accident, but these were resolved after a relatively short period of time. The plaintiff suffered headaches from the accident but they were resolved at the time of trial. The accident aggravated the plaintiff's depression either through an actual or perceived setback to his rehabilitation. There was no evidence the plaintiff's back injuries or hip joint problem were caused or aggravated by the accident. The accident did not affect the plaintiff's already disturbed sleep. The plaintiff was awarded $40,000 in non-pecuniary damages based on suffering a significant degree of physical and emotional pain and based on his age, nature and duration of injuries and impact on his enjoyment of life. There was no proved loss of income from the accident-related injuries in the past or likely in the future. The accident-related injuries had been resolved at the time of trial and therefore there was no cost of future care. Special damages for massage treatments were awarded in the amount of $4,000. |

**Counsel**

Counsel for the Plaintiff: T.J. Delaney and A. Ritchie (Articling Student).

Counsel for the Defendant: A. Urquhart.

**Reasons for Judgment**

|  |
| --- |
| **D. KLOEGMAN J.** |

**1**   On June 9, 2008, the plaintiff was driving home from a physiotherapy session at the Back in Motion program in Burnaby, when he was struck on the driver's side of his vehicle by the defendant, who had failed to stop at a stop sign (the "Accident"). The force of the impact was sufficient to spin the plaintiff's pick-up truck 180 degrees and render it uneconomical to repair.

**2**  The defendant admits liability for any injuries and damages she may have caused to the plaintiff.

**3**  During the Accident, the plaintiff struck his left shoulder on the door of his truck, his head on the window, and his right hip against the console. He cut his leg on the brake pedal, sprained his wrist and bruised his right ribs.

**4**  The morning after the Accident the plaintiff was feeling "fuzzy", with a stiff neck, headache, sore ribs and shoulder, and throbbing hip, lower back and wrist. The cut on his leg and pain in his wrist cleared up in a couple of days. His ribs were sore for a couple of weeks. He went for 10 to 12 massage therapy treatments for his shoulder and neck symptoms, but had to stop because he could no longer afford it. His right hip and lower back which had caused him pain before the Accident continued to be painful. He did not return to physiotherapy at the Back in Motion program until November 2008. After about a month of exercising there, he stopped because his hip was too painful.

**5**  Today his main areas of concern are his right hip, headaches and lower back, with some minor discomfort in his neck and shoulders.

**6**  The plaintiff claims against the defendant under all heads of damages for his personal injuries, in the total sum of $739,664. The defendant vehemently opposes all damage awards except a modest sum of $25,000 for non-pecuniary damages.

**7**  The reason for this significant discrepancy between the positions of the two parties lies in the unfortunate nature of the plaintiff's complex medical condition. Simply put, the defendant says that the plaintiff's damages stem almost entirely from his pre-accident state of poor health and disability, while the plaintiff says but for the accident he would have recuperated from his prior medical problems, returned to work, avoided his dependency on analgesics, resolved his financial issues and cured his depression.

**I.** **CAUSATION**

**A.** **Legal Principles**

**8**  Notwithstanding the recent review of the principles of causation by the Supreme Court of Canada 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 fundamental principles remain the same. These are neatly summarized by Eric S. Knutsen in his article "Clarifying Causation in Tort" [*(2010) 33 Dalhousie LJ 153*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5HSF-28X1-DXHD-G2SB-00000-00&context=) at 187-188:

1. ***Negligence*** law is a fault-based enquiry requiring a link between breach of an applicable standard of care with some harm to an injured accident victim in order to trigger compensation for the victim;
2. The default doctrinal test for causation in ***negligence*** is the "but for" test;
3. The focus of the causal enquiry is on the defendant's breach of the standard of care as a potential cause for some injury to the plaintiff;
4. Causation must be proven on a balance of probabilities;
5. A plaintiff need only prove that a defendant's breach of the standard of care is "a" cause of her injuries;
6. The material contribution test for causation is a rare and exceptional test, reserved only when the "but for" test fails;

...

1. If the victim is overly susceptible to harm, and suffers greater than foreseeable harm as a result of the defendant's ***negligence***, the defendant is liable for the entire harm, not for just harm that one might think foreseeable for a "normal," healthy person (thin-skull rule)--such a concept is triggered at the remoteness phase of the ***negligence*** analysis and not at the causation phase;
2. A defendant is only liable for the extent of the plaintiff's injuries caused by the defendant's ***negligence*** (crumbling skull rule)--such a concept is triggered at the damages phase of the ***negligence*** analysis and not at the causation phase.

**9**  It appears that the "but for" test, while it applies in determining which injuries were likely caused by the defendant's breach of care in the motor vehicle accident, has no place in determining the extent of damages these motor vehicle accident related injuries may have caused the plaintiff. The damages phase of the enquiry should focus on the principles of restoration and responsibility. Plaintiffs must be restored to the position they were in before an accident, and negligent defendants are only responsible for the harm their ***negligence*** caused, no more and no less.

**10**  It is during the damages assessment that the doctrines of thin skull and crumbling skull apply. If the damages are unexpectedly severe owing to a pre-existing condition that was latent and symptomatic and would not have affected the plaintiff in the future, then the thin skull would entitle the plaintiff to the full amount of his or her damages (*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=)).

**11**  Conversely, if the pre-existing condition was manifest and disabling, or would have become so in any event in the future, then the crumbling skull rule entitles the plaintiff only to additional damages suffered by the plaintiff as a result of the accident (*Smyth v. Gill*, [*2001 BCCA 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3XB-00000-00&context=)).

**12**  The measurable risk of debilitating effect in the future of the plaintiff's pre-existing condition must be reflected in both the non-pecuniary damages and loss of income award (*McKelvie v. Ng*, [*2001 BCCA 384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63KX-00000-00&context=)). There should be a similar reduction of damages to reflect unrelated intervening events that would have affected the plaintiff's original position adversely in any event (*TWNA v. Clarke*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=)).

**13**  The measureable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence (*Athey*).

**14**  If the injury is proven to be of a crumbling skull nature, then the defendant is liable only to the extent that the accident caused an aggravation to the pre-existing condition (*Pavlovic v. Shields*, [*2009 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3YF-00000-00&context=)).

**15**  Another way of distinguishing pre-existing injuries from non-tortious causes are to consider whether any of the plaintiff's injuries are "divisible injuries" capable of being separated out. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes (*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=), leave to appeal to SCC refused, [*[2010] S.C.C.A. No. 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-DYMS-63D0-00000-00&context=) (April 14, 2011)).

**16**  If the damages are divisible, the devaluation approach is the appropriate method for determining the amount of damages attributable to the defendant.

**17**  Therefore it is important, in the case at bar, to distinguish as much as possible between extent and duration of the plaintiff's injuries, both before and after the Accident, when assessing the plaintiff's claims under the various heads of damages.

**B.** **The Evidence**

**18**  To ascertain the effect of the Accident on the plaintiff's physical condition on June 9, 2008, it was necessary to cover the plaintiff's medical history in some detail at trial. There were a large number of clinical records admitted into evidence, and defendant's counsel introduced even more records during his cross-examination of the medical witnesses. Unfortunately, no single medical-legal report spoke to all of the plaintiff's ailments in a reliable manner. Parts of each report carried little weight because the necessary factual underpinning was lacking.

**19**  The plaintiff, while a seemingly honest and earnest witness, was not always reliable in his recollections or observations. He admitted to confusion about dates, or time periods, or even particular events or circumstances. This was not surprising, considering the plaintiff's age - 61 - and the prolificacy of medical visits and treatments he had undergone with a plethora of health professionals. Nonetheless, where his evidence conflicts with the documentary evidence, I give more weight to the latter.

**20**  The plaintiff blamed the injuries he received in the accident as having prevented him from continuing his rehabilitation, and disabling him from returning to work as a truck driver, or at all. However, the documentary evidence strongly supports the defence case that the complaints of the plaintiff which disable him from working today were the same complaints he made in the months preceding this accident. This is most clearly illustrated by the observations of the treating health professionals and the statements made by the plaintiff to these health professionals both before and after the accident

1. Right Hip
2. Pre-Accident

**21**  The plaintiff worked as a truck driver throughout his adult life. In 1992 he was injured when a hook fell and knocked him off a truck trailer. He suffered a fractured pelvis and was warned that eventually he would need a hip replacement.

**22**  In September 2007, after about 18 months of hip pain, the plaintiff underwent a total hip replacement.

**23**  The plaintiff started physiotherapy at Sungod Physiotherapists from October 22, 2007, to March 2008 in the hope of rehabilitating and returning to work.

**24**  The plaintiff attended the occupational rehabilitation #1 program at the Canadian Back Institute from March 12 to April 23, 2008, in the hope of rehabilitating and returning to work.

**25**  Dr. Lu, the plaintiff's orthopaedic surgeon, observed on April 16, 2008, signs of trochanteric bursitis, subluxating fascia lata and a tight iliotibial band in the plaintiff's right hip. However, he noted that the plaintiff was doing well, although he still had pain. At that time, Dr. Lu suggested a gradual return to work in 6 to 8 weeks. It should be noted that a gradual return to work was not available to the plaintiff with his past employer. They required the plaintiff to be fit to return to work full time.

**26**  The Canadian Back Institute records of April 24, 2008, indicated that the plaintiff was tender over the right greater trochanter.

**27**  On May 1, 2008, the plaintiff started the Back in Motion rehabilitation program in the hope of rehabilitating and returning to work. He only attended eight of the 26 sessions due to bronchial problems and a pulled muscle in his chest.

**28**  The Back in Motion intake assessment of May 1, 2008, stated that all movements of the plaintiff were limited from his hip pain. He was unable to reach items 10 inches from the floor, could only tolerate sitting for 20 minutes, walking for 30 minutes and standing for 30 minutes. His average pain was 4 to 5 out of 10.

**29**  Dr. Lai, the plaintiff's general physician for 20 years, recorded on May 7, 2008, that the plaintiff still complained of right hip pain and a clunking sound in the hip joint (which is consistent with sublaxation of the fascia lata). The plaintiff told her he was continuing to take the analgesic Endocet for his sore hip.

**30**  Dr. Miller, psychiatrist, recorded on May 16, 2008, that the plaintiff had a sharp pain in his right hip when he got up. Eric Baasch, medical consultant with Back in Motion, recorded the plaintiff as having ongoing hip pain and stiffness on May 29, 2008.

**31**  The plaintiff testified that before the Accident, he was doing well at the Back in Motion program. He testified that in the few days before the Accident he was covering about five miles a day on the treadmill. However, when the Back in Motion records were put to the plaintiff in cross-examination, he admitted he had only done five minutes on May 26, 20 minutes on May 27, 30 minutes on May 28, 20 minutes on May 29, 10 minutes on June 3, 30 minutes on June 6 and 30 minutes on June 9. At a recorded speed of two miles per hour, the longest distance the plaintiff covered on the treadmill in any one day right up to the day of the Accident was one mile.

**32**  Plaintiff's counsel submitted that the Pharmanet records showed a significant decrease in consumption of pain medication from January to mid-April 2008. There were no records from April 2008 to the date of the Accident. Dr. Lai's clinical record of May 7, 2008, notes that the plaintiff was taking the pain killer Endocet daily.

1. Post Accident

**33**  On June 9, 2008, the plaintiff was involved in the Accident. He was treated with massage therapy in June and July 2008 but he did not return to the Back in Motion program until November 2008. He stopped attending in December 2008.

**34**  The plaintiff reported to Dr. Lai that he hit his hip on the console of his truck. She did not record any bruising during her examination of him. She was concerned that the hip prosthesis may have been damaged in the Accident, but Dr. Lu confirmed in September 2008 that it had not been damaged. Dr. Sovio, orthopaedic surgeon, testified that it would take much greater forces to dislodge the prosthesis than those that occurred in the Accident.

**35**  Dr. Lu testified that the plaintiff's hip pain was likely secondary to trochanteric bursitis. He admitted that trochanteric bursitis can be a result of lateral hip surgery. Notably, Dr. Lu has never opined in his medical-legal report, or his testimony, that the plaintiff's trochanteric bursitis was caused by the Accident. In fact, he lists various other clinical conditions that could be contributing to the plaintiff's current hip pain such as subluxating fascia lata, tight iliotibial band, abductor weakness, degenerative spinal disease, and soft tissue injuries of the back.

**36**  Dr. Lu admitted in cross-examination that by the time of the plaintiff's last visit on March 3, 2011, the plaintiff's trochanteric bursitis was mild in intensity and intermittent in duration.

**37**  Dr. Purtzki, physiatrist, agreed with Dr. Lu that the plaintiff's hip pain was likely related to greater trochanteric bursitis. She said the cause of the trochanteric bursitis was likely a combination of pre-existing anatomical abnormalities, weakness after the hip surgery, and aggravation by the Accident.

**38**  Dr. Sovio did not deny that the plaintiff was suffering from trochanteric bursitis, but he was adamant that the plaintiff had a mechanical problem within the hip joint that was related to the outcome of the surgery. Dr. Sovio believed that the plaintiff had a microscopic loosening of the prosthesis that was not visible by x-ray, but created the "Trendelberg sign" in the plaintiff's gait and stance. He described the Trendelberg sign as a raising of the opposite hip joint to compensate for pain in weakness of the damaged joint. This was an outcome of the surgery, not the Accident

**39**  Dr. Sovio testified that a hip replacement is usually pain free 4 to 6 weeks after the soft tissues heal; yet in the plaintiff's case he was still experiencing pain and unable to fully weight bear by the time of the accident which was nine months after the surgery. In his opinion, a review of the clinical records showed there was not much change in the plaintiff's condition or degree of pain before or after the Accident.

**40**  I find that the plaintiff's pre-existing condition of trochanteric bursitis was aggravated by the Accident. No one denied it increased in magnitude after the Accident, but on Dr. Lu's evidence it seemed to have settled down to a minor complaint by March 2011.

**41**  I do not find that the condition of the plaintiff's hip joint is connected to the Accident in any way. It is not necessary to decide whether there has been a loosening of the hip prosthesis, as opined by Dr. Sovio, or not. It is not the non-tortious pre-existing injury that is on trial here; it is the tort-induced injury that must be proved on a balance of probabilities. The hip joint issues suffered by the plaintiff are clearly divisible from the trochanteric bursitis, and are clearly the result of the plaintiff's prior injury in 1992 and the surgery in 2007. The defendant cannot be held responsible for any loss suffered by the plaintiff that was not caused by the Accident.

1. Lower Back

**42**  In 2002, the plaintiff suffered injury to his lower back (among other things), and was off work for about three months.

**43**  In 2005, 2006, and 2007, the plaintiff made the occasional visit to a chiropractor complaining of sore lower back (among other things).

**44**  In 2006, Dr. Lai recorded a work-related injury to the plaintiff's lower back. On cross-examination, she opined that the plaintiff's current low back problem was related to this work place accident and arthritis of the spine, all of which predated the subject motor vehicle accident. She did not include reference to his low back in her medical-legal report because she did not consider it to be connected to the Accident.

**45**  Dr. Purtzki, physiatrist, opined that the plaintiff's low back pain was likely related to his hip-related abnormal gait and years of heavy work and lifting. She could find no clear association with the Accident.

**46**  Therefore, there is no evidence that the Accident caused or aggravated the plaintiff's lower back pain.

1. Depression

**47**  Dr. Miller, psychiatrist, examined the plaintiff on May 16, 2008, about three weeks before the Accident. He reported that the plaintiff had difficulty coping with the June 1992 work incident and "other stressors." At that time, his right hip injury, slow pace of recovery, inability to work, and financial concerns continued to generate some frustration, irritability, anxiety and depressive symptoms. Dr. Miller diagnosed the plaintiff with an adjustment disorder.

**48**  Dr. Shergill, psychologist, reported on March 25, 2010, that the plaintiff had been experiencing depressive and anxiety symptoms after his hip surgery in 2007. The plaintiff had experienced significant financial losses related to the sequelae of his work injury.

**49**  Dr. Vallance, psychiatrist, agreed on cross-examination that regardless of the Accident, the plaintiff probably would have been depressed and anxious and required anti-depressant drugs for his emotional state. The plaintiff's father died in October 2008, and his dog died about five months after that. His best friend in Thailand died in the fall of 2009. According to Dr. Vallance, all these losses were very considerable and pushed the plaintiff deeper into depression and escalated his anxiety.

**50**  Dr. Vallance opined that it is difficult to weigh the influence of so many negative factors in the plaintiff's life, but if the plaintiff had been able to return to work as planned in June 2008, it could have gone a long way towards resolving his emotional problems. Dr. Vallance viewed the Accident as a considerable setback for the plaintiff. Dr. Purtzki also viewed the Accident as a setback to the plaintiff's course of rehabilitation.

**51**  The evidence establishes on a balance of probabilities that the Accident likely aggravated the plaintiff's depression due to the setback (perceived or actual) in his rehabilitation. However, by November 2008, the plaintiff had returned to the Back in Motion rehabilitation program with the same tolerances as before the Accident, and it would not be reasonable to blame the Accident for ongoing depression after that time.

1. Sleep Disturbance

**52**  Dr. Lai wrote in her medical-legal report that the plaintiff did not experience any sleep disturbance because of right hip pain before the Accident. This is entirely contradicted by the plaintiff's statements to members of the Canadian Back Institute and Back in Motion rehabilitation programs. The plaintiff told Canadian Back Institute staff in April 2008 that hip pain was disturbing his sleep. The plaintiff told Eric Baasch of Back in Motion on May 29, 2008, that he was not sleeping well because of hip pain and fear of losing his vehicle and his house, which was in foreclosure.

**53**  Dr. Lai admitted in cross-examination that if she had had the records from the Canadian Back Institute, she would not have said the plaintiff experienced no sleep disturbance before the Accident.

**54**  The plaintiff told Dr. Vallance, about a month before the Accident, that he was having disturbed sleep due to pain. He told Dr. Miller he had to sleep with a pillow between his knees because of hip pain.

**55**  The plaintiff reported to Dr. Shergill on March 25, 2010, that he continued to experience pain in his hip and lower back which interfered with his function, sleep, and leisure activity.

**56**  I cannot find on a balance of probabilities that the Accident had any effect on the plaintiff's already disturbed sleep beyond what he was already experiencing in that regard.

1. Neck Pain

**57**  In November 2002, the plaintiff injured his neck in a car accident. In 2004, he injured his neck pulling a cable.

**58**  There are some entries in the chiropractic records that suggest the plaintiff visited once or twice a year for soreness in his neck between 2005 and 2007.

**59**  In 2005, the plaintiff was involved in another motor vehicle accident which caused him to go to Burnaby General Hospital because of neck pain.

**60**  Dr. Lai opined in her medical-legal report that on June 17, 2008, and July 11, 2008, the plaintiff complained of increasingly severe headaches, neck and shoulder pain. However, the actual entry in her clinical record of June 17 states the plaintiff had slightly decreased, neck, hip and shoulder pain.

**61**  Dr. Lai also stated in her medical-legal report that the plaintiff had only demonstrated limited improvement of his musculoskeletal symptoms, but on cross-examination she agreed that Dr. Beckman's observations of the plaintiff in May 2011 indicated significant improvement with his neck symptoms. She also agreed in cross-examination that the plaintiff's neck symptoms were worsened after he reported having taken a fall in September 2010 during which he hit his head and shoulder, although she had failed to mention this.

**62**  Dr. Beckman, when he saw the plaintiff in August 2008, found that the plaintiff demonstrated a decreased range of motion in his neck and complained of some pain in his posterior cervical area. When he saw the plaintiff in 2011, he found normal range of motion with mild neck pain on the end ranges.

**63**  I find on a balance of probabilities that the plaintiff suffered a soft tissue injury to his neck from the accident but that it had substantially resolved by May 2011.

1. Shoulder

**64**  The plaintiff injured his left shoulder in the November 2002 accident mentioned above.

**65**  Dr. Lai opined in her medical-legal report that the plaintiff continues to experience ongoing symptoms in his shoulder. However, the plaintiff testified that his shoulder symptoms resolved about one month after the accident. Dr. Lai professed not to have known that. She also admitted to forgetting her clinical note that the plaintiff's shoulder was hurt in September 2010, when he took a fall.

**66**  I find on a balance of probabilities that the plaintiff suffered a soft tissue injury to his shoulder that substantially resolved by one month after the Accident. Any current complaints about his shoulder cannot be attributed to the Accident.

1. Headaches

**67**  There was no significant evidence that the plaintiff suffered from chronic headaches before the Accident.

**68**  Dr. Beckman, neurologist, treated the plaintiff for headaches on July 23, 2008, and May 2, 2011. In the 2008 examination he diagnosed the plaintiff with soft tissue pain with secondary headaches from neck muscle strain incurred during the Accident.

**69**  In 2011, Dr. Beckman found that the plaintiff's neck pain was mild and only at the end range of motion, but his headaches were daily. Dr. Beckman diagnosed him as having analgesic rebound headaches from taking Endocet one to three times daily for two years without a break, and other analgesics before that.

**70**  Dr. Lai wrote in her medical-legal report that the plaintiff had chronic headaches since the Accident, from tightness in his neck and use of Endocet. However, Dr. Lai's clinical records show that the plaintiff told her in August 2008 that the headaches had decreased in severity. He told her in October 2009 that they had decreased in duration. Dr. Lai's clinical records also show that the plaintiff told her his headaches worsened after he hit his head when he fell in September 2010.

**71**  Dr. Beckman was unaware of the plaintiff's fall in 2010 and admitted in cross-examination that it could be an alternate cause of the plaintiff's headaches.

**72**  Dr. Purtzki opined in her medical-legal report that the chronic headaches appear to have been triggered by the Accident. She said that the plaintiff was prone to degeneration of the cervical spine from his previous accidents in 1992 and 2002, but was not symptomatic until after the 2008 accident. In cross-examination, she admitted that the headaches were likely a combination of flare-up of degenerative changes because of the Accident and rebound headaches from use of painkillers. She also said she did not know about the 2010 fall after which the plaintiff described his head as feeling "mushy." She deferred to the plaintiff's family doctor as to the degree this may have affected him, but stated that the plaintiff's complaints of headaches from the 2010 fall should not be minimized.

**73**  I find on a balance of probabilities that it is likely that the plaintiff suffered headaches as a result of the tightness in his neck and shoulder muscles caused by the Accident. However, I find that by the time of Dr. Beckman's diagnosis in May 2011 any headaches suffered by the plaintiff cannot be attributed to the Accident.

**C.** **Conclusion on Causation**

**74**  The plaintiff must be compensated for losses due to an aggravation of bursitis in the lateral aspect of the trochanter which was substantially resolved by March 2011. The plaintiff must be compensated for losses incurred by him for a soft tissue injury to his shoulder that substantially resolved after about one month, and a soft tissue neck injury that substantially resolved by May 2011. Finally, the plaintiff is entitled to compensation for headaches experienced until May 2011 and an aggravation of his depression due to the setback (perceived or otherwise) in his rehabilitation until November 2008.

**75**  The plaintiff is not entitled to compensation from the defendant resulting from post-surgical complications in his hip, such as sublaxating fascia lata, tight iliotibial band or weak abductor muscles. The plaintiff is not entitled to compensation from the defendant for his lower back issues which resulted from a previous injury and arthritis in the spine. The plaintiff is not entitled to compensation from the defendant for any neck injuries or headaches after May 2011.

**II.** **DAMAGES**

**A.** **Non-Pecuniary Damages**

**76**  It is difficult to differentiate between the extent of pain and interference with the plaintiff's enjoyment of life that was caused by the Accident between June 2008 and May 2011, and that which was caused by the plaintiff's hip replacement, lower back pain, depression or analgesic headaches.

**77**  The plaintiff claims that he is entitled to non-pecuniary damages in the range of $85,000. The defendant submits that the plaintiff's non-pecuniary damages are in the range of $25,000.

**78**  I have found that the aggravation of the plaintiff's trochanteric bursitis had receded by March 2011 and that his neck and Accident related headaches were substantially resolved by May 2011, just short of three years post-Accident. His shoulder injury resolved a month after the Accident and the aggravation of his depression should have receded by five months post-Accident.

**79**  There was little evidence of impact of the plaintiff's Accident related injuries on his pre-Accident activities, mostly because he was still recovering from the hip surgery and was restricted in his activity level at the time of the Accident.

**80**  As stated earlier, his functional capacity by November 2008 was at the same level as in the days before the Accident. The functional capacity evaluation performed at the request of WorkSafeBC in October 2009 indicated a sustained sitting tolerance of approximately one hour, a sustained standing tolerance of 30 minutes, a sustained walking tolerance of 20 to 30 minutes before right hip pain and limitations in lifting due to right hip and lumbar pain. It is notable that these records do not reflect any complaints of neck or shoulder pain. In fact, they state that he demonstrated the ability to fully reach, work at shoulder and overhead levels except for slight right hip lumbar region discomfort.

**81**  The plaintiff mentioned that he had been able to ride his bike for short distances before the Accident but there was no evidence whether or when he was able to resume bike riding.

**82**  Nonetheless, I am satisfied that the plaintiff endured a significant degree of pain, both physically and emotionally, from his Accident related injuries, and he is entitled to reasonable compensation for that. Given the plaintiff's age, the nature and duration of his injuries, and the impact on his enjoyment of life, I am of the view that his damages should be set at $40,000 (*Laroye v. Chung,* [*2007 BCSC 1478*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1J0-00000-00&context=); *Guilbault v. Purser*, [*2009 BCSC 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3KP-00000-00&context=); and *Carter v. Zhan*, [*2012 BCSC 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3FG-00000-00&context=)).

**B.** **Loss of Income**

**83**  Plaintiff's counsel submits that more important than pre- and post-Accident reports of pain suffered by the plaintiff is the evidence of pre- and post-Accident disability suffered by the plaintiff. Counsel points to Dr. Lu's opinion in April 2008 that the plaintiff would be ready for a gradual return to work in six to eight weeks. The expectation of the Back in Motion assessor on May 29, 2008, was that the plaintiff would be returning to work in some capacity in four to six weeks.

**84**  However, neither Dr. Lu nor any other medical expert opined in their report or testimony that the plaintiff would likely have been able to return to work if he had not been injured in the Accident.

**85**  In my opinion, the degree of disability of the plaintiff before and after the Accident is most clearly reflected in the documentary evidence of the activities of the plaintiff. The records of the Back in Motion rehabilitation program reflect the plaintiff's physical state and ability just before the Accident, and six months after the Accident.

**86**  In May 2008 the plaintiff's sitting, walking and standing tolerances were 20 to 30 minutes respectively. When he returned to the Back in Motion program in November 2008, his sitting tolerance had improved to 30 to 60 minutes and his walking and standing tolerances were the same as before the Accident. Therefore, by November 2008, the plaintiff had recovered to the same state of function as he experienced just before the Accident. Even by October 2009 his functional capacity had not changed significantly.

**87**  The evidence was overwhelming that the plaintiff's inability to return to work was related to the outcome of his hip surgery. Besides the opinions of Dr. Lu and Dr. Sovio that the plaintiff's bursitis was of a mild and intermittent nature, there were medical reports written by Dr. Lai to Canada Pension Plan (CPP) Disability Benefits, Co-Operator's Insurance Company, and To Whom it May Concern, respectively, all of which described the plaintiff's pre-Accident hip pain and surgery as the reason for his inability to work.

**88**  In the CPP disability application dated August 10, 2010, Dr. Lai diagnosed a right hip fracture, right hip fracture in 1992, right hip osteoarthritis in 2007, and right hip arthroplasty in 2007 as the cause of the plaintiff's disability. She made no mention of any headaches or soft tissue injuries in the neck, shoulder or back. In cross-examination, Dr. Lai confirmed that the listed diagnoses reported to Canada Pension Plan were not related to the motor vehicle accident. Most importantly, and key to the outcome of this case, Dr. Lai admitted that the ongoing problems the plaintiff has experienced from his previously existing right hip problem, in and by themselves, would disable the plaintiff from working; otherwise she would not have said this in her report to CPP.

**89**  Further, Dr. Lai confirmed to the Co-Operator's Insurance Company in a letter dated January 17, 2011, that it was the plaintiff's "chronic right hip pain and bursitis from post right hip arthroplasty" that disabled him from work and qualified him for long-term disability. Specifically, she stated:

[The plaintiff] is limited in all aspects of his activities of daily living by his persistent right hip pain. He is unable to sit, stand or walk for greater than 30 minutes duration. He walks with a limp because of his right hip replacement and pain in the right hip. ... I do not feel that [the plaintiff] is a competitive candidate for any type of future employment due to the limitations caused by his right hip pain.

**90**  When she completed the driver's medical examination form, Dr. Lai left blank the section entitled "musculoskeletal." She confirmed on cross-examination that by doing so, she was saying that the plaintiff did not have musculoskeletal issues that would affect his driving.

**91**  In the To Whom it May Concern letter dated March 1, 2010, Dr. Lai wrote "[the plaintiff] suffers from chronic right hip and back pain resulting from a past WCB related right hip fracture and subsequent right hip replacement surgery. He is unable to sit, stand or walk for greater than 60 minute intervals."

**92**  The overwhelming conclusion is that the plaintiff has not proved that he suffered any loss of income as a result of the Accident. Furthermore, the plaintiff has not shown any real possibility of income loss in the future because of the Accident. Unfortunately, by the time of the Accident, the plaintiff's skull had already "crumbled" in that he was suffering from a manifest disability that would have prevented him from working in any event.

**C.** **Cost of Future Care**

**93**  The plaintiff claims that he will spend about $1,000 a year on massage therapy and medications. Dr. Lu has also recommended shock-wave therapy or acupuncture. The plaintiff submits that present valuing a reasonable sum for cost of future care would be an award of $15,000.

**94**  Unfortunately, due to my findings as to the extent and duration of the injuries caused by the Accident, the plaintiff's need for future care only arises from his pre-existing ongoing chronic injuries that are not related to the Accident. Therefore, he is not entitled to any damages from the defendant in this regard.

**D.** **Special Damages**

**95**  The plaintiff claims special damages of $4,664.32. The defendant accepts a claim for Legacies Sports Massage, neck pillow and some mileage, for a total of $505.75.

**96**  I will allow the plaintiff's claim for everything except mileage, medication and parking after May 2011, by which time any injuries or aggravated symptoms of the plaintiff had substantially resolved. The majority of expenses seem to have been incurred before that date, so I will award the plaintiff $4,000 under this head.

**III.** **CONCLUSION**

**97**  The plaintiff has not made out a claim on the evidence for more than $40,000 non-pecuniary damages and $4,000 special costs, for a total of $44,000. The plaintiff is entitled to judgment for that amount, but the rest of the plaintiff's claim is dismissed.

D. KLOEGMAN J.

**End of Document**

[***Salame v. Sutherland, [2016] B.C.J. No. 1869***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KP4-X8R1-JW09-M421-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

L.A. Warren J.

Heard: December 14-18, 2015.

Judgment: August 31, 2016.

Docket: M161237

Registry: New Westminster

**[2016] B.C.J. No. 1869** | 2016 BCSC 1610

Between Joulnar Salame, Plaintiff, and Brian Douglas Sutherland, Defendant

(157 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Chest — Neck — Whiplash — Arm injuries — Psychological injuries — Depression — Considerations impacting on award — Age of claimant — Pre-existing injury — Credibility — Future treatment required — Action by 52-year-old married mother of seven for damages for fractured sternum, rotator cuff tear and whiplash sustained in motor vehicle accident allowed — Pain, depression and anxiety persisted over two years after accident and impacted marriage, ability to work in family business and ability to perform household chores — Plaintiff credible in describing impact of injuries on lifestyle — Award reduced to account for pre-existing osteoporosis and post-accident impact of unrelated back pain, carpal tunnel syndrome and eye surgery — Plaintiff awarded total of $173,244.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Contingencies — Considerations — Duration of loss — Employment status — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Affecting mobility — Affecting social relationships — Action by 52-year-old married mother of seven for damages for fractured sternum, rotator cuff tear and whiplash sustained in motor vehicle accident allowed — Pain, depression and anxiety persisted over two years after accident and impacted marriage, ability to work in family business and ability to perform household chores — Plaintiff credible in describing impact of injuries on lifestyle — Plaintiff awarded $110,000 for non-pecuniary loss, $9,870 for past income loss, $35,000 for future income loss, $16,500 for past housekeeping loss, $13,175 for future housekeeping loss, future care costs of $6,100 and special damages of $23,143 — Award reduced to account for pre-existing osteoporosis and post-accident impact of unrelated back pain, carpal tunnel syndrome and eye surgery.**

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| Action by Salame for damages for personal injuries sustained in a June, 2013 motor vehicle accident with Sutherland. Salame was a front-seat passenger in a Mazda operated by her son, Khattab, at the time of the accident. Sutherland admitted liability for the accident, in which Salame sustained a fractured sternum, a partial left rotator cuff tear, and soft tissue injuries to her neck. Salame was a 52-year-old married mother of seven. She and her husband owned and operated a laundromat where she worked 30 hours per week prior to the accident. She was also primarily responsible for childcare and housework. She had no health problems prior to the accident other than hypothyroidism, controlled with medication, a left foot and hip injury that resolved prior to the accident, and carpal tunnel syndrome in her right hand, for which surgery was successful. After the accident, Salame was diagnosed with moderate osteoporosis, for which she had experienced no symptoms pre-2013. Salame needed help with all tasks in the few months that followed the accident. She took pain medication. She began experiencing depressive symptoms and anxiety. Over time, she resumed responsibility for household chores but claimed that the work took longer and that she needed help with more physical chores. She took physiotherapy, massage therapy and acupuncture, and received a steroid injection in her shoulder which resulted in temporary improvement. She remained in significant pain one year after the accident, and remained unable to work until December 2014, when she resumed light duties at the laundromat. Her condition continued to improve to the date of trial, but she remained limited in her ability to perform heavy labour. She worked about 15 hours per week. She still had shoulder and upper back pain, depression and periodic episodes of extreme pain. She developed unrelated back pain in late 2014 and her carpal tunnel symptoms returned. She had unrelated eye surgery in October 2015. Medical experts disagreed in interpreting x-rays on the issue of whether or not Salame sustained fractured thoracic vertebrae in the accident.  HELD: Action allowed.  Salame was awarded $173,244 in total damages. Salame was a credible witness who readily admitted to having problems that were unrelated to the accident that impacted her ability to work and caused her pain. Her family and friends were reliable in corroborating her account of her pre-accident health and lifestyle and the impact of the accident on same. The judge accepted the opinion of the defence medical expert who opined that Salame did not sustain fractures to her thoracic vertebrae in the accident based on the fact that these did not resolved post-accident, suggesting that they were chronic, pre-existing injuries. Salame did suffer pain from the soft tissue injuries to her neck as well as the fractured sternum and rotator cuff tear. The court accepted that she continued to suffer from chronic whiplash associated disorder, as well as depressive symptoms and anxiety relating to the accident and not other causes such as menopause and her children growing up and moving away. Non-pecuniary damages were assessed at $110,000. Damages for past income loss were set at $9,870, representing the cost of hiring a worker to perform tasks Salame had performed and other business her husband had to give up to take her place at the laundromat. Future income loss was assessed at $35,000, representing the costs of replacement workers and the husband's loss of business opportunities over the next 10 years. She was awarded $16,500 and $13,175, respectively, for past and future loss of housekeeping, and future care costs of $6,100 for medications and physiotherapy. Special damages of $23,143 were conceded by Sutherland. Awards other than those for special damages and care costs were reduced by 10 per cent for the contingency she would have developed pain from osteoporosis in future, and five percent to reflect the impact of her unrelated back, wrist and eye problems. |

**Statutes, Regulations and Rules Cited:**

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

**Counsel**

Counsel for the Plaintiff: S. Ballard, V. Cheung.

Counsel for the Defendant: J. Marquardt.

**Reasons for Judgment**

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[Editor's note: The text of the judgment was corrected on the front page in Counsel for the Plaintiff's name where changes were made on September 2, 2016]

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| **L.A. WARREN J.** |

**Overview**

**1**  The plaintiff, Joulnar Salame, seeks damages for injuries she sustained in a car accident that occurred on June 1, 2013, at the intersection of 200th Street and 50th Avenue in Langley. She was the front seat passenger in a 1990 Mazda 4-door sedan driven by her son, Nader Khattab. They were travelling south on 200th Street when their vehicle was struck by a 2002 Honda Civic driven by the defendant, who was attempting a left turn on to 200th Street. The force of the impact was significant. Both vehicles were written off by ICBC. The defendant concedes liability.

**2**  Ms. Salame was wearing her seatbelt. At the time of the impact, she felt her chest crack and she experienced immediate, severe pain in her chest and neck. She was transported by ambulance to Langley Memorial Hospital. There is no dispute that she suffered a fractured sternum, a partial left rotator cuff tear, and soft tissue injuries in her neck. She alleges that she also sustained thoracic spinal fractures. She says her injuries caused significant and ongoing pain in her chest, left shoulder, neck and upper back, and ultimately lead to depressive symptoms.

**3**  Ms. Salame was 52 years old at the time of the accident. She has been married to Youssef Khattab for about 30 years. They have seven children whose ages at the time of the trial ranged between 30 and 17 years. The two youngest children still live at home with Ms. Salame and Mr. Khattab.

**4**  Ms. Salame and her husband have owned and operated a laundromat since 2007. Prior to the accident, Ms. Salame's life was centered on her family and the laundromat. She was primarily responsible for homemaking tasks. At the time of the accident, she was working at the laundromat approximately 28 to 30 hours a week, spread over the course of about three days, but her schedule varied depending on the workload at the laundromat and her husband's schedule. Many of her duties at the laundromat are physical.

**5**  In addition to the laundromat, Mr. Khattab operates a number of side businesses including installing security cameras, repairing computers, and preparing income tax returns. He is particularly busy with tax returns during what the parties referred to as the "tax season" which runs from February to the end of April each year.

**6**  Ms. Salame had no material health problems at the time of the accident. She had been diagnosed with hypothyroidism but that condition was treated successfully with medication. She had experienced a problem with her left foot and hip that, for a few months, prevented her from going on walks but did not prevent her from working or fulfilling her household duties. The hip and foot issue had resolved prior to the accident. Several years prior to the accident she had surgery on her right hand as treatment for carpal tunnel syndrome. That surgery was successful. After the accident, Ms. Salame was diagnosed with moderate osteoporosis. The osteoporosis pre-existed the accident but she did not experience any clinical manifestations of that condition before the accident.

**7**  In the first few months following the accident, Ms. Salame needed help with the simplest of tasks including getting into and out of bed and attending to her personal hygiene. She was prescribed anti-inflammatories, painkillers, including narcotics, and muscle relaxants. She began experiencing depressive symptoms and became irritated and anxious. Eventually, she was also prescribed antidepressant medication.

**8**  In the first six months after the accident, Ms. Salame was unable to do any of the grocery shopping, cooking and housework, and she was unable to perform any of her duties at the laundromat. Her husband and children took over those tasks. Over time, she has been able to resume responsibility for most of the household chores but the work takes her longer to complete and she continues to rely on her husband and children to do the heavier jobs.

**9**  Ms. Salame attended physiotherapy between January and June 2014 as well as massage therapy and acupuncture. She was referred to an orthopedic surgeon for investigation of the left shoulder pain. She received a steroid injection into the left shoulder which resulted in temporary improvement lasting about six weeks. She had an MRI of the shoulder which showed a partial thickness tear of one of the rotator cuff muscles.

**10**  One year after the accident, Ms. Salame was still suffering from significant pain. She had resumed some of her pre-accident homemaking duties but she remained unable to perform her duties at the laundromat. In February 2014, she and her husband hired an employee named Douglas Weir to help out at the laundromat. This coincided with tax season, during which Mr. Khattab was especially busy preparing tax returns. Mr. Weir worked part-time until November 2014. In addition to Mr. Weir, Ms. Salame's children stepped in to perform her work at the laundromat, as did Mr. Khattab, but unlike Mr. Weir, none of them were paid wages for performing Ms. Salame's work.

**11**  Ms. Salame returned to work at the laundromat gradually, commencing with light duties in December 2014, approximately 18 months after the accident.

**12**  In December 2014 or January 2015, Ms. Salame started a second course of physiotherapy. This lasted until about October 2015 when she underwent eye surgery and when ICBC stopped funding the sessions.

**13**  Over time Ms. Salame's condition has continued to improve. She gradually expanded the scope and duration of her work at the laundromat but she remains limited in her ability to carry heavy loads of laundry, clean the washrooms and the machines, and perform repetitive and reaching motions. She continues to take medications including antidepressant medication which she says limits her ability to deal effectively with customers. At the time of the trial she was working at the laundromat 2 to 3 times a week for a total of about 15 hours each week, or roughly half the hours she worked before the accident.

**14**  At the time of the trial, Ms. Salame continued to suffer from ongoing left shoulder pain and upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from depressed mood and periodic episodes of extreme pain.

**15**  In late 2014, Ms. Salame developed low back pain that she acknowledges was unrelated to the accident. It was fairly significant for a few months. In 2015, she experienced the return of carpal tunnel symptoms. In October 2015, Ms. Salame underwent surgery to repair a macular hole in her right eye. At the time of the trial in December 2015 she was continuing to recover from the eye surgery. She had reduced her hours at the laundromat following the eye surgery but expected to increase her hours again once her eye healed.

**16**  The defendant concedes that Ms. Salame suffered significant injuries in the accident, including the fractured sternum, left rotator cuff tear, and soft tissue injuries, and that these caused her pain that was severe enough to prevent her from fulfilling her household duties and her duties at the laundromat for a period of about 18 months. The defendant says these injuries gradually improved leaving her with close to complete recovery by March 2015. The defence submits that Ms. Salame did not suffer thoracic spinal fractures in the accident and that her upper back pain is more likely related to pre-existing osteoporosis.

**17**  The defence submits that Ms. Salame will suffer few if any ongoing limitations as a result of the sternum fracture and that she will suffer only minor ongoing limitations from the rotator cuff injury. The defendant concedes that the injuries Ms. Salame suffered in the accident contributed to her emotional and depressive symptoms, but says that she would have suffered from some level of depression anyway as a result of various factors unrelated to the accident including the onset of menopause, the death of her mother, her children growing up and leaving home, her osteoporosis diagnosis, and the return of carpal tunnel symptoms. The defendant submits that any ongoing symptoms significant enough to interfere with Ms. Salame's ability to work and perform household chores are related to progressive osteoporosis in her thoracic spine and lower back, carpal tunnel syndrome and the recent eye surgery, and are unrelated to the injuries she sustained in the accident.

**18**  Ms. Salame seeks damages for non-pecuniary loss, past and future loss of earning capacity, past and future loss of homemaking capacity, cost of future care, and special damages. The parties have agreed that Ms. Salame incurred special damages of $2,142.66. In addition to that amount, the defendant submits that Ms. Salame has established a claim for non-pecuniary damages reflecting a period of 18 months of gradually improving symptoms, damages for past loss of earning capacity in an amount limited to half the cost of Mr. Weir's wages, and damages, in a modest amount, for past loss of homemaking capacity. The defendant submits that Ms. Salame has not established a claim for future loss of earning capacity, future loss of homemaking capacity or costs of future care.

**Issues**

**19**  The primary issues for determination are:

1. Did the accident cause Ms. Salame's upper back pain? Among other things, did she suffer thoracic spine fractures in the accident, was the upper back pain a result of soft tissue injuries she suffered in the accident, or was the upper back pain more likely the result of her pre-existing osteoporosis?
2. To what extent, if any, are Ms. Salame's ongoing physical symptoms the result of her pre-existing osteoporosis which she would have experienced even if the accident had not occurred?
3. To what extent, if any, are Ms. Salame's ongoing depressive symptoms the result of factors unrelated to the accident which she would have experienced even if the accident had not occurred?
4. What is the appropriate quantum of non-pecuniary damages?
5. What is the appropriate quantum of damages for past loss of income earning capacity?
6. Has Ms. Salame established a claim for damages for future loss of income earning capacity and, if so, what is the appropriate quantum?
7. What is the appropriate quantum of damages for loss of homemaking capacity?
8. Has Ms. Salame established a claim for damages for cost of future care and, if so, what is the appropriate quantum?

**Credibility and Reliability**

**20**  The critical questions that need to be answered are what injuries were caused by the accident and what effect those injuries have had on Ms. Salame's life. While there was objective evidence of some of Ms. Salame's injuries, most notably the fractured sternum and the rotator cuff tear, her subjective reports of the impact of the injuries on her physical, mental and emotional state provide the foundation for the assessment of her damages. As in most cases involving subjective complaints, the answers to these questions turn to a significant extent on Ms. Salame's credibility. It is particularly important to exercise caution and examine her evidence carefully: *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.) at 399.

**21**  The factors to be considered when assessing credibility were summarized 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=), leave to appeal ref'd, [*[2012] S.C.C.A. No. 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-FGY5-M50Y-00000-00&context=). They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying his recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes his evidence or is otherwise inconsistent in his recollections, the witness's demeanour, and whether the witness's evidence seems generally unreasonable, impossible, or unlikely.

**22**  The defendant submits that while much of Ms. Salame's evidence is reliable, I should be cautious about accepting her evidence wholly at face value. This is because there was some confusion in her testimony about how she and her husband share the income generated by the businesses they operate; she failed to mention in her examination-in-chief some health issues that are unrelated to the accident; and the defendant submits there were some inconsistencies between her evidence at trial and her evidence given on examination for discovery. None of this gave me any cause for concern. To the contrary, I found Ms. Salame to be a very credible witness.

**23**  Ms. Salame's testimony did indicate some confusion concerning how the income from the family businesses was shared but she explained that she did not know much about this topic and that her husband looked after the accounting. There was nothing unreasonable or unlikely about her evidence in this respect.

**24**  Ms. Salame did not mention some unrelated health issues during her testimony in chief but the scope of topics covered in direct evidence is a reflection of counsel's judgment. It does not indicate a tendency on the part of the witness to withhold relevant evidence. When asked in cross-examination about unrelated health issues, Ms. Salame was forthcoming and made admissions against interest. For example, she acknowledged that her unrelated carpal tunnel symptoms affected, to some extent, her ability to perform certain duties at the laundromat.

**25**  Finally, while the defendant identified some minor differences between Ms. Salame's testimony at trial and on examination for discovery, none of those gave rise to any concern with respect to the credibility or reliability of her evidence. The differences were few and minor and, in my view, insignificant. I do not intend to refer to all of them. An example will suffice. At trial, Ms. Salame testified that her injuries prevented her from praying in the position that she has prayed all her life, which required her to bend and kneel. She said this made her feel very guilty. During her examination for discovery, when asked about "activities" that her injuries interfered with she did not mention praying. However, when this was pointed out to her during cross-examination she reasonably explained that praying is a religious obligation and she does not consider it to be an "activity". As McEachern C.J.S.C. said many years ago in *Diack v. Bardsley* [*(1983), 46 B.C.L.R. 240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-21YN-00000-00&context=) (S.C.), at para. 30, aff'd [*(1984), 31 C.C.L.T. 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-62X1-00000-00&context=) (C.A.), the "usefulness [of minor variations between a witness's evidence at trial and on discovery] is limited because witnesses seldom speak with much precision at discovery ...".

**26**  Ms. Salame's evidence concerning her pre-accident physical health and lifestyle, and the effect of her injuries was corroborated by reliable evidence from her husband, her son, her daughter and one of her good friends. None of those third-party witnesses was shown to have given inconsistent, exaggerated, unreasonable or implausible testimony and there was nothing to impugn their credibility.

**27**  Dr. Locht, the orthopedic surgeon retained by the defendant to perform an independent medical examination, acknowledged that there was no evidence of any amplified pain behaviours during his interview and examination of Ms. Salame and Dr. Locht believed she was truthful when she described her medical history.

**28**  Finally, Ms. Salame did not tend towards exaggeration, and her testimony was not shown to be implausible, internally inconsistent or inconsistent with other evidence. For these reasons, I concluded that Ms. Salame was a truthful witness who provided credible and reliable evidence.

**Causation**

**Legal Principles**

**29**  Ms. Salame must prove, on a balance of probabilities, that the accident caused the injuries in respect of which she seeks damages. The test for causation, established in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-17, [*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=), is the "but for" test. This requires Ms. Salame to establish that it is more likely than not that but for the accident she would not have suffered the injuries underlying her claim. Causation need not be determined by scientific precision and is best answered with ordinary common sense: *Athey* at para. 16.

**30**  Ms. Salame does not have to establish that the accident is the sole cause of the injuries. If other potential causes exist, she will still satisfy the causation test if she can prove a substantial connection between the injury and the defendants' conduct, beyond the *de minimu*s range. If she does so, the defendants will be fully liable for the harm suffered, even if other causal factors, which the defendants are not responsible for, contributed to the harm: *Athey*; *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=); *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=); *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=); *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=).

**31**  Where there are multiple potential causes of damage, the court must consider whether the underlying injuries are divisible or indivisible. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes whereas divisible injuries are those capable of being separated out and having their damages assessed independently: *Bradley v. Groves*, [*2010 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&context=) at para. 20. The characterization of damage as divisible or indivisible is necessary to ensure that the defendant is not held liable for injuries not caused by his or her ***negligence***: *Athey* at paras. 24-25. If an injury is indivisible, subject to contributory ***negligence***, the defendant is liable to the plaintiff for all damages attributable to that injury regardless of the contribution of other causes: *Athey* at paras. 17-20.

**32**  The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's ***negligence***, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35

**Discussion**

**33**  Again, it is not disputed that Ms. Salame sustained a fractured sternum, left rotator cuff tear, and soft tissue injuries in the accident. However, the defence submits that Ms. Salame did not suffer thoracic spinal fractures in the accident and that her upper back pain was more likely related to pre-existing osteoporosis. In addition, the defence submits that any ongoing physical symptoms are attributable to progressive osteoporosis in her thoracic spine and lower back, carpal tunnel syndrome and the recent eye surgery, and that any ongoing depressive symptoms are attributable to factors unrelated to the accident.

***Upper Back Pain***

**34**  Ms. Salame relies on the opinion evidence of Dr. Grover who is an orthopedic surgeon. He has been qualified as such by the Royal College of Physicians and Surgeons of Canada since 2006. He worked as an orthopedic surgeon in the United Kingdom between 1999 and 2001, and then in Newfoundland. He has practised in Chilliwack since 2007 and has privileges at several hospitals in the Fraser Health Authority.

**35**  Dr. Grover assessed Mrs. Salame on March 28, 2014. He reviewed the written reports of a CT scan performed on July 26, 2013, a bone density test performed on August 30, 2013, an x-ray of Ms. Salame's sternum and thoracic spine on October 4, 2013, an x-ray of her thoracic spine on March 3, 2014, and an x-ray of her left shoulder on February 24, 2014. He testified that in addition to reviewing the reports of those imaging studies, he also reviewed the images themselves. Dr. Grover then prepared an expert report dated March 28, 2014. No objection was made to Dr. Grover's qualifications as an expert in orthopedic surgery. No objection was made to the admissibility of any portion of his report.

**36**  Dr. Grover expressed the opinion that Mrs. Salame suffered the following injuries in the accident:

1. fractured sternum;
2. multiple stable wedge compression fractures of the thoracic vertebrae; and
3. left shoulder impingement, posttraumatic rotator cuff tendinitis and probable partial thickness rotator cuff tear.

**37**  The defendant relies on the opinion evidence of Dr. Locht who is an orthopedic surgeon. He has been qualified as such by the Royal College of Physicians and Surgeons of Canada since about 1980. He has practised as on orthopedic surgeon at Chilliwack General Hospital since 1999. He has an appointment as a Clinical Instructor in the Department of Orthopaedics at UBC.

**38**  Dr. Locht assessed Mrs. Salame on June 22, 2015, and then prepared an expert report. He reviewed the reports of the July 26, 2013 CT scan, the August 30, 2013 bone density test, the October 4, 2013 x-ray, the February 24, 2014 x-ray, and the March 3, 2014 x-ray, as well as x-rays conducted on June 1, 2013 and July 12, 2013, and MRIs conducted on September 11, 2014 and January 3, 2015. In addition to reviewing the reports of those studies, he reviewed the x-ray images taken on July 12, 2013, October 4, 2013 and March 3, 2014. No objection was made to Dr. Locht's qualifications as an expert in orthopedic surgery. No objection was made to the admissibility of any portion of his report.

**39**  There was significant agreement between Dr. Locht's and Dr. Grover's opinions. In particular, Dr. Locht agreed that Ms. Salame sustained a fractured sternum and left shoulder rotator cuff tear in the accident. He also expressed the view that she suffered soft tissue injuries in the neck region with diffuse pain into the shoulders and upper back. The principal area of disagreement between the expert witnesses concerned whether Ms. Salame suffered thoracic spine fractures in the accident.

**40**  The basis stated in Dr. Grover's report for his opinion that Ms. Salame suffered "multiple stable wedge compression fractures of her thoracic vertebrae" in the accident is the absence of any history of pre-existing fractures and the view that Ms. Salame's pre-existing osteoporosis made her susceptible to such fractures. In cross-examination, Dr. Grover testified that his diagnosis of multiple compression fractures was based on the imaging he reviewed and Ms. Salame's history of back pain. In the body of the report, Dr. Grover did not specifically identify the thoracic vertebrae that he thought showed evidence of fracture and there is no analysis of the diagnostic imaging. An appendix attached to the report summarizes the findings of some of the imaging studies. The appendix refers to the CT scan performed on July 26, 2013; the x-ray of her sternum and thoracic spine performed on October 4, 2013; and the x-ray of her thoracic spine performed on March 3, 2014. The appendix also refers to the bone density scan and an x-ray of her left shoulder but those are not relevant to the present question.

**41**  The material portion of the radiologist's report of the CT scan of July 26, 2013 reads:

FINDINGS

Mild anterior wedging is seen for the T6 and T8 vertebral bodies without definite acute fracture planes. These could represent old injuries. No definite acute thoracic spine fracture. There is, however, vague sclerosis seen for the anterosuperior corners of T2 and T3 which could represent healing subacute fractures. Equivocal loss of anterior vertebral body height is seen for T9. T10 and T11 also show equivocal loss of anterior vertebral body height. There is qualitatively low bone density and there is subtle endplate concavity which can be seen with osteoporosis. Suggest correlation with bone density.

...

IMPRESSION

No definite acute thoracic spine fracture. There are thoracic wedge compression fractures as described, especially for T6 and T8 which are of unknown acuity...

**42**  In the appendix to his report, Dr. Grover wrote that the CT scan of July 26, 2013 "revealed wedge compression fractures of the thoracic six and thoracic eighth vertebrae of unknown acuity", but he did not mention T2 or T3. In cross-examination, Dr. Grover acknowledged that the radiologist's report was ambiguous and that the deformities or changes noted in relation to T6 and T8 could represent old injuries. He emphasized that the radiologist noted sclerosis in relation to T2 and T3 and he said this was evidence of healing that was consistent with a traumatic fracture occurring 7 to 8 weeks previously, or, in other words, around the time of the accident. He also acknowledged that there was no similar evidence of healing in relation to T6 or T8 and he agreed that if those vertebrae had been fractured at the same time as T2 and T3 one would expect to see the same signs of healing. This testimony suggested that the findings with respect to T2 and T3 were the most significant in terms of supporting the view that thoracic fractures occurred in the accident and yet Dr. Grover did not refer to either T2 or T3 in his report.

**43**  The x-ray of October 4, 2013 is stated to be a comparison of the July 26, 2013 CT scan. The material portion of the radiologist's report of that x-ray reads:

The previously described mild wedge compression fracture along the mid thoracic spine is stable. Mild wedge compression fracture along the superior endplate at the approximate T7 level is again noted with no significant interval change. No new acute osseous abnormalities are identified.

**44**  In the appendix to his report, Dr. Grover wrote that the x-ray of October 4, 2013 "revealed mild wedge compression fractures of multiple thoracic vertebrae without any significant interval change". In cross-examination, Dr. Grover agreed that the radiologist report referred to fractures along "the mid thoracic spine" and he agreed that the mid thoracic spine would not include T2 or T3.

**45**  The findings as stated on the radiologist's report of the March 3, 2014 x-ray are virtually incomprehensible. They read:

The bones osteopenic. Mild compression deformities are present involving T7, nine, 10 and 12. It is normal. Acute compression deformity.

Comment: No significant interval change.

**46**  In the appendix to his report, Dr. Grover wrote that the March 3, 2014 x-ray "revealed that her bones continued to be osteopenic along with mild compression deformities involving the thoracic seventh, ninth, tenth and twelfth vertebrae". In cross-examination, Dr. Grover agreed that there was no evidence of injury having been sustained to T7, T9, T10 or T12 in the accident. He acknowledged that the statement "It is normal" in the radiologist report was likely a mistake. He said the statement "Acute compression deformity" could be a typo. He also said that if there had been a compression fracture at T2 or T3 it probably, but not necessarily, would have shown up on the March 3, 2014 x-ray. However, he also emphasized that the deformities in relation to T2 and T3 were originally noted on a CT scan and he said that it would be more reliable to compare a subsequent CT scan to a prior CT scan rather than a subsequent x-ray to a prior CT scan. Unfortunately there was no subsequent CT scan in evidence.

**47**  In cross-examination, Dr. Grover acknowledged that osteoporosis of the spine can lead to spontaneous compression fractures (in other words, fractures that occur in the absence of trauma) if the osteoporosis is "pretty advanced". He indicated that Ms. Salame's osteoporosis was not yet at that stage.

**48**  The conclusions I drew from Dr. Grover's evidence as a whole are:

1. the reports of the imaging studies indicate deformities in the thoracic vertebrae but are inconclusive with respect to whether these are fractures that were sustained in the accident;
2. one would expect to see evidence of healing if there were acute (i.e., recently sustained) fractures and the only evidence of healing indicated in the imaging studies was that noted in the July 26, 2013 CT scan with respect to T2 and T3;
3. there was no indication of any deformity in relation to T2 or T3 in the x-rays taken after the July 26, 2013 CT scan and if there had been a compression fracture at T2 and T3 evidence of same would probably have shown up on the subsequent x-rays;
4. Dr. Grover did not mention T2 or T3 specifically in his report which suggests that he did not consider the diagnostic imaging to be significant in relation to T2 or T3 at the time he wrote his report;
5. Ms. Salame had pre-existing osteoporosis which renders her susceptible to compression fractures; and
6. such fractures would be unlikely to occur spontaneously in a patient with moderate osteoporosis.

**49**  In his report, Dr. Locht expressed the opinion that Ms. Salame did not suffer thoracic spine fractures in the accident. In his view, the pain she experienced in the area of her thoracic spine after the accident was the result of neck pain referral associated with the soft tissue injuries she sustained in the accident. His opinion that she did not suffer thoracic compression fractures in the accident was based on:

1. the absence of any recorded complaints of pain in her thoracic spine by the paramedics or emergency personnel immediately following the accident;
2. his view that the kind of deformities of the thoracic spine noted in the imaging studies are not uncommon in the absence of injury;
3. the fact that the sequential x-rays taken on July 12, 2013, October 4, 2013, and March 3, 2014 do not show evidence of healing which would be present if fractures had occurred in the accident; and
4. a thoracic spine MRI taken on January 3, 2015 (after Dr. Grover had written his report) did not show evidence of previous or healed thoracic spine fractures.

**50**  In cross-examination, Dr. Locht agreed that if someone is in acute pain in one area of their body they might not notice pain in another area. This acknowledgment aligned with Dr. Grover's testimony to the effect that he would not be surprised if Ms. Salame did not complain of back pain until the day after the accident because the chest pain from the fractured sternum would likely have dominated her senses. In the circumstances, I place no weight on the fact that the paramedics and emergency personnel did not record complaints of pain in the thoracic spine.

**51**  Dr. Locht agreed in cross-examination that while spontaneous spinal fractures can occur with advanced osteoporosis, it is unlikely that Ms. Salame would have had a spontaneous fracture. However, he was not cross-examined on his view that deformities in the thoracic spine of the kind noted on the imaging studies are not uncommon in the absence of injury.

**52**  Dr. Locht was also not cross-examined on his view that there was no evidence of healing and that such evidence which would be present if Ms. Salame had actually sustained fractures in the accident. This view is consistent with Dr. Grover's view to the effect that one would expect to see evidence of healing if the fractures were acute. There is no evidence of healing on the sequential x-rays. As noted above, there is some evidence of possible healing with respect to T2 and T3 on the CT scan but this was not noted by Dr. Locke at all and was not noted by Dr. Grover in his report. The only reasonable inference is that neither expert considered this single reference to T2 and T3 to be significant.

**53**  As already discussed, Dr. Grover confirmed that his diagnosis of multiple compression fractures was based, in significant part, on the imaging studies but there was no actual analysis of those studies in the body of his report and the radiologist's reports are, on their own, ambiguous. His opinion was undermined in cross-examination by his acknowledgment that one would expect to see evidence of healing if the fractures were acute and that the only evidence of healing was a single reference to T2 and T3, neither of which was referred to in his report. For these reasons, I prefer Dr. Locht's opinion on the question of whether Ms. Salame sustained thoracic spine fractures in the accident.

**54**  Ms. Salame's family physician, Dr. Ahmed, also authored an expert report and testified at the trial. I have not overlooked her opinion, as expressed in her report, that Ms. Salame suffered "multiple thoracic spine wedge compression fractures" in the accident. However, in cross-examination, Dr. Ahmed confirmed that this opinion was based on the radiologist's report of the CT scan performed on July 26, 2013 which, as already discussed, was equivocal. Also, Dr. Ahmed agreed that upper back pain could be caused by soft tissue injury. In the circumstances, Dr. Ahmed's evidence did not provide a persuasive retort to Dr. Locht's opinion.

**55**  The burden to prove causation is on the plaintiff. I am not persuaded that is more likely than not that Ms. Salame suffered compression fractions to her thoracic spine in the accident. However, I agree with the submissions of Ms. Salame's counsel to the effect that this is of little consequence in this case because, notwithstanding the defence submissions to the effect that the upper back pain was most likely caused by the pre-existing osteoporosis, the defence expert, Dr. Locht, expressed the opinion that "all of Ms. Salame's complaints after the subject accident were a result of the accident related injuries". He documented her complaints as including pain in the interscapular area. He attributed this to "pain referral pattern" caused by soft tissue injuries to her neck sustained in the accident. In this regard, he stated:

Ms. Salame's diffuse pain pattern was consistent with a Whiplash Associated Disorder Grade II and included the posterior neck, occiput, trapezius ridges, shoulder prominences and radiation down between the shoulder blades to include the thoracic spine.

**56**  Accordingly, although I am not satisfied that Ms. Salame sustained thoracic fractures in the accident, I am satisfied that she suffered from severe upper back pain as she described it, and I accept Dr. Locht's opinion that this was referred pain resulting from the soft tissue injuries to her neck which were sustained in the accident.

***Ongoing physical symptoms***

**57**  Ms. Salame testified that at the time of the trial, she continued to suffer from ongoing left shoulder pain. It had improved overall since the accident but continued to be bothersome and had deteriorated since she stopped attending physiotherapy in October 2015. She testified she also continued to suffer from constant upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from periodic episodes of extreme pain, which occur about every five to six weeks. She said that she still cannot turn her neck completely and her sleep is still disrupted.

**58**  In late 2014, she developed some low back pain, which became quite severe for a period of a few months. In 2015, she complained of carpal tunnel symptoms in both hands, but primarily in the left. In October 2015, she underwent surgery to repair a macular hole in her right eye. At the time of the trial in December 2015, she was continuing to recover from the eye surgery.

**59**  The defence submits that Ms. Salame's ongoing physical symptoms are related to progressive osteoporosis in her thoracic and lumbar spine, carpal tunnel syndrome and the recent eye surgery, and are unrelated to the injuries she sustained in the accident.

**60**  It is important to emphasize that Ms. Salame is not advancing a claim for damages associated with low back pain, carpal tunnel symptoms or her eye issue. Those conditions might be relevant considerations when assessing her damages but they are unrelated to determining the legal cause of the injuries for which she seeks compensation in this action. In other words, the low back pain, carpal tunnel symptoms and eye issue are injuries or conditions that are divisible from the injuries underlying the claim. At this stage, the question is whether any of the ongoing symptoms that she attributes to the injuries she sustained in the accident are more properly characterized as the debilitating effects of the pre-existing osteoporosis which she would have experienced anyway.

**61**  Ms. Salame did not have any material pre-accident history of shoulder or back pain. The osteoporosis was diagnosed after the accident but she concedes that it pre-existed the accident. She also concedes that she has had some low back pain since the accident but she denied this was her main ongoing problem. Her primary ongoing physical complaints are the shoulder and upper back pain. There is no evidence or suggestion that the shoulder symptoms are related to the osteoporosis. The remaining question is whether the ongoing upper back symptoms are properly characterized as the effects of pre-existing osteoporosis that she would have experienced anyway (i.e., whether the crumbling skull rule applies).

**62**  In my view, the evidence does not support the conclusion that Ms. Salame's ongoing upper back pain is the result of her osteoporosis that she would have suffered from irrespective of the accident.

**63**  As already discussed, Dr. Grover attributed Ms. Salame's back pain to compression fractures in her thoracic spine caused by the accident. While he agreed, in cross-examination, that osteoporosis was a progressive condition that could lead to spontaneous fractures and generalized pain and stiffness, he said the condition would have to be "pretty advanced" for it to happen spontaneously. The clear implication of this testimony was that, in his view, Ms. Salame's osteoporosis was not so advanced. He was not specifically asked to express an opinion as to whether Ms. Salame would have experienced upper back pain as a result of her osteoporosis even in the absence of the accident.

**64**  As already discussed, Dr. Ahmed attributed Ms. Salame's back pain to compression fractures caused by the accident. In cross-examination, she agreed that osteoporosis is a risk factor for compression fractures but said it is not a cause of such fractures except in much older people who could suffer spontaneous fractures. Again, the implication was that Ms. Salame was not suffering from osteoporosis that had progressed to the stage where she was at risk of spontaneous fractures.

**65**  Dr. Locht agreed that despite the osteoporosis there was a less than 50% chance that Ms. Salame would have developed fractures in the next 10 years as a result of the osteoporosis. Further, his opinion, as expressed clearly in his report, is that Ms. Salame's "current" pain complaints in the neck and interscapular area, which he described as "posterior mid thoracic pain", are related to what he referred to as "her Chronic Whiplash Associated Disorder". That report was written on July 30, 2015, roughly five months before the trial. He did not express the opinion that her back pain was a symptom of the osteoporosis that she would have suffered in any event of the accident. For the reasons already expressed, I accept Dr. Locht's evidence in this regard.

**66**  For the forgoing reasons, I conclude that Ms. Salame is suffering from Chronic Whiplash Associated Disorder and that her ongoing upper back pain was caused by the soft tissue injuries to her neck which were sustained in the accident. Her pre-existing osteoporosis rendered her susceptible to traumatic compression fractures but, for the reasons I have already expressed, I am not persuaded that it is more likely than not that Ms. Salame actually sustained thoracic compression fractures in the accident.

***Ongoing depressive symptoms***

**67**  Ms. Salame testified that at the time of the trial she continued to suffer from depression. She continued to take antidepressants.

**68**  The defendant concedes that the injuries Ms. Salame suffered in the accident likely contributed to her depression, but says that she would have suffered from some level of depression anyway as a result of various factors unrelated to the accident including the onset of menopause, the death of her mother, her children growing up and leaving home, her osteoporosis diagnosis, and the return of carpal tunnel symptoms. The defendant submits that these other factors substantially contributed to Ms. Salame's mental state and are the cause of its persistence.

**69**  Ms. Salame's evidence was that she did not suffer from any significant mood conditions prior to the accident. She testified, compellingly, about the significant, constant pain that she suffered during the six months following the accident, and the ongoing pain she suffered thereafter. The pain medication made her feel lazy, dizzy and drowsy and caused her to be unable to focus or concentrate. She felt disappointed because she could not help her family around the house and could not contribute at work. She felt guilty because she was unable to pray in the manner in which she had done for her whole life. Her sleep became affected. She isolated herself and became anxious and irritated. This evidence was corroborated by the evidence of her husband, her son and her daughter. I accept it without reservation.

**70**  Dr. Ahmed expressed the opinion that Ms. Salame is suffering from chronic pain disorder and depression as a result of the injuries she suffered in the accident. There is no contrary evidence and her opinion in this respect was not undermined in cross-examination.

**71**  I find that within six months of the accident Ms. Salame began experiencing depressive symptoms as a result of the injuries she suffered in the accident and that she continues to suffer depressive symptoms. Even if other factors contributed, I would find that her depression was an indivisible injury for which the defendant is liable regardless of the contribution of other causes. Having said that, the evidence does not support the defendant's submission. There is simply no evidence, expert or otherwise, to the effect that the other factors the defendant relies upon caused Ms. Salame's depression or even contributed to it.

**72**  Ms. Salame denied experiencing significant mood symptoms associated with menopause. This was corroborated by Dr. Ahmed who testified that although she reported mild mood symptoms along with other menopause-related symptoms in December 2012, the first time Ms. Salame reported any significant mood symptoms was after the accident. Dr. Ahmed testified that in December 2012 she recommended an herbal treatment and gave Ms. Salame a prescription to use if the herbal treatment did not work. She testified that Ms. Salame did not fill the prescription. None of this evidence was undermined and I accept it.

**73**  Ms. Salame denied that her mother's illness and death, or her children leaving home, contributed to her depressive symptoms. She readily admitted that her mother's illness and death caused her sadness, but she had not lived close to her mother since 2006 and her mother was elderly when she died. Her death cannot be characterized as unexpected or tragic. Ms. Salame testified that even though some of her children had left home, the family remained close and she was eagerly anticipating the arrival of grandchildren. I accepted all of her evidence in this respect without reservation.

**74**  For the forgoing reasons, I conclude that Ms. Salame continues to suffer from depressive symptoms caused by the injuries she sustained in the accident.

***Current Condition and Prognosis***

**75**  The defendant submits that by March 2015, Ms. Salame's recovery was close to complete. The evidence does not support that submission. It appears to be based on a note in Dr. Ahmed's clinical records from March 2015 to the effect that Ms. Salame had returned to work full-time in January 2015, and a note in Ms. Salame's physiotherapist's clinical records from March 2015 to the effect that Ms. Salame reported working six days a week.

**76**  Dr. Ahmed acknowledged that on March 5, 2015 she made a note in her clinical records to the effect that Ms. Salame was back to work on a full-time basis since January. However, she testified that she was unaware of what full-time meant to Ms. Salame. Ms. Salame testified that by January 2015 she was back to work three times a week, which was her normal pre-accident schedule, but for fewer hours each day than she had typically worked before the accident. She started working about five hours a day and then increased to about eight hours a day during tax season. She testified that she found the work difficult and painful and so when tax season was over she reduced her hours again. She acknowledged that she may have told Dr. Ahmed, in March 2015, that she was working full-time, but for her three days a week was her normal schedule.

**77**  The physiotherapist, Krystie Cheong, acknowledged that on March 18, 2015 she made a note in her clinical records to the effect the Ms. Salame was going to work six days a week. However, she also testified that Ms. Salame sometimes had difficulty expressing herself in English and she acknowledged that her note could reflect a misunderstanding on her part. She also acknowledged that in July 2015 she made a note in her clinical records to the effect that Ms. Salame was, at that time, trying to work a few hours every week. Ms. Salame denied the suggestion that she was working six days a week in March 2015. She maintained that Ms. Cheong must have misunderstood what she said, in March 2015, about the extent to which she was working.

**78**  For the reasons I have already expressed, I found Ms. Salame to be a very credible witness. The two clinical notes, considered in the broader context of Dr. Ahmed's testimony and Ms. Cheong's testimony, as summarized above, do not detract from Ms. Salame's credibility. I accept her evidence as to the state of her condition in early 2015. I find that she was working three days a week at that time, starting with about five hours a day and progressing to about eight hours a day.

**79**  I also accept Ms. Salame's evidence as to her current condition. Specifically, she continues to suffer from significant left shoulder pain and is limited in her ability to perform heavier physical tasks as a result. She continues to suffer constant pain in her upper back and occasional pain in her chest. She suffers periodic episodes of severe pain. Her sleep continues to be disrupted.

**80**  There is no material conflict in the expert evidence of Dr. Grover and Dr. Locht concerning Ms. Salame's prognosis.

**81**  Dr. Grover characterized his prognosis as guarded. His opinion was that Ms. Salame's injuries were "very likely" to continue to affect her recreational activities and she was "very likely" to continue to suffer long-term symptoms and restrictions. At the time he wrote his report, in March 2014, it was his view that her pain was "very likely to persist for at least another eighteen to twenty four more months, and could well last longer, on a balance of probability".

**82**  Dr. Locht's report is dated July 30, 2015, roughly five months prior to trial. His prognosis for Ms. Salame's shoulder is guarded due to "permanent changes to the rotator cuff tendon". He said ongoing bursitis and impingement is to be expected. With respect to her sternum injury, he said she would probably have tenderness in the area indefinitely. He did not provide a prognosis for her soft tissue injuries.

***Summary on causation***

**83**  In summary, I make the following findings on causation, the current state of Ms. Salame's condition, and her prognosis:

1. Ms. Salame sustained a fractured sternum, left rotator cuff tear, and soft tissue injuries in the accident.
2. Ms. Salame developed and continues to suffer from chronic pain, or what Dr. Locht referred to as Chronic Whiplash Associated Disorder. Her prognosis is guarded and it is more likely than not that her pain will continue indefinitely.
3. Over time, the pain interfered with Ms. Salame's sleep and resulted in anxiety and depression. She continues to suffer from depressive symptoms as a result of the injuries she sustained in the accident.

**Damages**

**General legal principles**

**84**  The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendant's ***negligence***: *Athey* at paras. 32-35.

**85**  If there is a measurable risk that a pre-existing condition, in this case osteoporosis, would have detrimentally affected Ms. Salame even without the defendant's ***negligence***, that risk must be taken into account in reducing the damages award. However, where no such measurable risk is established, the fact that a pre-existing condition may have made her more vulnerable to sustaining the injury caused by the defendant's ***negligence*** will not serve to reduce the damage award.

**86**  Unrelated intervening events may be taken into account in the same way as pre-existing conditions. If there is a measurable risk that an unrelated intervening event, in this case the onset of low back pain, the return of carpal tunnel symptoms and the eye issue, would have affected Ms. Salame's original position adversely irrespective of the defendant's ***negligence***, it may be appropriate to reduce the quantum of the defendant's liability accordingly: *Athey* at paras. 31-32.

**87**  Measurable risks, or in other words contingencies, need not be proved on a balance of probabilities. Rather, as with any hypothetical event, they are given weight in the assessment of damages according to their relative likelihood: *Athey*, para. 27.

**88**  I will initially assess Ms. Salame's damages under each of the heads of damage that she claims, without regard for contingencies associated with the pre-existing osteoporosis, the low back pain, the carpal tunnel symptoms, and the eye surgery. At the end of this section, I will adjust for any contingencies that I find amount to a measurable risk.

**Non-Pecuniary Damages**

**89**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, leave to appeal ref'd [*[2006] SCCA No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=), the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle.

**90**  Notwithstanding her pre-existing osteoporosis, Ms. Salame had no material health problems prior to the accident. She was able to maintain her home and, together with her husband, work at their business. She was happy and social, and enjoyed spending time with her family and socializing with friends.

**91**  Ms. Salame sustained serious injuries in the accident. For about six months following the accident, she suffered from severe and unrelenting pain in her chest, neck, upper back and left shoulder areas. Within about a year of the accident, Ms. Salame's chest pain and neck pain had improved but she still had constant pain in her shoulder and upper back. At the time of the trial, more than 2 1/2 years after the accident, she continued to suffer from ongoing left shoulder pain and upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from periodic episodes of extreme pain in her upper back. Ms. Salame's prognosis is guarded. It is more likely than not that her pain will continue indefinitely. Over time, the pain interfered with Ms. Salame's sleep and resulted in anxiety and depression. She continues to suffer from depressive symptoms as a result of the injuries she sustained in the accident. The medication she took left her drowsy and impaired her concentration. She suffered side effects from the medication including constipation and hemorrhoids.

**92**  Ms. Salame was completely disabled by her injuries for about six months. She needed help with the simplest of tasks, including getting out of bed, attending to her personal hygiene and getting dressed. Over time, her functionality has improved but she is still not able to perform heavier housekeeping task and duties at the laundromat.

**93**  In addition to the pain and physical suffering, Ms. Salame's injuries have had a significant negative effect on the enjoyment of her life. It was apparent to me that she and her husband have a very close and supportive relationship, but their relationship was damaged as a result of her condition. Mr. Khattab testified, persuasively, that he feels he has lost the person he loved. He walks on eggshells when he is around Ms. Salame and works hard to accommodate her moods. His physical touch causes her pain and their intimacy has been affected. Ms. Salame's relationship with her children has also been affected as she has become withdrawn and is much less communicative.

**94**  Ms. Salame loves her work at the laundromat. She particularly enjoyed communicating and socializing with customers. I will address her claim for loss of income earning capacity later. However, I am satisfied that her inability to work for about a year and a half after the accident had a negative impact on her enjoyment of life and this is a factor that is appropriately considered in assessing her non-pecuniary damages.

**95**  Similarly, Ms. Salame loves maintaining her household and took great pride in her home. Her friend, Ms. Hoda Mohamad, testified that before the accident, Ms. Salame's home was very clean and tidy, but after the accident it became messy, dishes were left in the sink, and food was left out around the stove. I will address Ms. Salame's claim for loss of homemaking capacity later. However, her inability to maintain her home, particularly in the first six months or so after the accident, had a negative impact on her enjoyment of life.

**96**  The pain also prevented Ms. Salame from enjoying and participating in recreational activities. Before the accident, she walked regularly, for exercise, sometimes with Ms. Mohamad. She also enjoyed helping her husband with yard work, reading, and walking to the grocery store to shop for food for her family. She and her husband socialized with friends every Saturday evening and Ms. Salame enjoyed preparing refreshments for those gatherings.

**97**  In the months following the accident, Ms. Salame's ability to walk was impeded. She was only able to walk for short periods of time. She is now able to go for longer walks on days when her pain is not bad. In the first few months after the accident she was unable to read because she could not sit still, due to the pain, and the medication affected her ability to concentrate. In the first few months after the accident she was unable to do the grocery shopping. Her social life has not returned to its prior state. Although she has resumed socializing, she does so less frequently and she no longer prepares refreshments. Her friends drop by to see her but they do not stay for long and she is withdrawn and not engaged in the visits.

**98**  The pain also interfered with Ms. Salame's ability to practice her religion. As already discussed, she was unable to pray in the manner that she had done her entire life because she could not bend over and kneel down. She resumed praying a couple of months after the accident but she had to do so from a seated position. Ramadan was two months after the accident and because of her medication she was unable to fast. She testified that she felt guilt as a result.

**99**  As Ms. Salame's condition has improved, she has resumed some aspects of her old lifestyle, but it was apparent to me that the ongoing pain and depression has affected her personality causing her to be anxious, short tempered and withdrawn. This continues to have a significant effect on her relationships with her husband, her children and her friends, and in turn has caused Ms. Salame significant emotional suffering.

**100**  Counsel for Ms. Salame and counsel for the defendant have each provided me with several cases to assist in determining the appropriate award of non-pecuniary damages.

**101**  Counsel for the defendant submits that the authorities support an award of about $60,000 for non-pecuniary damages. Speaking generally, the authorities the defendant relies on concern plaintiffs whose injuries were less severe and long-lasting than the injuries sustained by Ms. Salame.

**102**  In *Bhandal v. Charlebois*, [*2015 BCSC 2315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HR-00000-00&context=), the plaintiff suffered moderate soft tissue injuries to his neck, back and shoulders that initially caused significant pain and disability but resolved within about a year. He also suffered ongoing head pain and pain and stiffness in his neck at the base of his skull. Non-pecuniary damages of $60,000 were awarded.

**103**  In *Harris v. Xu*, [*2013 BCSC 1257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B1YX-00000-00&context=), the plaintiff suffered soft tissue injuries to her neck, shoulder and back. Her previously asymptomatic disc disease was aggravated. She also suffered two broken ribs and bruises, headaches, fatigue and disturbed sleep. She continued to suffer from neck symptoms four years post-accident. However, it was found that she had "generally recovered" within about 10 months of the accident. Non-pecuniary damages of $60,000 were awarded.

**104**  In *Butcher v. Vantol*, [*2013 BCSC 2425*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1FR-00000-00&context=), the plaintiff suffered neck, back and shoulder pain and headaches, all of which were significant for a few months but then fluctuated in intensity. Within less than two years of the accident, the plaintiff was having more good days and bad. Her lifestyle was affected by the injuries but for the most part she was able to continue to work. Non-pecuniary damages of $60,000 were awarded.

**105**  In *Amini v. Mondragaon*, [*2014 BCSC 1590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G3H-VVF1-JSRM-62MX-00000-00&context=), the plaintiff suffered soft tissue injuries causing pain in her neck, upper back and shoulders, capsulitis of the right shoulder, a mild injury to her rotator cuff, as well as a mild disc bulge at C5/6. She remained somewhat limited in her functionality and her mood suffered. However, she was able to continue to work in the two years after the accident. She took a two-month medical leave more than two years later, during which she traveled to Iran. Non-pecuniary damages of $55,000 were awarded.

**106**  In *Turner v. Coblenz*, [*2008 BCSC 1801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0S6-00000-00&context=), the plaintiff suffered moderate soft tissue injuries to her neck, upper back, left shoulder and chest wall, as well as mild hearing loss due in part to a mild concussion. She was substantially recovered by the time of the trial, three years post-accident, but was left with residual shoulder pain. Non-pecuniary damages of $50,000 were awarded.

**107**  Counsel for Ms. Salame submits that the authorities support an award in the range of $100,000 to $130,000 for non-pecuniary damages. I have read the authorities he relies upon but I will not refer specifically to all of them. Speaking generally, I found these authorities to concern plaintiffs who suffered injuries, with resulting pain and suffering, that was more similar to Ms. Salame's situation than the plaintiffs in the cases relied upon by the defendant.

**108**  In my view, *Andrews v. Mainster*, [*2012 BCSC 823*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-248K-00000-00&context=), was the most helpful comparison. That case concerned a female plaintiff aged 51 years. She sustained two small sternum fractures, an exacerbation of pre-existing degenerative arthritis that resulted in pain in her neck and arm, soft tissue injuries and an exacerbation of pain in her shoulder, back and hip. She also suffered a serious exacerbation of anxiety, depression and mood disorders. The chest fractures had substantially healed within about four months of the accident and the other physical injuries within about 15 to 16 months. The plaintiff continued to suffer from significant psychological symptoms but it was found that her pre-existing psychological condition was about 50% responsible for her current psychological condition. Non-pecuniary damages of $85,000 were awarded but that reflected a significant reduction to account for the fact that the ongoing psychological symptoms were attributed, in significant part, to her pre-existing condition.

**109**  .Awards of damages in other cases provide a guideline only. Ultimately, each case turns on its own facts. While similar in nature, Ms. Salame's physical injuries were more severe and long-lasting than those suffered by the plaintiff in *Andrews*. In particular, in *Andrews* it was found that within sixteen months of the accident, with respect to her physical injuries, the plaintiff had returned to her original position. In contrast, at the time of the trial more than 2 1/2 years had passed since the accident and Ms. Salame continued to suffer constant pain in her upper back and shoulder, and this is likely to continue. While Ms. Salame's anxiety and depression was not as significant as that suffered by the plaintiff in *Andrews*, she did not have pre-existing psychological conditions.

**110**  Having considered all of the authorities and the factors discussed in *Stapley*, I assess Ms. Salame's non-pecuniary damages at $110,000, prior to any adjustment for contingencies associated with her pre-existing osteoporosis. As already explained, I will adjust for contingencies later in this judgment.

**Loss of Income Earning Capacity**

**111**  Compensation must be made for the loss of income earning capacity as a capital asset and not merely 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=) at 251-254. Nevertheless, a pecuniary loss must be established, the existence of which is typically assessed by comparing what would have been the plaintiff's past and future earnings if the accident had not occurred with the plaintiff's actual past and likely future earnings given the accident did occur. The fundamental question is whether the plaintiff has established, to the requisite standard of proof, an impairment to his or her income earning ability leading to a pecuniary loss, which loss might exist even when the plaintiff continues in his or her usual occupation: *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.

**112**  The determination of what would have happened in both the past and the future had it not been for the accident, and the determination of what will happen in the future given the accident did occur, are hypothetical exercises. While actual past events must be proven on a balance of probabilities, the standard of proof in relation to hypothetical events is simple probability: *Athey* at para. 27. If a plaintiff establishes a real and substantial possibility, as opposed to a speculative possibility, of a hypothetical event, the event must be given weight according to its relative likelihood and compensation must be awarded based on an estimation of the chance that the event will occur: *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 17. The court must make allowances for the possibility that the assumptions upon which the determination is based may prove to be wrong, and all contingencies, positive and negative, that are established as realistic as opposed to speculative possibilities must be given effect.

**113**  In summary, to award damages for loss of past earning capacity, the court must be satisfied, on a balance of probabilities, that the accident caused an impairment of the plaintiff's ability to engage in some activity relevant to her income earning potential and, if so satisfied, the court must assess the chances that the plaintiff would have earned more income than she did earn in the pre-trial period had she not been injured and make an award based on that assessment that reflects all realistic contingencies: *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 paras. 31, 36-37.

**114**  To award damages for loss of future earning capacity, the court must be satisfied that, as a result of the accident, there is a real and substantial possibility of a future event leading to an income loss: *Perren* at para. 32. If so satisfied, the court must assess the chances that the plaintiff would have earned more income in the future had she not been injured than she will earn in the future given that she has been injured and make an award based on that assessment that reflects all realistic contingencies.

**115**  There is more than one way to analyze a loss of future income earning capacity. The "earnings approach", which is generally appropriate where the plaintiff has some earnings history and the court can more easily measure the loss mathematically, typically involves a determination 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: *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. The "capital asset approach", which is typically used when the loss is not as easily measurable, involves the consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and 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=) at para. 8 (S.C.).

**116**  Irrespective of the approach used, the court is required to quantify a pecuniary loss and the quantification must be grounded in the evidence and the particular facts of the case. There must be a "reasoned analysis to explain and justify the award": *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 para. 56. While the loss need not be calculated with mathematical precision, mathematical, statistical, and/or economic evidence will inform the assessment. This reflects the fact that an award for loss of earning capacity, irrespective of the quantification approach adopted, is not "simply at large": *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. 20.

***Past loss of income earning capacity***

**117**  Ms. Salame and her husband operate the laundromat as a family business and the income earned goes into a "family pot". The income earned from Mr. Khattab's side businesses also goes into the "family pot".

**118**  The laundromat is open seven days a week from 7 a.m. to 10 p.m. Ms. Salame and Mr. Khattab offer a laundry drop off service. They personally sort, wash, dry and fold the laundry that is dropped off. They accept dry-cleaning and alterations but send that work out. They also pick up and deliver laundry. Before the accident, Ms. Salame was working about three full days a week. Occasionally the children would help out on the weekends. There were no paid employees.

**119**  Prior to the accident, Ms. Salame's duties included receiving laundry; sorting, washing, drying and folding laundry; talking to clients, answering their questions, and helping them with the machines; answering the phone; making change; cleaning the machines; cleaning the premises; and taking out and picking up alterations and dry-cleaning. Mr. Khattab's duties were similar but, in addition, he was responsible for repairing the machines, bookkeeping and accounting.

**120**  It is not disputed that Ms. Salame was unable to work at the laundromat for about a year and a half after the accident. She returned to work in December 2014, doing light duties and at reduced hours.

**121**  During the time that Ms. Salame was not able to work at the laundromat, her duties were assumed by Mr. Khattab, by some of Ms. Salame's children, and for about a 10-month period of time by the part-time employee, Mr. Weir. Mr. Khattab spent 9 to 10 hours a day, seven days a week at the laundromat. The children worked about 15 hours a week. In February 2014, Mr. Weir was hired. He worked about 17 hours a week between February and November 2014, for a total of slightly less than 700 hours. The children were not paid wages for their work but Mr. Weir was paid wages. The cost to the business for Mr. Weir's work, including wages and CPP and EI contributions, was $7,870.08.

**122**  Mr. Khattab turned down requests for security camera installations because that work required him to leave the laundromat and Ms. Salame was not able to cover for him. He estimated that he lost about $2,000 in income in 2015 as a result. He turned down this kind of work in 2013 and 2014 as well, but he did not provide an estimate or any evidence of the amount of income lost as a result.

**123**  At the time of the trial, Ms. Salame was working about 15 hours a week at the laundromat and was expecting to increase her hours after recovering from the eye surgery. Mr. Khattab estimated he was spending about 40 to 45 hours a week there and the children continued to work about 15 hours a week. Again, the children were not paid wages for their work.

**124**  The laundry has generated annual net income of approximately $15,000 per year. Ms. Salame does not claim that the income from the laundromat decreased as a result of her inability to work. Rather, she says that as a result of her injuries she suffered a pecuniary loss represented by the cost of hiring Mr. Weir, the forgone income from Mr. Khattab's security camera installation business, and the value of the time spent by Mr. Khattab and the children doing the work at the laundromat that she would have done had she not been injured. She seeks a total of $20,000 under this head of damages.

**125**  The defendant concedes that Ms. Salame suffered a compensable loss of earning capacity but says her loss is limited to half the cost of hiring Mr. Weir. The defendant says that only half that cost is recoverable by Ms. Salame because the other half of the cost is properly viewed as Mr. Khattab's loss given they divide all the costs and profits equally.

**126**  There is no doubt that Ms. Salame's ability to do her work was impaired, completely, during the first year and a half after the accident, and that it remained partially impaired thereafter. She continues to be unable to do the heavier aspects of her work at the laundromat, particularly the duties that involve reaching and heavy lifting. The question is whether she has established that the physical impairment resulted in a pecuniary loss.

**127**  I have no difficulty concluding that Ms. Salame has established a pecuniary loss in an amount equal to the full cost of hiring Mr. Weir. Although she and Mr. Khattab share the income from the laundry business they do so from a family pot that would have been greater, by the amount of that cost, but for the accident. It was Ms. Salame's contribution to the business that was satisfied by Mr. Weir's labour.

**128**  Similarly, I have no difficulty concluding that Ms. Salame has established a pecuniary loss in an amount equal to the income forgone from the security camera installation business. While she was not personally involved in that business, I am satisfied that it was as much a family business as was the laundromat in that the income from it went into the same family pot. Had an employee been hired to mind the laundromat so that Mr. Khattab could attend to the security camera installation business, the laundromat would have suffered a loss. In *Hanson v. Smith*, [*1990 CanLII 438*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2J8-00000-00&context=) (BCSC), a similar situation was held to give rise to a compensable loss of earning capacity. The measure of this aspect of Ms. Salame's loss is the loss to the security camera installation business. This is difficult to quantify on the evidence before me. I accept Mr. Khattab's estimate of $2,000 of income forgone in 2015, but there is no evidence of the magnitude of the loss in the earlier years. Ms. Salame's counsel submits that it is reasonable to infer the loss would be similar each year, but Mr. Khattab did not testify to that effect. Ms. Salame bears the burden of establishing the loss. In the circumstances, she has only established a loss of $2,000 in forgone income from the security camera installation business.

**129**  The final question, in respect of this head of damages, is whether the time spent by Mr. Khattab and the children performing Ms. Salame's work represents a compensable loss of earning capacity, in the absence of evidence of any particular pecuniary disadvantage as a result. I find it does not. Ms. Salame cites *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=) as supportive of her position that their labour represents a compensable loss to her. In my view, *Ibbitson* is distinguishable. In *Ibbitson*, the Court of Appeal found, at para. 20, that the plaintiff suffered a pecuniary disadvantage because he had to work longer hours to maintain his pre-accident level of income. Ms. Salame suffered no pecuniary disadvantage as a result of her family performing her work.

**130**  For the forgoing reasons, I assess Ms. Salame's damages for past loss of earning capacity, prior to any adjustment for contingencies, at $9,870.08. Again, I will adjust for contingencies later in this judgment.

**131**  Pursuant to s. 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=). If the parties are unable to reach agreement on the amount to be deducted from this award, by reason of this provision, they may apply for further directions.

***Future loss of income earning capacity***

**132**  As explained above, the threshold question is whether Ms. Salame has established a real and substantial possibility of a future event leading to an income loss.

**133**  As already discussed, Ms. Salame's prognosis is guarded. It is more likely than not that she will continue to suffer from ongoing shoulder and upper back pain, and occasional pain in her chest area. She continues to suffer from periodic severe episodes of pain. I accept her evidence that she remains limited by her pain in performing all the duties at the laundromat that she used to perform. She cannot do the heavy lifting, she cannot clean the machines, she cannot clean the washrooms or the floors.

**134**  I am satisfied that, as a result of Ms. Salame's ongoing physical limitations, there is a real and substantial possibility of a future event leading to an income loss. Specifically, there is a real and substantial possibility that in the future she and Mr. Khattab will have to hire someone to perform some of her duties at the laundromat or Mr. Khattab will have to decline opportunities to earn income from one or more of his side businesses, or both. Although Ms. Salame is well-educated (she obtained a Bachelor's degree in history from the University of Alexandria in Egypt in 1984), since immigrating to Canada in 2001 she has not worked except at the laundromat. At her age and with her ongoing pain and associated physical limitations, there is no real possibility that she could take up alternative paid employment to offset this potential loss.

**135**  It is difficult to measure Ms. Salame's future loss of income earning capacity. In my view, the capital asset approach should be employed. As a result of her injuries, Ms. Salame has clearly been rendered less capable overall of earning income from all types of employment. She is less marketable or attractive as a potential employee and she has clearly lost the ability to take advantage of all job opportunities that might otherwise have been open to her. While her loss need not be calculated with mathematical precision, an award for loss of earning capacity is not at large and its quantification must be grounded in the evidence.

**136**  The cost of hiring Mr. Weir for 10 months was $7,870.08. This is $9,444 on an annualized basis. In a single year, Mr. Khattab gave up $2,000 in income from the security camera installation business. This amounts to a total potential annual loss of $11,444. Of course, the cost of hiring Mr. Weir represents the cost of replacement labour during a time when Ms. Salame was not working at all. Further, there is some duplication because with a part-time employee available it might not be necessary for Mr. Khattab to give up side jobs. Ms. Salame has now returned to work and she anticipates that once she recovers from her eye surgery she will work as many hours as she worked before the accident. However, she continues to suffer from quite significant pain and it is reasonable to infer that she may not be able to sustain this number of hours. In addition, it is likely that she will never recover sufficiently to be able to perform all her pre-accident duties.

**137**  In all the circumstances, I assess the chances of Ms. Salame having to hire replacement labour in the future and being unable to cover for Mr. Khattab so that he can attend to side jobs at 30%. At the time of the trial she was 55 years old. It is reasonable to infer that she will work another 10 years, to age 65. I assess her damages for loss of future earning capacity at $35,000 which is roughly 30% of $11,444 multiplied by 10 years. Again, this is prior to any further adjustment for the contingencies discussed later in this judgment.

**Loss of homemaking capacity**

**138**  A loss of homemaking award is properly characterized as an award for loss of capacity, distinct from a cost of future care claim: *McTavish v. MacGillivray*, [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) at para. 63; *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. 72-78. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss.

**139**  As stated in *Westbroek* at para 74:

An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]

**140**  Before the accident, Ms. Salame assumed responsibility for virtually all of the homemaking tasks for her family. This included grocery shopping and cooking for her family, cleaning their 3,800 square foot house, and doing the laundry. In the first six months after the accident she was unable to perform any of these chores. Mr. Khattab and the children did all the work around the house. Collectively, they dedicated approximately 30 hours a week to these tasks. Over time, Ms. Salame gradually resumed responsibility for most of the housework. By the end of 2014 she was doing lighter jobs such as some cooking, doing dishes, making beds and tidying up. By the time of the trial, she had resumed responsibility for most of the household chores but it takes her longer to do the work and she still depends upon her husband and children to do the heavier tasks such as cleaning the floors and the washrooms. Mr. Khattab estimated that by the time of the trial, Ms. Salame was performing about 75% of the housework.

**141**  Ms. Salame is seeking an award of $50,000 under this head. This is based on an estimate of 30 hours a week of housework in the first six months after the accident, 15 hours a week in the subsequent 12 months, 7 1/2 hours a week in the following 12 months (to the time the trial), and five hours a week for the five years following the trial. At $25 an hour, this amounts to $48,750 for the past loss and $38,750 for the future loss. Ms. Salame submits that considering the overall reasonableness of an award, $50,000 is appropriate.

**142**  I accept Ms. Salame's estimate of the number of hours of homemaking services she would have performed but for her injuries as reasonable and supported by the evidence. I also accept that her proposed rate of $25 per hour is reasonable. However, as discussed above, the Court of Appeal has made clear that a cautionary approach to the assessment of damages under this head is adopted to ensure that the award is commensurate with the loss. In *Westbroek*, where the plaintiff did not intend to pay anyone else to perform the household chores he was unable to do, an award based on $24 per hour for housekeeping services was reduced by two-thirds in keeping with the cautionary approach.

**143**  There was no evidence that Ms. Salame paid anyone else to perform the homemaking tasks she was unable to perform or that she has any intention to pay anyone else to perform those tasks in the future. In the circumstances, I would reduce her estimate of $48,750 for the past loss and $38,750 for the future loss by two-thirds, and award $16,500 for the past loss and $13,175 for the future loss. This is prior to any further adjustment for the contingencies discussed later in this Judgment.

**Cost of future care**

**144**  Ms. Salame is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. The award is to be based on what is reasonably necessary on the medical evidence, to preserve and promote her mental and physical health: *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.

**145**  The test for assessing an appropriate award for the cost of future care is an objective one based on the medical evidence. It is two-fold: first, there must be a medical justification for the cost; and second, the claim must be reasonable: *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.

**146**  In her report, Dr. Ahmed recommended continued medication and regular exercise. During her oral testimony, she clarified that by regular exercise she meant that Ms. Salame should exercise either on her own or under the supervision of a physiotherapist or kinesiologist. She said once or twice a month sessions with a physiotherapist might be helpful. In his report, Dr. Locht recommended a home exercise program and anti-inflammatory medications, but in cross-examination he agreed that Ms. Salame should have periodic reviews of her exercise program by a physiotherapist.

**147**  Ms. Salame testified that she intends to continue to take medication for pain and depression. She estimated the cost of antidepressants at $20 per month and pain medication at a further $20 per month. Ms. Salame testified that she intends to continue to attend physiotherapy because it resulted in improvement of her shoulder symptoms. Ms. Cheong testified that the cost of a private physiotherapy session is $65.

**148**  Ms. Salame seeks an award of $12,600 for cost of future care which is based on one physiotherapy session per month, at $65 per session, and $40 per month for medications, for 10 years.

**149**  I am satisfied that Ms. Salame's claim as it relates to medications is reasonable. However, in my view, the medical evidence falls short of establishing that one physiotherapy session per month is reasonably necessary. Again, Dr. Ahmed testified only that once or twice a month sessions might be helpful and she did not actually recommend physiotherapy in her written report. Dr. Locht's evidence, however, satisfies me that a home-based exercise program with periodic reviews by physiotherapist is reasonably required. Two physiotherapy sessions per year to check on her progress and modify her program is reasonable. At $65 a session, for 10 years, this would cost $1,300. To this I add medication costs of $40 per month for 10 years ($4,800) for a total award under this head of $6,100.

**Special damages**

**150**  Special damages are agreed to in the amount of $2,142.66.

**Adjustments for contingencies**

**151**  As already discussed, Dr. Grover testified that Ms. Salame's pre-existing osteoporosis renders her susceptible to compression fractures. He also said that the possibility of spontaneous fractures would increase with age. Dr. Ahmed expressed a similar view. She said osteoporosis is a risk factor for compression fractures but said it is not a cause of such fractures except in older people who could suffer spontaneous fractures. Dr. Locht testified that there was a less than 50% chance that Ms. Salame would have developed fractures in the next 10 years as a result of the osteoporosis.

**152**  I am persuaded that there was and remains a realistic possibility of Ms. Salame suffering compression fractures causing upper back pain as a result of her pre-existing osteoporosis, irrespective of the accident. On the evidence before me, this was a remote possibility prior to trial but it becomes a more significant possibility as Ms. Salame ages. In these circumstances, it would not be appropriate, in my view, to reflect this contingency in assessing Ms. Salame's past loss of earning capacity or her past loss of homemaking capacity; however, I would reduce her claim for non-pecuniary damages, her loss of future income earning capacity claim, and her loss of future homemaking capacity claim by 10% each to reflect the possibility that she would have, in the future, developed significant upper back pain as a result of the osteoporosis, in any event.

**153**  Ms. Salame has suffered from periods of low back pain, carpal tunnel symptoms and the discomfort associated with her recent eye surgery, but as already discussed those are divisible injuries or conditions. I would make no adjustment in assessing her non-pecuniary damages for the divisible injuries or conditions because that assessment reflects only the pain and suffering associated with the injuries for which the defendant is liable. However, Ms. Salame acknowledged that these conditions interfered with her ability to work in the time period up to trial, although to a much less significant extent than did the fractured sternum, the shoulder injury and the upper back pain. It is reasonable to infer that these conditions also interfered with her ability to maintain her home in the period up to trial, although, again, to a much less significant extent than the accident-related injuries. In the circumstances, I would reduce her loss of past income earning capacity claim and her loss of past homemaking capacity claim by 5% each to reflect the impact of these conditions, irrespective of the accident.

**154**  There is no evidence to suggest that Ms. Salame's eye condition will continue to cause any ongoing problem. However, given the pre-existing osteoporosis and the fact that she has had recurring carpal tunnel syndrome, I am satisfied that there is a measurable risk that low back pain and carpal tunnel symptoms would have affected her future income earning capacity and her future homemaking capacity in any event. On the evidence, it is very difficult to predict when and to what extent this would have occurred. The most I can say is that it is likely that the risk of low back pain arising as a result of the pre-existing osteoporosis would have increased gradually as she aged. I would reduce her loss of future income earning capacity claim and her loss of future homemaking capacity claim by a further 5% each to reflect the contingency that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident.

**155**  I would make no adjustment to Ms. Salame's claim for damages for the cost of future care or to her special damages claim, because those claims reflect actual costs associated only with the injuries she sustained in the accident.

**Conclusion**

**156**  Ms. Salame is awarded total damages of $173,243.66, less a deduction for taxes on the past loss of earning capacity component of this award. This total amount is comprised of:

1. non-pecuniary damages in the amount of $99,000 (originally assessed as $110,000 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, irrespective of the accident);
2. damages for past loss of income earning capacity in the amount of $9,377 less a deduction for taxes (originally assessed as $9,870.08 but reduced by 5% to reflect the impact of her low back pain, carpal tunnel symptoms and eye surgery, irrespective of the accident);
3. damages for future loss of income earning capacity in the amount of $29,750 (originally assessed as $35,000 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, in any event, and by a further 5% to reflect the possibility that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident);
4. damages for past loss of homemaking capacity in the amount of $15,675 (originally assessed as $16,500 but reduced by 5% to reflect the impact of her low back pain, carpal tunnel symptoms and eye surgery, irrespective of the accident);
5. damages for future loss of homemaking capacity in the amount of $11,199 (originally assessed as $13,175 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, in any event, and by a further 5% to reflect the possibility that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident);
6. damages for cost of future care in the amount of $6,100; and
7. special damages in the amount of $2,142.66.

**157**  If the parties are unable to agree on costs, or the amount to be deducted from the past loss of earning capacity component of the award, they may arrange to make submissions concerning those matters by contacting the Registry.

L.A. WARREN J.

**End of Document**

[***Dhah v. Harris, [2010] B.C.J. No. 215***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0TC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: January 20-22, 2010.

Judgment: February 8, 2010.

Docket: M070752

Registry: Vancouver

**[2010] B.C.J. No. 215** | [*2010 BCSC 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TN-00000-00&context=) | [*2010 CarswellBC 280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TN-00000-00&context=) | [*186 A.C.W.S. (3d) 572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23TN-00000-00&context=)

Between Harvinder Singh Dhah, Plaintiff, and Dustin Sidney Harris and Clarke Donald Harris, Defendants

(38 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Defendant driver found fully liable for a 2006 motor vehicle collision — The defendant was making a left turn across a double solid line at a point where there was no intersection or driveway — The location and nature of the manoeuvre required him to pay particular attention to the ditch, and he did so at the expense of being attentive to oncoming traffic — Although the defendant looked right before entering the roadway, there was no evidence he looked again before crossing the centre line — The collision was caused solely by his *negligence*.**

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| Action by plaintiff seeking damages for injuries sustained in a 2006 motor vehicle accident. The plaintiff was riding a motorcycle when he collided with a pickup truck driven by one of the defendants. By agreement, the trial dealt only with the issue of liability.  HELD: Defendant fully liable for the collision; plaintiff awarded costs at Scale B.  Neither expert opinion provided a reliable basis on which to make any significant findings of fact. The court accepted that the plaintiff's speed was not unreasonable, that he did not see the defendant's pickup truck until it was already in front of him, and that at least as he perceived the situation, he was too close to stop safely. Section 155(1)(a) of the Motor Vehicle Act contained an outright prohibition against crossing a double line. The defendant was making a left turn across a double solid line at a point where there was no intersection or driveway, namely a point where oncoming drivers would have no reason to anticipate vehicles entering the roadway. He knew there was a curve to his right and knew or ought to have known that oncoming drivers might have limited visibility. The location and nature of the manoeuvre required him to pay particular attention to the ditch across the road, and he did so at the expense of being attentive to oncoming traffic. Although the defendant looked right before entering the roadway, there was no evidence he looked again before crossing the centre line, and reasonable prudence required him to do so. The collision was caused by the ***negligence*** of the defendant. As the dominant driver, the plaintiff was entitled to proceed with reasonable caution based upon an assumption that other drivers would obey the law and yield him the right-of-way. The defendant's ***negligence*** was the sole cause of the collision. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules,

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 155*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GG-00000-00&context=)(1)(a), s. 156

**Counsel**

Counsel for Plaintiff: E.A. Thomas.

Counsel for Defendant: R.H. Swadden.

**Reasons for Judgment**

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

**1**   The plaintiff was riding a motorcycle when he collided with a pickup truck driven by one of the defendants. He claims damages for personal injury, but by agreement of the parties this trial dealt only with the issue of liability.

**2**  The collision occurred on September 8, 2006, at approximately 4:30 p.m. in the 3500 block of River Road in Delta. River Road at that location runs in what I will for convenience refer to as a north-south direction, although it is actually northeast to southwest. It consists of one lane in each direction, separated by a double solid line. In the area where the collision occurred, there is a gravel shoulder on the west side of the road and a grassy area adjacent to the shoulder. On the east side, there is no gravel shoulder and only a narrow grassy area that slopes down into a ditch.

**3**  The plaintiff was on his way home from work and travelling in the northbound lane. The defendant, Dustin Harris, was driving a pickup truck owned by his father, the other defendant. I will refer to the driver Dustin Harris as "the defendant" for the balance of these reasons. The defendant's pickup truck had been parked on the west side of the road, facing south, and he was turning around to enter the northbound lane.

**4**  As the plaintiff approached the accident scene, the road made an "S" curve, curving first to his right, straightening, and then curving to his left. The collision occurred a short distance after the second curve.

**5**  The plaintiff testified that as he came around the second curve, he suddenly saw a pickup truck in front of him moving from his left to his right with its front wheels already across the centre line and in the northbound lane. He said he immediately took his hand off the accelerator and applied both the front and rear brakes. The plaintiff said that he applied his brakes "pretty hard" because he considered the situation to be an emergency. After the plaintiff applied his brakes, the motorcycle fell to its side and both the plaintiff and the motorcycle slid some distance on the road before hitting the side of the pickup truck.

**6**  The plaintiff said that the pickup truck was about 50 or 60 feet in front of him when he first saw it and, in cross-examination, he estimated the speed of the truck at about ten kilometres per hour (kph). Those estimates were obviously made on a very brief observation in frightening circumstances and can be given little weight. As for his own speed prior to seeing the truck, the plaintiff says he was travelling at approximately the 50 kph speed limit.

**7**  The defendant testified that his pickup truck had been parked on the west side of the road, partly on the gravel shoulder and partly on the grass. In order to turn around, he backed up onto the grassy area until the pickup truck was perpendicular to the road, with a straight stretch of road to his left and the "S" curve to his right. He said he then drove to the edge of the road, saw no traffic to his left and two vehicles approaching to his right. After waiting for those vehicles to pass, he said he checked again to his left and right and, seeing no other traffic, began to make a left turn across the southbound lane and across the centre line into the northbound lane.

**8**  The defendant said he was making the turn slowly because he was aware of the ditch on the east side of the road and wanted to be sure of making the turn without driving into it. He said he did not see the plaintiff before starting his turn and was not aware of the plaintiff's presence until impact.

**9**  Shortly before reaching the S-curve, the plaintiff passed a driveway where Suzanne Calnan was waiting to turn her car onto River Road. After the motorcycle passed her, she turned onto the road, travelling in the same direction. She testified that she lost sight of the motorcycle as it entered the curve and that she came upon the scene of the collision after it had already occurred.

**10**  Ms. Calnan testified that she believed the speed limit in the area was 50 or 60 kph and that the motorcycle appeared to be travelling at a normal speed. The evidence of Ms. Calnan does not permit me to make any specific finding of the plaintiff's speed or to say whether or not he was driving within the speed limit. However, I accept her evidence as confirming that the plaintiff was not travelling at a noticeably excessive or reckless speed.

**11**  A business that made large industrial containers was located on the west side of the road at the S-curve. Some of those containers were typically placed near the side of the road. In addition, some of that business' employees including, on the day in question, the defendant, parked their vehicles at the side of the road. These containers and vehicles were to the plaintiff's left as he approached the portion of the road curving to his left. He said they obstructed his view of the road around the curve.

**12**  The containers and parked vehicles were located to the defendant's right as he began his left turn. He testified that he could see the road for approximately 300 feet to his right before the point at which the containers obstructed his view. His distance estimate is based on measurements the defendant made approximately two years after the accident. Photographs taken by the defendant when he made the measurements in 2008 show containers in a position similar to what is shown in earlier photographs that the defendant took approximately two hours after the accident.

**13**  However, the defendant also testified that there were a number of vehicles -- he believes about six -- parked between him and the containers. He took the first set of photographs at a time when there was only one parked car -- the later photographs show only two.

**14**  The defendant says that the other parked vehicles did not obstruct his view of the road as far as the containers. Of course, the defendant was seated in the cab of a pickup truck, giving him a different vantage point than what the plaintiff had while seated on a motorcycle. The fact that parked vehicles did not block the defendant's view says nothing about what the plaintiff could or could not see coming from the opposite direction.

**15**  The plaintiff also took photographs of the accident scene. Because, as he says, they were taken "a few days" after the accident, they are no more reliable as an exact reconstruction of the scene than those photographs taken by the defendant. However, the plaintiff's photographs show more parked vehicles than do the defendant's; they illustrate that such vehicles were at least capable of creating additional view obstruction, depending on their precise location and size.

**16**  Both parties called expert witnesses in accident reconstruction. The opinion of the defendant's expert included an analysis of sight lines and suggested that the plaintiff would have been able to see the pickup truck in the centre of the road from at least 93 metres away, which would have been more than adequate stopping distance at any speed below 100 kph. The plaintiff's expert criticized the defence expert's analysis on a number of points, including the fact that his measurement of sightlines considered only the effect of the large containers and not the potential effect of other parked vehicles. I do not find either expert's opinion to be particularly helpful because neither had the information necessary for a complete analysis.

**17**  The defendant identified and photographed a skid mark on the road which I accept was likely left by the plaintiff's motorcycle. However, there was no evidence of the length of that skid mark or the distance between the end of the skid mark and the point of impact. There is no evidence of the position of the two vehicles immediately after the collision and, as I have said, no evidence showing the position of other parked vehicles. Much of this evidence is missing because the police officer who attended a few minutes after the accident did not consider it serious enough to warrant a detailed investigation.

**18**  There are photographs of the defendant's pickup truck showing a dent near the bottom of the truck box just behind the passenger door. That dent is believed to have been caused by the impact with the plaintiff. There is a repair estimate indicating what portions of the plaintiff's motorcycle were damaged, but no photographs of that damage.

**19**  Lacking the data necessary to form a complete scientific opinion, both experts have filled in the gaps with conjecture and argument. Neither expert opinion provides a reliable basis on which to make any significant findings of fact.

**20**  As a result, my findings of fact must be based on the evidence of the parties and the only independent witness, Ms. Calnan. I have already said that, while I can make no finding of the plaintiff's precise speed, I accept Ms. Calnan's evidence to the effect that the speed did not appear to be unreasonable. I also accept the plaintiff's evidence that he did not see the defendant's pickup truck until it was already in front of him and that, at least as the plaintiff perceived the situation, he was too close to stop safely.

**21**  I also accept the defendant's evidence that he did not see the plaintiff before he began his left turn, but that in itself does not answer the question of whether the plaintiff was there to be seen. The defendant says that he could see approximately 300 feet to his right and did not see the plaintiff. If the plaintiff was not within that 300-foot area when the defendant began his turn, the collision could not have occurred unless the plaintiff travelled at least 300 feet in the time it took the defendant to cross one lane and part of another -- a distance of less than ten metres. Simple arithmetic indicates that if the plaintiff was travelling at, for example, 60 kph, it would have taken him more than five seconds to reach the point of impact.

**22**  I find it highly unlikely that the defendant was moving at the extremely slow speed that that would imply. I find it more likely that the defendant was focussed on the tightness of the turn and the need to avoid the ditch across the road and that he failed to pay sufficient attention to situation to his right. Either he allowed more time than he now recalls to elapse between looking right and beginning his turn or he simply failed to notice the plaintiff who was there to be seen.

**23**  Even if the defendant was turning at an extremely slow speed and the plaintiff was not there to be seen when the defendant began his turn, the plaintiff obviously would have come into view at some point before the collision. On the defendant's own evidence, he did not look to his right again before he crossed the double solid centre line.

**24**  It is a matter of common knowledge that roads are typically marked with a double solid line at locations where drivers will have reduced visibility of the road ahead. Sections 155 (1)(a) and 156 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, read as follows:

155 (1) Despite anything in this Part, if a highway is marked with

1. a solid double line, the driver of a vehicle must drive it to the right of the line only,

...

156 If the driver of a vehicle is causing the vehicle to enter or leave a highway and the driver has ascertained that he or she might do so with safety and does so without unreasonably affecting the travel of another vehicle, the provisions of sections 151 and 155 are suspended with respect to the driver while the vehicle is entering or leaving the highway.

**25**  Counsel for the defendant argues that the defendant reasonably concluded that he could safely enter the roadway and was leaving enough distance for oncoming vehicles to adjust to his presence. He argues that the effect of s. 156, in those circumstances, is that once the defendant entered the roadway, other drivers including the plaintiff were required to "accommodate" his position. In effect, counsel argues that if the defendant determined on reasonable grounds that he could safely cross the centre line, he acquired the right of way from the moment he entered the roadway.

**26**  I cannot accept that submission. Section 155(1)(a), standing alone, contains an outright prohibition against crossing a double solid line. Section 156 does no more than provide limited exceptions to that absolute prohibition. It does not, in my view, diminish the duty to proceed with caution and it does not remove the right of way from another driver who is approaching in his or her proper lane.

**27**  In any event, the question of whether or not the defendant was in violation of the statutory provision is not determinative. The question is whether the defendant kept a proper lookout and took appropriate care in the circumstances: *Dickie Estate v. Dickie and De Sousa* [*(1991), 5 B.C.A.C. 37*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X3FC-00000-00&context=) (C.A.).

**28**  In *Dickie*, the plaintiff was in the process of making a u-turn across a double solid line when he was struck by the defendant who was approaching at an excessively high speed. The Court of Appeal said at para. 12:

[The plaintiff] was engaging in a manoeuvre that was fraught with danger. He placed himself and the oncoming drivers in a position of risk. That being so, in my opinion, the law required of him a very high degree of care which would manifest itself in a sharp lookout before he crossed over the solid double line into the northbound lanes on the causeway. There was nothing to prohibit Dickie from seeing the oncoming De Sousa vehicle before his vehicle entered the northbound lanes of travel.

**29**  I find that the defendant in this case was similarly "engaging in a manoeuvre that was fraught with danger". He was making a left turn across a double solid line at a point where there was no intersection or driveway -- at a point where oncoming drivers would have no reason to anticipate vehicles entering the roadway. He knew there was a curve to his right and knew or ought to have known that oncoming drivers might have limited visibility. The location and the nature of his manoeuvre required him to pay particular attention to the ditch across the road and I have found that he did so at the expense of being attentive to oncoming traffic.

**30**  I also note that the Court in *Dickie* referred to the need for a sharp lookout before the driver crossed the centre line and before he entered the northbound lanes. In the circumstances of this case, it was not sufficient for the defendant to form an opinion about the safety of his manoeuvre before he entered the roadway. He says that he looked right at that point, but, in my view, his duty to keep a sharp lookout continued beyond that. He gave no evidence of having looked again before crossing the centre line; in my view, reasonable prudence required that he should have done so.

**31**  Therefore, I find that the collision at issue was caused by the ***negligence*** of the defendant. The question then becomes whether there was any contributory ***negligence*** on the part of the plaintiff.

**32**  The defendant argues that the plaintiff was clearly not keeping a proper lookout because he only saw the defendant's pickup truck when it was already crossing the centre line and that he should have seen it as it entered the roadway. The plaintiff also knew or should have known from his motorcycle training that a sudden application of brakes is to be avoided because it causes the front wheel to lock, resulting in a loss of stability and control. The defendant argues that the plaintiff could have avoided the collision simply by slowing down.

**33**  I agree that the plaintiff might have seen the defendant's pickup truck an instant earlier. However, there is no evidence that seeing it an instant earlier would have made enough difference to avoid the collision. Further, the plaintiff was travelling in his proper lane and had no reason to expect anything other than a clear lane of travel ahead of him.

**34**  Similarly, the plaintiff may, in hindsight, have had alternate courses of action open to him, although there is no evidence that they would have made a difference. However, he did not have the luxury of carefully considering all his options. He reacted to the sudden appearance of a dangerous situation in front of him.

**35**  In *Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.), the defendant was turning left at an intersection when she collided with the plaintiff's bicycle. Neither saw the other until just before the collision. The Court of Appeal reversed the trial judge's finding of contributory ***negligence***, saying at para. 11:

[11] The plaintiff was not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable person ought to have foreseen as being within the ordinary range of human experience. The plaintiff was entitled to proceed on the assumption that all other vehicles will do what it is their duty to do, namely observe the rules regulating traffic.

**36**  In *Zarifeh v. Narcisse*, [*2006 BCSC 969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1WD-00000-00&context=), the plaintiff was attempting to make a "shallow u-turn" across a street and was struck broadside by the defendant's vehicle. The plaintiff admitted that he was partially at fault, but argued that some liability should be attributed to the defendant because she failed to see his vehicle as it began the u-turn. The Court rejected that argument, saying at paras. 31-32:

[31] In *Ouellet v. Cloutier*, [*[1947] S.C.R. 521*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B08V-00000-00&context=), the Court said:

The fact that an accident might occur is not the criteria which should be used to determine whether there has been ***negligence*** or not. The law does not require a prudent man to foresee everything possible that might happen. Caution must be exercised against a danger if such danger is sufficiently probable so that it would be included into the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it might be, would render impossible any practical activity.

As I understand the law, there is no obligation on a driver to keep himself specially prepared for action in an unforeseen emergency and it is only where the possibility of danger emerging is reasonably apparent that special precautions must be taken.

[32] In *Coulter (Guardian ad litem) v. Leduc*, [*2005 BCCA 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DR-00000-00&context=), the Court said, at paragraph 37:

No duty will arise for the dominant driver unless it is clear that he perceived the danger and had an opportunity to avoid the accident.

...

Accordingly, Constable Leduc, as the dominant driver, was entitled to proceed with reasonable caution based upon an assumption that other drivers would obey the law and yield him the right-of-way.

**37**  In my view the same reasoning applies to the position of the plaintiff in this case and I find that the ***negligence*** of the defendant was the sole cause of the collision.

**38**  The plaintiff will have his costs of the action as ordinary costs at Scale B of the *Rules of Court* subject to any matters either party wishes to bring to my attention with respect to costs. If this is the case, the parties can apply for a different order for costs within 30 days of these reasons for judgment.

N.H. SMITH J.

**End of Document**

[***Bassi (Litigation guardian of) v. Bassi, [2010] B.C.J. No. 2663***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2PH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Penticton, British Columbia

A.F. Cullen J. (In Chambers)

Heard: November 25, 2010.

Oral judgment: December 3, 2010.

Docket: 29388

Registry: Penticton

**[2010] B.C.J. No. 2663** | 2010 BCSC 1896 | 7 M.V.R. (6th) 113 | 196 A.C.W.S. (3d) 1206 | 2010 CarswellBC 3619

Between Ravideep Singh Bassi, Jasmine Kaur Bassi and, Jaskanwarpal Singh Bassi, by their Litigation Guardian, Baljit Kaur Bassi, and the said Baljit Kaur Bassi, Plaintiffs, and Talwinder Singh Bassi, Defendant

(35 paras.)

**Case Summary**

**Tort law — *Negligence* — Ultimate *negligence* — Application to particular situations — Automobile accidents — Motor vehicles — Liability of driver — Evidence and proof — Application by defendant to motor vehicle accident claim to dismiss action dismissed — Defendant claimed he lost control of van, ultimately crossing highway and flipping van in ditch because deer appeared on other side of blind curve — No evidence established exactly what risk deer posed or what other evasive action driver could have taken or did take — Curve in highway not so sharp as to warrant van crossing highway to correct swerve — Plaintiffs established defendant, driving for five hours with no sleep, was negligent — British Columbia Rules of Court, Rule 9-7.**

|  |
| --- |
| Application by Bassi for an order dismissing an action brought against him by his wife and three children arising from a July 2005 motor vehicle accident. Bassi had no slept for nearly 24 hours when the accident took place as he drove his family home from a wedding they attended five hours away from their home. The accident took place near the end of the drive, between 5:00 and 5:30 a.m. Bassi swerved off the travelled portion of the highway across the paved shoulder and onto the gravel shoulder on his right. He then swerved sharply to the left, crossed the entire highway and ended up on the gravel shoulder of the other side. As Bassi sought to correct his van's momentum, the van rolled over completely and ended up with its rear wheels in the ditch and its front wheels on the shoulder of the road. Each of the plaintiffs suffered injuries. It was light out at the time of the accident, although the sun was not up. The highway was dry. Bassi explained the accident occurred at a blind curve in the road. He claimed he was around the speed limit of 80 kph and did not slow down for the curve because it was not sharp and there were no signs posted indicating that he should slow down. He claimed a deer jumped into the roadway as his van rounded the curve. He initially swerved as he tried to steer away from the deer. Bassi's wife claimed he told her he was driving at 90 kph and that he braked when he tried to avoid the deer. Bassi did not adopt her evidence. He claimed he stopped two times prior to the accident to ensure he was not too tired to continue the drive.  HELD: Application dismissed.  Bassi's explanation for the accident did not neutralize the inference that leaving his lane of travel, then crossing the highway to the opposite shoulder, and ultimately losing control of his vehicle and causing it to roll over, involved ***negligence*** on his part. There was no clear evidence of what actual crisis Bassi was confronted by as he rounded the curve and saw the deer. It was not clear how close to him the deer was or if there was some other way he could have avoided hitting it. The curve itself was not so sharp as to explain why Bassi would have had to go completely across the highway to correct the van when it ventured onto the right gravel shoulder. There was no evidence Bassi tried anything else to avoid the deer, like braking. In all the circumstances, including the fact Bassi was driving with no sleep for almost five hours at the time of the accident, the plaintiffs established on a balance of probabilities that the accident was a product of Bassi's ***negligence***. |

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court, Rule 9-7, Rule 18A

**Counsel**

Counsel for the Plaintiffs: M.F. Welsh.

Counsel for the Defendant, by teleconference: P. Gartner.

**Oral Reasons for Judgment**

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| --- |
| **A.F. CULLEN J. (orally)** |

**1**   On July 17, 2005, at approximately 5:00 to 5:30 a.m., the defendant, Talwinder Bassi, while driving eastbound on Highway 3A between the villages of Keremeos and Olalla, swerved off the travelled portion of the roadway across the paved shoulder and onto the gravel shoulder to his right. He then swerved sharply to his left, crossed the eastbound and westbound lanes of the highway crossing the paved shoulder and ending up on the gravel shoulder of the westbound lane. As he sought to correct his vehicle's momentum, it rolled over one complete revolution ending up with its rear wheels in the westbound lane's ditch and his front wheels on the westbound lane's shoulder.

**2**  At the time of the accident, the defendant had been up and not slept for nearly 24 hours. Earlier during the evening of July 16, he and his wife, Baljit, and their three children, Ravideep, Jasmine, and Jaskanwarpal, had attended a wedding in the Lower Mainland of British Columbia. At the end of the evening at about 1:00 a.m. on July 17, the defendant and his wife and children left for their home in Oliver, which in total is about a five-hour drive in their family vehicle, a Honda van. It was during that trip home, nearly five hours into the drive, that the accident occurred causing some degree of injury to each of the three children and to Ms. Bassi, all of whom are plaintiffs in this action. This is an application brought by the defendant, Mr. Bassi, to have the plaintiffs' action against him dismissed on the basis that the evidence falls short of proving that he was negligent in the manner in which he drove leading up to the accident.

**3**  The evidence is that it was light at the time of the accident, although the sun was not up. The highway was dry and there was no other traffic on the road at the material time. The accident occurred just east of a slight curve in the highway as it skirts around a bluff or embankment on the left-hand side to eastbound traffic. The defendant provided an explanation for the accident in his examination for discovery conducted on August 5, 2008, and subsequently in an affidavit sworn July 20, 2009. In his examination for discovery, the defendant testified he was travelling at around 80 kilometres per hour, either a little under or a little over that speed, which he believed to be the speed limit. The curve in the road is not that sharp, but, "You can't see around it" because of the bluff or embankment to the left of the eastbound traffic. He was asked if he slowed his vehicle down when he was making his turn and he responded, "It's not that sharp a turn, but I have to -- there's no like -- no yellow signs to slow down or something. It's not that sharp." He was asked to describe what happened and he responded as follows:

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| --- | --- | --- | --- |
|  | 120 Q | Yes? |  |

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|  | A |  | And it was kind of little bit of blind spot, so you cannot see the whole highway on the other side. |  |

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|  | 121 Q | Right. |  |

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|  | A |  | And when I start turning there, then I saw a deer jumping into the highway. |  |

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|  | 122 Q | All right. |  |

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|  | A |  | And then I got a little nervous, so I tried to steer away from the deer. |  |

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| --- | --- | --- | --- |
|  | 123 Q | Right. |  |

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|  | A |  | And as soon as I steer away from the deer, my vehicle was on the shoulder, which is very tight over there, like only three, four feet. And the vehicle, I start losing control, so I try to bring the vehicle back to the pavement, which I did, but the turn was so sharp it started going to the other way right away, on the other side of the highway. And then I went on the other shoulder within -- you know, without even noticing, you know, right on the left shoulder. And then I tried to steer back onto the highway again, to the main like pavement. And then there I start rolling around, 360, and went back onto the wheels of the vehicle. I was trying to avoid those ditches, but that's the best I could avoid. |  |

**4**  He testified he knew the area had wildlife including deer. He was in the middle of the curve when he saw the deer. He steered to the right "to avoid the deer." When his right wheels hit the gravel shoulder, he turned to the left to avoid the ditch. He agreed he veered across the highway going very sharply to the other shoulder and then corrected again to bring the vehicle back on the highway, at which point, the vehicle rolled over. Earlier in the trip, he saw some wildlife standing right beside the road and "slowed down and went by them."

**5**  In his affidavit, he deposed that during the trip, he stopped briefly two times to refresh himself. At Princeton, his wife offered to drive, but he told her he was okay and kept driving. In his affidavit, he described the events leading to the accident as follows, and here I am quoting from paragraphs 20 to 26:

1. I started to drive around the curve in the highway, when all of a sudden I saw a deer jumping onto the highway. The deer was going from my left to my right side. I got a little nervous so I tried to steer away from the deer.
2. As I steered to the right and my vehicle went onto the right shoulder, which was very tight. There was only about 3 or 4 feet of space on the right shoulder, There are ditches on either side of that portion of the highway.
3. I started to lose control on the right gravel shoulder, so I tried to bring the vehicle back to the pavement, which I did, but the turn in the highway was so sharp, the van started to go right across the highway and onto the left shoulder.
4. I tried to steer the van back onto the highway again, to the main pavement. I was trying to avoid the ditches. At this point, the van started to roll over onto its roof.
5. The van rolled, just once as I recall. The van came to rest on the left side of the highway with the front wheels on the shoulder and the back wheels hanging into the ditch.
6. My van never did make contact with the deer.
7. The whole thing, from the time I saw the deer to the time the van stopped, took only a few seconds.

**6**  None of the passengers in the vehicle saw the deer as they were asleep or close to asleep at the time the accident occurred. Ms. Bassi deposed in an affidavit sworn August 6, 2009, that she thought her husband told her that he braked as he swerved, but the defendant does not adopt that in his evidence asserting only that he swerved and made no mention of braking or attempting to brake. Ms. Bassi also deposed that she thought the defendant told her he was going about 90 kilometres per hour which she believed was the speed limit. His evidence was that he was going about 80 kilometres which he believed was the speed limit.

**7**  There are some photographs depicting the area where the accident took place attached to Ms. Bassi's third affidavit dated September 30, 2009. The photographs show the curve in the road as appearing very gradual. The view of the road ahead is partly impeded by the bluff on the left side to eastbound traffic which the road curves around. The road straightens out after the curve for a significant distance. According to the photos in Ms. Bassi's September 30th affidavit, the point at which the vehicle went onto the gravel shoulder on the right-hand side is some distance beyond the end of the curve in a straight section of the road. The area where it rolled over is similarly some distance beyond the point where it went onto the right shoulder and, again, on the straight portion of the road.

**8**  The applicant's position on the evidence is set out in his outline of argument in paragraphs 15 to 22 which read as follows:

1. The Defendant believes that the speed limit at that portion of Highway 3A was 80 k/ph, and he believes that he was either driving a little over or a little under the speed limit.
2. As the Defendant started to drive around the left curve, he suddenly saw a deer jump onto the left side of the highway. He became nervous and tried to steer away from the deer.
3. The Defendant steered to the right and his Van went onto the right shoulder. The Defendant says the shoulders are only 3 or 4 feet wide.
4. The Defendant started to lose control in the gravel on the right side shoulder, so he tried to bring the Van back onto the pavement. The Defendant says that the curve in the highway was so sharp that his Van went across the highway and onto the shoulder on the left side of the road.
5. The Defendant tried to steer the Van to the right and back onto the highway to avoid going into the ditch on the side. At this point, the Van started to roll over onto its roof.
6. The Van rolled over once and came to rest on the left side of the highway with its wheels on the ground. The front wheels on the shoulder and the back wheels were hanging into the ditch.
7. The Defendant's Van did not make contact with the deer.
8. The Defendant says that the time from when he first saw the deer to his Van coming to a stop after rolling took only a few seconds.

**9**  The applicant submits and the respondents concede that this is an appropriate case in which to sever off the issues of liability and quantum of damages as the evidence relative to liability is unrelated to the evidence required to determine the nature and extent of the plaintiff's injuries. The applicant also submits and the respondents concede that the issue of liability is amenable to resolution by way of what was Rule 18A and is now Rule 9-7. The respondent/applicant submits that although the evidence is to some extent scant, it does not involve any issues of credibility as only the defendant can describe what happened and there is no other cogent evidence to consider.

**10**  I have considered the matter and conclude that this is an appropriate case to consider the issue of liability separately from that of damages and that it is appropriate for resolution by way of Rule 9-7 as I am satisfied that despite the relatively scant evidence to be considered on the issue of liability, I am able to find the facts necessary to determine the issue and it would not be unjust to do so on this application. I consider that, as well, a determination under Rule 9-7 will assist in the efficient resolution of this matter.

**11**  On the issue of liability, the applicant contends that in the circumstances the plaintiffs have not met the evidentiary burden of proving his ***negligence*** on a balance of probabilities. The defendant says this is a case in which the evidence is equally consistent with an explanation of no ***negligence*** as it is with ***negligence*** and given that the burden of proof lies on the plaintiffs, their action stands to be dismissed.

**12**  The defendant/applicant submits this is not one of those cases where the defendant is relying on the defence of inevitable accident arising from some factor under his exclusive control or wholly within himself as in the case of *Perry v. Banno*, [*[1993] B.C.J. No. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S19K-00000-00&context=), where the defendant claimed a sudden unanticipated loss of consciousness in which case the burden shifts to the defendant. The defendant contends this is a case where there is an external cause of the accident - the deer running into the road - and in light of that explanation which renders the accident as consistent with no-***negligence*** as ***negligence***, the plaintiffs have failed to prove their case.

**13**  The defendant/applicant relies on a number of decisions notably *Pitts Enterprises Ltd. v. Farkes et al*, [*2004 BCSC 1493*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0G2-00000-00&context=), where the defendant was confronted by a moose which suddenly appeared in the road in front of him in circumstances where he had no opportunity to take any evasive action. He struck the moose and went into oncoming traffic. In that case, Mr. Justice Powers analysed the issue raised by the evidence before him in paragraphs 12 to 16 of his judgment as follows:

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|  | [12] |  | In circumstances where a vehicle leaves a travelled portion of the road, or moves into an oncoming lane of traffic, the presumption of ***negligence*** on the driver's part arises, which the driver must rebut by explaining how the accident occurred without ***negligence*** on his part. The explanation must be based on evidence not speculation (*Lee v. Chan* 1997 CanLII 4201 (B.C.S.C.), [*(1997), 29 B.C.L.R. (3d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21KJ-00000-00&context=) (B.C.S.C.)). |  |
|  | [13] |  | If the driver can show how the accident occurred without ***negligence***, and such explanation is a reasonable one, then the burden is again on the plaintiff to prove ***negligence***. If the explanation is equally consistent with ***negligence*** and with no ***negligence***, then the burden to establish ***negligence*** still remains upon the plaintiff. (*Ballard v. North* BB.R.Co. (1923), 60 Sc.L.R. 441 at p. 5). |  |
|  | [14] |  | In the present case, the defendant must provide an explanation for how he came to be on the wrong side of the road. The explanation must be reasonable and equally consistent with ***negligence*** and with no ***negligence*** before the burden of proof shifts back to the plaintiff. |  |
|  | [15] |  | The defendant has provided an explanation for how he came to be on the wrong side of the road. He lost control of his vehicle because the steering was damaged when he struck the moose standing in his lane. This explanation is equally consistent with ***negligence*** and with no ***negligence*** and therefore, the burden to establish ***negligence*** remains upon the plaintiff. |  |
|  | [16] |  | The issue then is whether the plaintiff has proven on the balance of probabilities that the defendant was negligent in operating his vehicle when it struck the moose. |  |

In the result, Justice Powers found that the defendant in that case "was not negligent in failing to see the moose earlier than he did," and that he:

... was not driving at an excess rate of speed given the road, lighting conditions, and condition of the vehicle for that amount of wildlife where the accident happened.

**14**  In that case, of course, the defendant actually struck the wildlife on the road and what happened thereafter could not be attributed to the fault of the defendant as he had lost control over the steering of his vehicle and hence the vehicle itself. In the present case, the defendant did not strike the deer he described seeing and the issue remains whether the driving that ensued from his reaction to seeing the deer was as consistent with non-***negligence*** and with ***negligence***.

**15**  In pursuing that analysis, counsel for the defendant submits that the seminal case of *Fontaine v. British Columbia (Official Administrator)*, [*[1997] S.C.J. No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S0T2-00000-00&context=), which attenuates the value of those cases referring to a "presumption of ***negligence***" arising from the incontestable fact of a vehicle leaving its lane of travel or the roadway altogether, is an important consideration. In *Fontaine*, two hunters, Leowen and Fontaine, went on a hunting trip on November 9, 1990. They were expected to return on November 12, 1990, but never returned. They were found in their vehicle apparently driven by Leowen several months later in a creek off the highway. There were no witnesses to the accident and no one knew precisely when, how, or why the accident occurred. There was evidence of heavy rains and washouts in the area around the time the two went missing.

**16**  In the course of giving judgment for the court, Mr. Justice Major reviewed the development of the "so-called maxim of *res ipsa loquitur*" which "has been referred to in ***negligence*** cases for more than a century." He concluded at paragraphs 26 and 27 as follows:

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

In relation to the circumstantial case before the court, he concluded that the allegation of ***negligence*** was not made out noting as follows as paragraph 31:

There are a number of reasons why the circumstantial evidence in this case does not discharge the plaintiff's onus. Many of the circumstances of the accident, including the date, time and precise location, are not known. Although this case has proceeded on the basis that the accident likely occurred during the weekend of November 9, 1990, that is only an assumption. There are minimal if any evidentiary foundations from which any inference of ***negligence*** could be drawn.

In a passage the applicant in the present case relies on, Justice Major noted as follows:

The appellant submitted that an inference of ***negligence*** should be drawn whenever a vehicle leaves the roadway in a single-vehicle accident. This bald proposition ignores the fact that whether an inference of ***negligence*** can be drawn is highly dependent upon the circumstances of each case ...

**17**  The applicant in the present case also relied on the recent case of *Singleton v. Morris*, [*[2010] B.C.J. No. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0S6-00000-00&context=). In that case, the defendant drove her vehicle into the rear of the plaintiff's vehicle while it was stopped at a stop sign at an intersection. The defendant provided an explanation corroborated by others that there was an oily substance on the road surface that prevented her from stopping in time. The trial judge in that case found there was a *prima facie* case of ***negligence***, but found that the defendant provided an explanation of how the accident could have happened without ***negligence*** on her part, that the onus remained on the plaintiff, and that she failed to discharge that onus.

**18**  The Court of Appeal agreed with the trial judge's analysis dismissing the appeal. In its reasons, the court relied on the judgment of Justice Major in *Fontaine* explaining its effect as follows in paragraphs 33 and 34:

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| --- | --- | --- | --- | --- |
|  | [33] |  | Mr. Justice Major's statement sets out the general approach in ***negligence*** cases. That is, the trier of fact should weigh both the circumstantial evidence and the direct evidence, where available, in determining whether the plaintiff has established a prima *facie case* of ***negligence***. In cases involving both direct and circumstantial evidence, the circumstantial evidence, and any inferences that may be drawn from it, is but one component of the case. Where, however, there is no direct evidence, circumstantial evidence and the inferences that may arise from it may form the entire basis of the plaintiff's case. |  |
|  | [34] |  | Importantly, as stated by this court in *Marchuk v. Swede Creek Contracting Ltd.* [*(1998), 116 B.C.A.C. 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M1C4-00000-00&context=) at para. 10: |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10 |  | ... The legal burden of proof, of course, remains on the plaintiff throughout. |  |

**19**  The court noted, however, that whether an explanation will neutralize an inference of ***negligence*** is highly dependent on the facts, citing *Nason v. Nunes*, [*2008 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=), and that the issue is whether the explanation is "adequate to neutralize whatever inference the circumstantial evidence could permit to be drawn,' relying on *Fontaine* at paragraph 33 where Major J. described the inference of ***negligence*** in the particular circumstances of that case as "modest."

**20**  As I see it, the issue in the present case is whether the defendant's explanation of the accident, involving as it does the mechanism of a deer running onto the highway from his left, neutralizes the inference that by leaving his lane of travel onto the right gravel shoulder, then crossing both lanes of the highway to the opposite gravel shoulder, and ultimately losing control of his vehicle and causing it to roll over involved negligent driving on his part. In my view, it does not. Although the deer running onto the highway presents a basis for an explanation that the accident could have happened without ***negligence***, the explanation actually advanced by the defendant is inadequate to offset the inference that his ***negligence*** had a significant role in the accident.

**21**  In the first place, there is no clear evidence where the deer was in relation to the defendant's vehicle when he saw it or whether the action he took was the only or most effective way to evade the deer. The defendant said he swerved because he "got a little nervous." It is unclear whether he was simply startled and overreacted or whether he took the only evasive manoeuvre open to him in the circumstances. There is simply no evidence of what actual crisis the defendant was confronted with or how imminent it was.

**22**  Secondly, although the defendant asserts the deer came from his left from behind the bluff and he noticed it partway through the curve, it appears from the plaintiff Ms. Bassi's uncontradicted pictures - and explanation that the defendant's vehicle did not swerve off the road to the right until some distance past the corner down the straightaway which cast some doubt in the absence of the clearer evidence as to the nature and duration of the defendant's reaction to seeing the deer or where he was when he reacted or where the deer was when he first saw it.

**23**  Third, the defendant asserts, at least in his affidavit, that the reason he went across the highway to the left gravel shoulder was because "the turn in the highway was so sharp." It is evident, however, from the defendant's evidence on discovery and the photographs that the curve in the highway is not sharp, but is, in fact, quite gradual. Moreover, based on the uncontradicted photographs and affidavit of the defendant, Ms. Bassi, at the point where the van turned back onto the highway from the right gravel shoulder, it was well out of the curve and on the straightaway. There was no turn in the highway at all to cause the defendant to go "right across the highway and onto the left shoulder."

**24**  In his discovery, the defendant testified that when he tried to bring the van back onto the highway, "The turn was so sharp, it started going the other way right away on the other side of the highway." It is not clear in that passage whether he was referencing the turn in the road or his own turn of the van in trying to bring the vehicle back onto the highway. Although he clarified that in his affidavit, his explanation appears quite at odds with the nature of the highway where he is said to have lost control and that significantly attenuates the value of his explanation because it fails to answer why he veered back across the highway to the opposite side.

**25**  The defendant's explanation also lacks any indication that he considered or attempted any other means of avoiding the accident such as by braking either when he first saw the deer or as he veered off the road to the right. There is no evidence of any skid marks, brake marks, distances, or reaction times that would aid in understanding how the accident took place or whether the defendant's explanation could adequately account for what occurred.

**26**  In my view, this is a case in which the plaintiffs have established a *prima facie* case of ***negligence*** and, while the defendant has offered an explanation of what occurred, it lacks cogent detail and is not sufficiently full, complete, or consistent with the existing conditions to neutralize the inference of ***negligence*** arising from the circumstances of the accident. In short, the defendant's explanation does not adequately ground a non-***negligence*** version of how and why he came to lose control of his vehicle.

**27**  I conclude that all the circumstances, including the evidence that the defendant had not slept for nearly 24 hours and had driven for about four-and-a-half hours through the night before the accident occurred, establishes on a balance of balance of probabilities that the accident was a product of his ***negligence*** notwithstanding the explanation he advanced involving his reaction to seeing a deer coming onto the highway from his left. I, therefore, find liability in favour of the plaintiffs.

**28**  Are there any other orders that you are seeking at this point, Mr. Welsh, or is this matter simply to be adjourned so that the issue of damages can be addressed?

[SUBMISSIONS RE COSTS]

**29**  THE COURT: I am satisfied that this should be costs in any event of the cause.

**30**  MS. GARTNER: And that is on this application?

**31**  THE COURT: On this application, yes, not of the action as a whole.

**32**  MR. WELSH: Of this application and preparation for it?

**33**  THE COURT: Yes.

**34**  MR. WELSH: Yes, and that is on Scale?

**35**  THE COURT: Scale B.

A.F. CULLEN J.

**End of Document**

[***Mah v. Vancouver (City), [2000] B.C.J. No. 44***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1S9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Master Bolton (In Chambers)

Heard: September 23, 1999.

Judgment: January 12, 2000.

Vancouver Registry No. B973675

**[2000] B.C.J. No. 44** | 2000 BCSC 41 | 4 C.P.C. (5th) 232 | 9 M.P.L.R. (3d) 52 | 93 A.C.W.S. (3d) 983

Between Annette K. Mah, plaintiff (applicant), and The City of Vancouver and Terry Charles Beyer, defendants (respondents)

(112 paras.)

**Case Summary**

**Practice — Pleadings — Amendment of pleadings — Prejudice or presumed prejudice, what constitutes — Circumstances when amendment denied — Limitation of actions — Practice — Time for determination of compliance with limitation period — Municipal law — Actions against municipality — Limitation periods — Applicable period, personal injury claim.**

|  |
| --- |
| Application by the plaintiff, Mah, to amend her statement of claim. In 1997, Mah was badly hurt when she was run over by a recycling truck owned by the defendant City of Vancouver and driven by the defendant City employee, Beyer. Within two weeks of the accident, Mah gave notice to the City. She alleged ***negligence*** against Beyer, for which the City was vicariously liable. The statement of claim contained no pleadings alleging direct ***negligence*** on the part of the City. In 1998, counsel for Mah concluded that the City might have been directly responsible for the accident. Mah sought to add particulars of ***negligence***, including allegations of inadequate training of employees and the use of inadequate equipment on behalf of the City. The City objected to the amendments on the grounds that the amendments alleged ***negligence*** in the making of pure policy decisions, which could not form the basis for a claim against a municipality, and that they set up a new cause of action for injury and were therefore barred by the Limitation Act.  HELD: Application dismissed.  The Court was not satisfied that any of the proposed amendments were policy issues. It was left to the trial judge to determine the question of whether the particulars of ***negligence*** in the proposed amendments alleged that the City had acted pursuant to an enactment, or without legislative authority. There was nothing in the evidence to show that the running of the limitation period had been postponed. The reasons for the delay were relevant, but did not exculpate Mah from all fault or culpability. The prejudice to the parties of granting or refusing the application was equally balanced, but the delay on behalf of Mah's counsel to amend a full year before they applied to do so required that the balance of justice be resolved in favour of the City. |

**Statutes, Regulations and Rules Cited:**

Limitation Act, ss. 3(2)(a), 4(4), 6(3), 6(4).

Municipal Act, s. 754.

Vancouver Charter, s. 294(1).

**Counsel**

D.J. Wallin, for the plaintiff (applicant). J. Webster, for the defendants (respondents).

|  |
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| **MASTER BOLTON** |

**1**   This is an application by the plaintiff to amend her pleadings. The amendments allege a new cause of action for damages for injury to the plaintiff's person. The application was brought more than two years after the injury occurred.

BACKGROUND

**2**  On March 14, 1997, the plaintiff was very badly hurt when she was run over by a recycling truck owned by the defendant City of Vancouver and driven by a City employee, the defendant Mr. Beyer. She consulted counsel and within two weeks of the accident had given the requisite notice to the City. Subsequently, a writ was issued and a statement of claim filed which alleged various particulars of ***negligence*** against the defendant Mr. Beyer, for which the City of Vancouver was vicariously liable. The statement of claim contained no pleadings alleging direct ***negligence*** on the part of the City.

**3**  In August 1998, the plaintiff conducted an examination for discovery of Mr. Beyer. As a result of inquiries made in preparation for it, and answers given at the examination, counsel for the plaintiff concluded that the City may itself have been directly responsible for the accident. Inadequate training of employees and use of inadequate equipment are examples of the particulars of ***negligence*** they now wish to allege. Questions asked at the examination for discovery relating to these theories were objected to by counsel for the defendants, on the basis that they were not relevant to the existing pleadings. Counsel for the plaintiff disagreed, but a judge in chambers and the Court of Appeal upheld the position of the defendants. Consequently, by a motion filed August 6, 1999, the plaintiff has applied to amend to allege particulars of ***negligence*** directly against the City.

THE PROPOSED AMENDMENTS

**4**  The new particulars of ***negligence*** alleged against the City are:

The said injuries, loss, damage and expense, suffered by the Plaintiff as a consequence of the accident were caused, or in the alternative, contributed to by reason of the ***negligence*** of the City of Vancouver, the particulars of which include the following:

1. failing or neglecting to properly or adequately supervise the Defendant Beyer;
2. failing or neglecting to properly or adequately train the Defendant Beyer as to proper and safe procedures with respect to the operation of the Truck, and to ensure that the Defendant Beyer was familiar with the dangers inherent in the operation of the Truck on or near property where the Plaintiff or other members of the public may be reasonably expected to be present;
3. failing or neglecting to properly or adequately train the Defendant Beyer with respect to the proper operation of the mechanical, safety, and warning devices of the Truck;
4. failing or neglecting to take any, or any reasonable care to prevent injury or damage to the Plaintiff and other members of the public while its employees were performing their duties in operating the Truck on property where the Plaintiff and other members of the public may be present;
5. failing or neglecting to properly or adequately install, maintain, or calibrate the mechanical, braking, IMAX, or other safety, or warning devices of the Truck;
6. failing or neglecting to instal or utilize proper or adequate safety and back-up warning devices with respect to the Truck;
7. allowing the Defendant Beyer to operate the Truck in the Street without any, or any effective brakes, visual aids and steering mechanism;
8. allowing the Defendant Beyer to operate the Truck when the Defendant City of Vancouver knew, or ought to have known, that the Truck was not appropriate for use in the Street, due, in part, to its large size;
9. allowing the Defendant Beyer to operate the Truck when the Defendant City of Vancouver knew, or ought to have known, that the Truck was not in a fit mechanical condition; and
10. failing or neglecting to utilize a swamper or second employee on the Truck to ensure the safety of the Plaintiff and other members of the public while the Truck was being operated by one of its employees.

**5**  The defendant City objects to these amendments on several grounds:

1. The proposed amendments allege ***negligence*** in the making of pure policy decisions, which cannot form the basis of a claim against a municipality.
2. The proposed amendments set up a new cause of action which is barred by the six-month limitation period set out in s. 294(1) of the Vancouver Charter.
3. The proposed amendments set up a new cause of action for injury to the person and are therefore barred by s. 3(2)(a) of the Limitation Act.
4. In response to the plaintiff's assertion that even if the amendments would be statute-barred they should nevertheless be allowed under s. 4(4) of the Limitation Act, it is not appropriate to allow that discretionary remedy in all the circumstances.

CLAIMS AGAINST A MUNICIPALITY FOR POLICY DECISIONS

**6**  This objection is essentially an argument that the proposed amendments disclose no reasonable cause of action. I do not believe I need to cite any authority for the proposition that before amendments can be refused on this basis, their lack of merit must be plain and obvious.

**7**  The defendant's contention that these pleadings are plainly bad is based on the decision of the Supreme Court of Canada in Brown v. British Columbia (Minister of Transportation and Highways) [*(1994), 89 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CF-00000-00&context=). The court refers to the distinction between policy decisions and operational decisions, and to the principle that governments can only be sued in respect of the latter. The decision refers to other cases describing the difficulty in fixing a dividing line between "policy" and "operation", and adopts a passage from the decision of Mason, J. of the Australian High Court in Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1:

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

**8**  Applying that principle to the proposed amendments in the present case, I am not satisfied that any of them are so clearly policy issues that the claim is bound to fail. Some, such as failing to adequately supervise the defendant Mr. Beyer, would seem fairly clearly to be "inaction that is merely the product of administrative direction". Others are less clear. It may be that the inadequate training alleged in paragraphs (b) and (c) of the proposed amendments will ultimately hinge on the extent of the financial or personnel resources the City allocated to training, and therefore end up squarely on the "policy" side of the line. But it could equally be that the (assumed) inadequate training resulted from the instructor teaching theories about safety that were patently wrong, and thus amount to operational ***negligence***. Similarly, failing to utilize a swamper to assist Mr. Beyer may be a policy decision arising out of budgetary or personnel issues, but it is entirely possible that it was simply a mistake; there is evidence that a defect with the regular truck led Mr. Beyer to use a bigger than normal truck on his route on that fateful day, and it may be that someone simply failed to realize that a swamper should have been used on this bigger truck under the existing policy.

**9**  All of this is, of course, entirely speculative, but it is speculation that is not unreasonable on the face of the pleadings. Since it is possible that the facts will indeed establish ***negligence*** in an operational decision, the pleadings cannot be struck on this ground.

THE VANCOUVER CHARTER

**10**  Section 294 of the Vancouver Charter provides:

1. All actions against the city for the unlawful doing of anything purporting to have been done by the city under the powers conferred by any Act of the Legislature, and which might have been lawfully done by the city if acting in the manner prescribed by law, shall be commenced within six months after the cause of such action shall have first arisen, or within such further period of time as may be designated by the Council in any particular case, but not afterwards.

**11**  Identical wording in s. 754 of the Municipal Act was considered by the Court of Appeal in Grail and Grail v. District of Cyanic et al [*(1989), 38 B.C.L.R. (2d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M25F-00000-00&context=). The court held:

Section 754 is intended to apply to actions of the municipality that purport to be done pursuant to an enactment but that fail to comply with the requirements of the enactment. The section does not apply to acts, such as the negligent driving of a motor vehicle causing injury, for which no existing legislative authority is available to make the act lawful.

**12**  Given that distinction, the question in this application is whether the particulars of ***negligence*** in the proposed amended pleadings describe actions that purport to be done pursuant to an enactment, or actions for which no existing legislative authority is available to make the act lawful.

**13**  As with the policy/operational decision issue, I conclude that this issue cannot be resolved at this stage. Its resolution will depend almost entirely on facts relating to the allegations of ***negligence***. There may well be some fine nuances in the facts relating, for example, to the training and supervision issues identified in the particulars, which will determine the outcome of the Grail analysis.

**14**  Consequently, this issue can only be determined by the trial judge. It is premature to apply to dismiss the claim before the relevant facts can be known.

THE LIMITATION ACT

The Applicability of the Limitation Act

**15**  No ***negligence*** against the City is pleaded in the current Statement of Claim, merely vicarious liability for the ***negligence*** of its employee. I am satisfied that the proposed amendments, which do allege direct acts or omissions of ***negligence*** against the City, constitute a new cause of action.

**16**  The accident occurred on March 14, 1997. The application to amend was filed on August 6, 1999. As this new cause of action will be raised more than two years after the right to bring the claim arose, it will be barred by s. 3(2)(a) of the Limitation Act, unless it is saved by the provisions relating to postponement of the running of time under s. 6(4) or the general power to allow late amendments pursuant to s. 4(4).

Postponement of the Running of Time

**17**

1. The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
2. for personal injury;

...

1. Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
2. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
3. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

**18**  The submission of counsel for the plaintiff is that the plaintiff, although she instructed counsel very shortly after the accident, did not have facts within her means of knowledge such that she should know she might have a cause of action against the City arising, for example, out of the failure to assign a swamper to the recycling truck.

**19**  The problem with this theory is that there is barely a hint of evidence to support it. Counsel did make some representation that much of the evidence on which the proposed amendments are based was obtained when an associate from the plaintiff's law firm inspected some of the City's equipment and documents shortly before the examination for discovery in August 1998, and at the discovery itself. But there is nothing in the affidavit material to that effect. Although to some extent I can accept the representations of counsel on uncontroversial issues, I am not at all sure that this representation can be said to be uncontroversial. But even if it were admitted in evidence as if it had been sworn to in an affidavit, there is still no evidence from which I could conclude that a reasonable person, having taken appropriate legal advice, could not have made these inquiries and developed this theory of liability immediately after the accident.

**20**  The evidence, in addition to the representations referred to in the preceding paragraph, is confined to affidavits from a partner and a secretary at the plaintiff's law firm. It deals exclusively with events at and following the examination for discovery of the defendant Mr. Beyer on August 25, 1998. It contains not a word about the investigations that were conducted, or were not conducted, or might have been conducted, or could not have been conducted, by the plaintiff or her agents, that might establish the ignorance that could be imputed to a reasonable person under s. 6(4).

**21**  Excerpts from Mr. Beyer's examination for discovery are included in the plaintiff's material, but, with respect, this evidence seems to damage the plaintiff's case on this application rather than help it. The first extract is directly relevant to sub-paragraph (j) of the proposed amendments:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Was anyone with you on this route? |  |
|  | A | No, sir, I was by myself. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are there routes you drive where you have someone going with you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, these are a single-man team. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are the trucks equipped to allow for a driver and a swamper or for a team of two? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Sure they are, yep. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are there any teams that the city send out on these routes of two? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | MR. WEBSTER: | Don't answer that question. |  |

MR. LAHAY:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are you refusing to answer that on the advise of counsel? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | To the best of your knowledge does the city ever send out a team of two on this particular route? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | MR. WEBSTER: | / Don't answer that question. |  |

MR. LAHAY:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Are you refusing to answer that on the advise of counsel? |  |

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

Another sequence of questions deals with training:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, you began with the city in May of 1996. What were you doing in May of 1996, driving the truck right away? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, I was. |  |
|  | Q | Was there a probationary period? |  |
|  | A | No, I was trained for three days. |  |
|  | Q | Who trained you? |  |
|  | A | At that time it was Wayne Matthews. |  |
|  | Q | Is he a city employee? |  |
|  | A | Yes, he is. |  |

**22**  It appears from these passages that the plaintiff's solicitors had identified swamping and training as areas of potential interest before they began the examination of Mr. Beyer. If they were able to identify these issues before conducting the examination, it is their responsibility to show that they could not reasonably have done so before a specific date less than two years before they sought to add the new cause of action. In my opinion, they have not done so.

**23**  Nothing in the evidence before me establishes that any different considerations would apply to the other particulars of ***negligence*** in the amended pleadings. Nothing in the subsequent exchanges between counsel, relating to the plaintiff's unsuccessful applications in Supreme Court and the Court of Appeal to compel answers to questions similar to those set out above, seems to me to be at all relevant to the crucial issue of why the plaintiff could not reasonably be expected to have, until some date less than two years before this application to amend was brought, the means of ascertaining the facts that she now wishes to plead.

**24**  In the circumstances, I must conclude that there is no evidence to show that the running of the s. 3(2)(a) limitation period has been postponed.

Amendments the Court Considers Just

**25**  Section 4(4) of the Limitation Act provides:

1. In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

Recent Leading Authorities

**26**  The law relating to s. 4 appears to be in the course of a significant change. Previous leading cases from the Court of Appeal, such as Bank of Montreal v. Ricketts [*(1990), 44 B.C.L.R. (2d) 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61P3-00000-00&context=), [*39 C.P.C. (2d) 224*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61P3-00000-00&context=), [*68 D.L.R. (4th) 716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61P3-00000-00&context=), and Lui v. West Granville Manor Ltd. [*(1985), 61 B.C.L.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=), [*18 D.L.R. (4th) 391*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=) ("Lui No.1"), have more recently been distinguished and doubted by the same court in Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. [*(1996), 34 C.C.L.I. (2d) 211*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=), [*46 C.P.C. (3d) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=), 117 W.A.C. 161, [*19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=), [*60 A.C.W.S. (3d) 1128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=), and Tri-Line Expressways v. Ansari, [*143 D.L.R. (4th) 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S324-00000-00&context=).

**27**  The Teal decision was handed down in February 1996. In that case the plaintiff's premises were damaged by fire in January 1993. The insurers denied coverage, and plaintiff's counsel considered the insurers' position and advised against an action on the policy. Later, an action was commenced where the insurers were named as defendants, but only on allegations of vicarious liability for misrepresentations or ***negligence*** of their agents.

**28**  A contractual limitation period under the policy expired in January 1994. In May 1994 plaintiff's counsel revisited the question of the insurers' contractual liability, and concluded there was a better case to be made than he had previously thought. In June, the plaintiff purported to file a further amended statement of claim pleading the new cause of action, but this was procedurally improper and the amendments were struck out by consent in July. In October, the plaintiff applied for leave to amend.

**29**  The learned chambers judge found that the delay was slight and the defendant insurers would suffer no real prejudice if the amendments were allowed. The court concluded:

In my judgement, if a limitation period is missed through minor inadvertence for a short time and if it is shown that no prejudice will accrue to the defendant by overriding it, the court should look favourably on an application to amend which will have that effect. But where, as here, there was a careful and deliberate decision by the plaintiff, based upon the advice of counsel, not to sue, and where that decision was communicated to the insurers, I am of the opinion that the insurers' right to be secure from time barred claims assumes an increased importance so that, although no real prejudice is shown if the amendment is allowed, it must be refused as a matter of policy. The sanctity of the bargain not to claim after one year must be upheld.

**30**  In allowing the appeal, McEachern, C.J.B.C. dealt with the general principles applicable to s. 4(4) at paragraph 74:

I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.

**31**  Finch, J.A. was even less prescriptive at paragraph 45:

On principle, therefore, it appears to me that the discretion to permit amendments afforded by both Rule 24(1) and s. 4(4) of the Act was intended to be completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities.

**32**  The same paragraph deals with delay:

Delay, and the reasons for delay, are among the relevant considerations, and the judge should consider any explanation put forward to account for the delay. But no one factor should be accorded overriding importance, in the absence of a clear evidentiary basis for doing so.

**33**  His lordship said little about prejudice, beyond accepting the finding in chambers that the defendants would suffer no real prejudice if the amendments were allowed. His lordship then turned to the issue of the deliberate decision not to plead the proposed cause of action within the limitation period. He expressly disagreed with the reasons of Locke, J.A. and Gibbs, J.A., who gave the majority decision in the Bank of Montreal v. Ricketts case, on which the chambers judge had relied, and concluded that:

As no clear ratio decidendi emerges from Bank of Montreal v. Ricketts I do not consider that I am so bound [to follow it].

**34**  His lordship expressly disagreed with a dictum of Locke, J.A. that s. 4 of the Limitation Act does not "authorize the luxury of a change of mind", and stated at paragraph 66:

There is no requirement in the authorities nor as a matter of "policy", that leave to add a new cause of action against existing parties should be refused solely on the basis that the plaintiff's conduct was the result of a deliberate decision or was "voluntarily dilatory".

**35**  He then went on at paragraph 67 to deal with the exercise of the court's discretion under s. 4:

In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour.

**36**  In applying these principles to the facts of the case, his lordship said:

I would not characterize the plaintiff's conduct as dilatory. There was a deliberate decision based on the lawyer's advice not to include a claim under the policy. I would not be too critical of the lawyer for having changed his mind. The question of insurance coverage does not, on its face, appear to be clear cut. I do not consider that an honest error of judgment by a lawyer on a difficult legal question should be fatal to an application to amend or should outweigh all other relevant considerations.

In my respectful view the learned chambers judge erred by unduly fettering his undefined discretion under Rule 24(1) and under s. 4(4) of the Limitation Act by placing unwarranted weight on the plaintiff's original decision not to sue on the policy to the apparent exclusion of other relevant considerations. I think he also erred in regarding Bank of Montreal v. Ricketts as authority binding him to hold that a plaintiff's deliberate decision not to sue (or to allege a cause of action) is fatal to an application to amend.

**37**  The Tri-Line case involved an application made at the commencement of a trial to add a new plaintiff. The learned trial judge allowed the application, and his decision was upheld by the Court of Appeal.

**38**  The case arose from a motor vehicle accident in January 1993. The defendant's vehicle hit a tractor-trailer, damaging the tractor. This was owned by a Mr. Thompson and leased to a trucking company, Tri-Line. Tri-Line did some of the repairs itself and paid for the rest. Eventually, a writ was issued naming only Tri-Line as plaintiff.

**39**  The limitation period expired in January 1995. At an examination for discovery in March 1995 it came to the attention of both counsel that the truck was owned by Mr. Thompson, not Tri-Line. At the conclusion of the examination "it seems" that defendant's counsel told plaintiff's counsel he would defend the claim on that ground, among others.

**40**  Plaintiff's counsel did nothing about adding the new plaintiff and amending the pleadings until the opening of the trial in December 1995, when he applied, without a motion or affidavits in support, to add Mr. Thompson as a plaintiff. The learned trial judge deferred his decision until all the evidence went in at trial. Then he allowed the application, stating:

In my opinion, Thompson is a person connected with the subject matter of this proceeding because his claim is, for the most part, the same as Tri-Line's, and because I consider it to be just and convenient to bring him into the action

I see no obstacle to Thompson being joined as a plaintiff even though Tri-Line could probably maintain the action without him. There is no prejudice to the defendant, even though there is a disadvantage in losing a possible defence under the Limitation Act.

**41**  On appeal, the appellant argued that there was no evidence before the court below which provided an explanation of the delay. It is difficult to determine whether the Court of Appeal accepted that proposition or not. At paragraph 20 the court states that the trial judge did not reach his decision until all the evidence had been heard at trial, but it is possible that this evidence related only to liability for the accident, and not to procedural matters where, presumably, counsel himself would have had to testify.

**42**  But in any event, their lordships did not consider themselves bound to allow the appeal even if there were no satisfactory explanation. Writing for the court, Lambert, J.A. said at paragraph 14:

The decision of this Court that is put forward by the appellant in support of his argument that delay for which no good explanation is provided is an insuperable bar to the joinder of a party is Bank of Montreal v. Ricketts [*(1990), 44 B.C.L.R. (2d) 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61P3-00000-00&context=), [*68 D.L.R. (4th) 716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61P3-00000-00&context=) (B.C.C.A.). I do not think that the ratio decidendi of the two majority judges in Ricketts, each of whom gave separate reasons, is any wider than the proposition that where a claim is voluntarily abandoned, and the abandonment communicated to the person claimed against, all before the limitation period expires, that factor may be so significant that in some cases, of which Ricketts is one, it may be regarded as a dominant factor in the assessment of the justice and convenience of adding a party. In short, Ricketts provides an example of a particular application of the "just and convenient" test in its own circumstances, but does not set out any more general principles.

His lordship expressly agreed with the conclusion of Finch, J.A. in Teal that as no clear ratio decidendi emerges from Bank of Montreal v. Ricketts the court was not bound to follow it.

**43**  Lambert, J.A. then went on to deal, at paragraph 15, with Lui No. 1:

I would like to add only that to the extent that unexplained delay may be thought to give rise to a presumption of prejudice, that presumption, which seems to have been first mentioned in Lui v. West Granville Manor Ltd. [*(1985), 61 B.C.L.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=), [*18 D.L.R. (4th) 391*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=) (B.C.C.A.) ("Lui No. 1"), at p. 331 should be confined to the sort of context in which it was first mentioned, namely the context of third party proceedings against a new party on an entirely new cause of action. Here is the passage at p. 331 of Lui No. 1:

To put it another way, where the limitation period has expired and the third party proceedings set up a separate cause of action, prejudice to the third party must be presumed, and an explanation is required, from the defendant who issued the third party notice, to explain the delay and to explain the dependence of the third party proceedings on the original action, before the third party notice will be allowed to stand.

**44**  The effect of the Teal and Tri-Line cases appears to be this. The discretion afforded the court by s. 4(4) is completely unfettered, subject only to it being exercised judicially (Finch, J.A.). The overriding question is, what is just and convenient. Important considerations relevant to that question are the length of the delay and prejudice to the respondent (McEachern, C.J.B.C.).

**45**  With regard to delay, the reasons for the delay are relevant, but they need not exculpate the applicant from all "fault" or "culpability" (Finch, J.A.). Indeed, an application may be allowed even when no good explanation for the delay is provided at all (Lambert, J.A.). There is no principle that a conscious decision not to make a claim, or "voluntary dilatory behaviour", should bar an amendment outside the limitation period (Finch, J.A.).

**46**  With regard to prejudice, the presumption of prejudice set out in Lui No. 1 should be confined to the context of third party proceedings against a new party on an entirely new cause of action. No such presumption exists in other cases involving new parties or causes of action (Lambert, J.A.).

**47**  Other factors to be considered are the expiry of the limitation period and the extent of the connection, if any, between the existing claims and the proposed new cause of action (Finch, J.A.).

Applying the Teal and Tri-Line principles to this case

Length of Delay

**48**  The application was brought two years and five months after the accident. That is, 23 months after any applicable six-month limitation period in the Vancouver Charter and five months after the two-year Limitation Act limitation period. Most significantly, in my view, it was brought 12 months after the need for amendments became obvious at the examination for discovery.

**49**  In my view, this delay is moderately serious. It is certainly not so serious that it is by itself fatal to the applicant, but its full impact can only properly be gauged after considering the effect that the delay has had on the prejudice to the respondent.

Reasons for Delay

**50**  The lack of any explanation of the delay up to the date of the examination for discovery of Mr. Beyer in August 1998, has already been dealt with in paragraphs 18 to 24. Nor is there any acceptable explanation of the subsequent delay.

**51**  It was apparent at the examination that the defendants were taking the position that no allegations of direct ***negligence*** against the City had been pleaded, and that questions relating to issues not pleaded would not be answered. I am, quite frankly, baffled by the affidavit material introduced by the plaintiff on this issue. It consists mostly of correspondence between counsel that, to the extent it is relevant at all, shows the defendants' solicitor taking an entirely reasonable position, subsequently vindicated by a chambers judge and the Court of Appeal, about the need to plead issues before questions can be asked about them or relevant documents produced.

**52**  Even if plaintiff's counsel had said why they believed this view of relevance to be wrong (and they have not done so), common-sense and self-preservation cried out for an amendment to the pleadings in the seven months remaining after the issue surfaced and before the limitation period expired, just in case they might be wrong. But nothing was done, and, equally importantly for this present application, nothing has been said about why it was not done. In the absence of evidence as to counsel's actual thought processes, the obvious speculation as to their reasoning runs from simple (but continuing) inadvertence, to an arrogant and wilful refusal to consider any viewpoint other than their own wrong one.

**53**  In West Fraser Mills Ltd. v. Chouinard [*(1992), 73 B.C.L.R. (2d) 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M167-00000-00&context=) (S.C.) affirmed [*(1993), 79 B.C.L.R. (2d) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3H8-00000-00&context=) (C.A.), plaintiff's counsel had failed to join a necessary plaintiff to the action. A master refused an application to do so brought after the limitation period expired, but his decision was reversed by Esson, C.J.S.C. (as he then was). His lordship agreed with the master that the explanation for the failure to join the new plaintiff earlier was "puzzling", but was able to infer, on the evidence, that:

...there was carelessness in not including its name in the style of cause, but no deliberate decision not to include it in the action.

As there was no prejudice to the defendants other than the loss of their limitation defence, the court allowed the addition of the new plaintiff. The decision was upheld on further appeal.

**54**  In my respectful opinion, it is simply not possible in the present case to conclude or infer that "there was carelessness but no deliberate decision" not to plead direct ***negligence*** against the City. In the face of the defendant's refusal to answer questions about non-pleaded issues at the examination for discovery, some deliberation seems likely, but the true reason why this application was brought five months after the limitation period expired, rather than seven months before, remains a mystery.

**55**  One conclusion, however, seems quite clear. The responsibility is the solicitors' rather than their client's. In my respectful opinion, this conclusion ought to have considerable impact on the issue of the prejudice which will accrue to the plaintiff if the amendments are refused. She might conceivably lose this present lawsuit because of a lack of timely pleadings, although it seems fairly unlikely that liability could be found against the City on the amended pleadings if all allegations of ***negligence*** against their employee are dismissed. But it is possible. If so, then it seems to me, on the basis of the limited evidence before me, that she would have a strong case of ***negligence*** against her present counsel. And if this conclusion is wrong, and evidence is indeed available to rebut a prima facie case of ***negligence***, then the very lack of such evidence in this present application may be an independent ground of ***negligence*** or breach of contract, insofar as the solicitors have continued to act for her rather than insisting she retain independent counsel who could more objectively distinguish between her interests and their own.

**56**  Notwithstanding these conclusions, it is clear from Teal and Tri-Line that whether the delay is simply unexplained, or resulted from actual fault of the plaintiff or her agents or from a deliberate decision not to plead the new cause of action, the reason for the delay is not necessarily a bar to the proposed amendments. However, neither case suggests that the issue should be ignored altogether.

Prejudice to the Defendant

**57**  There is no presumption of prejudice, but of course this does not preclude a finding of actual prejudice.

**58**  No evidence has been led that delay has compromised the ability of the City to defend the action. There is no suggestion that witnesses or documents have been lost, or that memories are fading, and so on. Indeed, it seems extremely unlikely that such could be the case, as the City has been involved in the action from the beginning by virtue of the allegations of vicarious liability. The inclusion in the claim of these new causes of action is unlikely to result in a delay of the trial. I am satisfied, therefore, that there is no prejudice to the defendant's ability to present a full answer on the merits to the plaintiff's existing and proposed claims.

**59**  There is, however, prejudice of another sort, in the loss of the shield against liability offered by the limitation period. I am satisfied that no evidence as to this sort of prejudice need be led. It results from the very nature of the application. I note that both the chambers judge and Finch, J.A. in the Teal case explicitly stated that the defendant would suffer no significant prejudice if the amendment were allowed, despite the loss of a contractual limitations defence. But it is clear that both courts considered this issue to be a relevant factor in the balance of justice between the parties, as a right to be secure against time-barred claims. Whether it is called "prejudice" or "a right to be secure against time-barred claims", the loss of an accrued limitations defence is clearly a factor to be taken into account in applications under s. 4(4).

Prejudice to the Plaintiff/Expiry of the Limitation Period

**60**  The issue of prejudice to the plaintiff is not explicitly referred to in many of the cases I have reviewed, but in my opinion it is necessarily inherent in the analysis of what is just and convenient. Prejudice to a respondent cannot be assessed in a vacuum. It must be done by weighing it against the prejudice resulting to the other side if the application fails.

**61**  As in the respondent's case, there is no need for explicit evidence on the point in applications to amend outside the limitation period, unless prejudice beyond the ordinary is anticipated. In the usual case the prejudice is inherent in the application - an arguable cause of action may be lost if the amendments are refused.

**62**  In the present case, I have concluded that the prejudice may be somewhat less than is immediately apparent, because of the possibility of a claim against the solicitors referred to at paragraphs 55 and 56 of these reasons.

Connection between existing and proposed causes of action

**63**  This issue is really, I think, an aspect of the balance of prejudice. The greater the connection, the less the prejudice to the respondent, and vice versa.

**64**  Here, the cause of action against Mr. Beyer focuses primarily on the few seconds before the terrible moment when his truck ran over Ms. Mah. The proposed action against the City focuses on more distant events, such as training, the choice of this type of truck for that particular route, and the absence of a swamper.

**65**  But the issues are very closely linked. No one at the City has said, or probably could say, that the expansion of the pleadings as contemplated by the amendments is either surprising or (subject to the loss of the accrued limitation defence) prejudicial.

Summary of Relevant Factors

**66**

1. Delay - moderately serious.
2. Reasons for delay - not explained, but plaintiff's counsel appear to be at fault to an unknown degree. The lack of explanation is a separate fault on the part of counsel.
3. Prejudice to defendant - loss of limitation defence. Otherwise, none.
4. Prejudice to plaintiff - loss of arguable cause of action. Tempered by possible claim against counsel if damages in this action are reduced by loss of this cause of action for direct ***negligence*** against the City.
5. Connection between new and old causes of action - quite close, but not identical.

Analysis

**67**  In my view, even ignoring any diminution of the prejudice to the plaintiff as a result of the potential claim over against counsel, the prejudice to the parties of granting or refusing the application is exactly balanced, because the one is the mirror image of the other. Whatever number or adjective is used to describe the prejudice to the plaintiff of losing the cause of action is automatically, in my view, applicable to describe the prejudice to the defendant of losing the limitations defence to that same cause of action.

**68**  Given that balance of prejudice, and if all else is equal, then the decision should go in favour of the applicant, to permit all matters in issue between the parties to be adjudicated by a court.

**69**  But here, all else is not equal. The mere length of the delay favours the defendant slightly, and the lack of a hundred percent overlap of the old and new causes of action tends, ever so slightly, in the same direction. Much more important, in my view, is the fact that the plaintiff's agents are responsible for the fact that this issue arose at all because they did not apply to amend in a timely fashion.

**70**  Although Teal is authority for the proposition that the reasons advanced for a missed limitation date need not exculpate the applicant from all fault or culpability, and Tri-Line indicates that an absence of any good explanation is not necessarily a bar to amendments out of time, the cases do not go so far as to require the court to ignore the question of responsibility altogether. We are all - litigants, plaintiffs' counsel, defence counsel, and courts - fallible, and a simple oversight or error in judgment should not disturb the preference for permitting amendments which will allow all issues to be properly litigated. But in my respectful opinion, if the error is egregious or, as here, a studied silence on the part of the applicant or her advisers makes it impossible to assess the extent of the fault, the balance should shift the other way and the amendments should be refused.

**71**  If this seems harsh, it is, I think, fair to point out that the apparent error in missing the limitation date, for which they have elected to give no reason or excuse, is one made by counsel in the course of exercising a fiduciary's duty of care to a client, in a matter in which they profess a certain expertise and for which they may expect handsome remuneration. If the amendments are allowed they will be spared the consequences of their error at the expense of a litigant who owes no more particular duty of care to the plaintiff than it does to any other of its multitude of "neighbours", and whose breach of duty may be no more than a momentary carelessness in failing to realize that Mr. Beyer should take a swamper when he substituted one type of truck for another.

**72**  Forgiveness of error is a noble principle which most of us have benefitted from at one time or another, and which should be exercised generously by the court, with a proper sense of the fallibility of humankind, when no one is significantly prejudiced by the decision. But, in my respectful opinion, it behooves the court to be careful about excusing error when the cost will be paid entirely in the coin of another litigant's interests.

**73**  For those reasons, if I were able to exercise a discretion unfettered by any constraints at all, I would dismiss the application. But as was said by Finch, J.A. in Teal, a court's unfettered discretion must be exercised "judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities."

Other Cases

**74**  I am well aware that dismissal of the application may be at odds with the prevailing view adopted in other cases. I do not believe that any of these authorities contain guidelines clearer than Teal or Tri-Line, but it is useful to undertake an empirical review of how other courts have exercised their discretion in similar cases.

**75**  I have confined my review to cases decided after Teal, which appears to mark a major change in course from that plotted by the Ricketts and Lui decisions. I have reviewed every case in the British Columbia Superior Courts database which refers to Teal Cedar Products v. Dale. Not all are particularly helpful to the present case, but I will set out below a summary of the cases which are on point in two material aspects - no prejudice will accrue to the respondent beyond the loss of the limitation defence, and an explanation of the delay by the applicant is either non-existent or unsatisfactory.

**76**  (I have not included in this review the decisions in Wood v. Boon, [*[1996] B.C.J. No. 1622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61D1-00000-00&context=), (July 9, 1996) Victoria Registry 95/1369 (S.C.), and Virk v. Innes, [*[1998] B.C.J. No. 692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S284-00000-00&context=), (March 26, 1998) Vancouver Registry B961476 (S.C.). Both of these decisions are somewhat anomalous. The former because a new defendant was added, but with the right to raise the limitation defence at trial. The latter because the decision to refuse leave to add a defendant was based on a lack of evidence as to the merits of the proposed claim, which is not usually considered a necessary part of such applications.)

Triebwasser v. Strelley, [*[1996] B.C.J. No. 1656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61FC-00000-00&context=), (July 17, 1996) New Westminster Registry S011923, (S.C.).

**77**  This was an appeal of the (pre-Teal) decision of a master refusing an application to add the Crown as a defendant.

**78**  The plaintiff was injured in a motor vehicle accident in September 1991. He sued the driver and an R.C.M.P. officer whom he accused of "jumping out" from a radar site. Former counsel for the plaintiff was unaware that "gross ***negligence***" must be proved against an individual police officer defendant. When counsel learned of this, he discontinued against the constable. Then he discovered that ordinary ***negligence*** was sufficient to found a claim against the Crown, as the employer of a police officer. He applied to add the Crown in April or May 1996, and the master dismissed the application.

**79**  On appeal, the Teal Cedar case was raised for the first time. The court concluded that Teal permitted an extension of time where there had been "an honest error of judgment", but concluded that more than this was involved here. Counsel had concluded the action might succeed against the Crown after interviewing or conducting an examination for discovery of the existing defendants. The court concluded that counsel should have done this as soon as he learned of the problem proving gross ***negligence*** against the individual officer, rather than 10 months later, and that in the circumstances it was not just to add the new defendant.

Cederstrand v. Cooper & Harvey Enterprises Inc., [*[1996] B.C.J. No. 1917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61TW-00000-00&context=), (August 27, 1996) Kelowna Registry 23244.

**80**  Application to substitute one defendant for another in a slip-and-fall case.

**81**  The accident happened on the premises of an A&W restaurant in August 1992. Within a couple of months, plaintiff's counsel was contacted by insurance adjusters, who described their insured as a company, P. As the limitation period was approaching, plaintiff's counsel conducted enquiries to determine the identity of the defendant he should name in the writ. After various enquiries, he learned that the current business license was issued to company C. He did a corporate search of company C. This would have disclosed, if counsel had read it carefully, that C was not incorporated until some months after the accident.

**82**  The writ was issued naming only C as a defendant. It was not served until July 24, 1995. The defendant filed a statement of defence on August 9, 1995, expressly pleading that the defendant C was legally incorporated on a date subsequent to the date of the plaintiff's loss. The plaintiff did nothing about this new information until after an examination for discovery of a representative of C on May 7, 1996. Thereafter, the application to substitute P as a defendant in place of C was brought promptly.

**83**  The court concluded that the plaintiff's solicitors' explanation for the delay, which suggested that the information about P had only come to his attention at the examination for discovery in May 1996, could not be accepted, as it was contrary to the letter from the adjusters and the statement of defence referred to above. Consequently, the court concluded, "There is no explanation or reason for the delay set out in the materials let alone a satisfactory one."

**84**  The court concluded that as the principals of P and C were the same, there was minimal prejudice to the proposed defendant. The court also accepted there was some prejudice to the plaintiff, although it concluded that she might still succeed against another defendant (the landlord of the premises in which the restaurant was situate).

**85**  The court concluded that neither P nor C had done anything to hide the identity of the true defendant, but had notified counsel through their agent long before the limitation period expired. Plaintiff's counsel had waited until almost the last moment to commence the action, and almost another year to serve the defendant. He did nothing to investigate the express defence pled after the identity of the defendant was put in issue, but rather waited another 10 months to conduct an examination for discovery. On balance, the court concluded that it was not just to add the new defendant.

Kennedy v. United Lock-Block Ltd., [*[1997] B.C.J. No. 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S361-00000-00&context=) (January 27, 1997) Vernon Registry 11847 (S.C.).

[The Court had numbered this text paragraph 86. Quicklaw has removed the number.]

**87**  The action arose from the death of Mrs. Kennedy on March 19, 1993, when a concrete block retaining wall being constructed by her husband, the plaintiff Mr. Kennedy, collapsed and fell on her. An action was commenced by Mr. Kennedy, and a separate action was brought on behalf of Mrs. Kennedy's infant children. Both parties applied to add the Municipality as a defendant.

**88**  The accident occurred on March 19, 1993. Notice of an intention to claim against the Municipality was given, on behalf of Mr. Kennedy alone, on November 25, 1993; that is, considerably more than the two months required by s. 755 of the Municipal Act. No action was commenced against the Municipality, or anyone, within the six months required by s. 754 of the Municipal Act. When Mr. Kennedy did commence his action, in April 1994, the defendants were the supplier of the concrete blocks used to build the retaining wall, and a firm of engineers.

**89**  Separate counsel were retained on behalf of the infants in June 1995. A notice of an intention to claim against the Municipality was given on their behalf on June 28, 1995. Their writ was issued, presumably soon afterwards, naming as defendants the suppliers, engineers, and Mr. Kennedy, but not the Municipality.

**90**  Both sets of plaintiffs applied to add the Municipality in October 1996.

**91**  With respect to the infants' claim, the court concluded that there was nothing in the material in support of the application that provided a "reasonable excuse" for the failure to give notice between March 1993 and June 1995. No reason was given why action was not commenced within the six-month limitation period. The delay between the retainer of counsel for the infants in June 1995 and the application to add the Municipality in October 1996 was explained on the basis that counsel concluded the City would not be liable because a third party engineer was responsible for the construction. The plaintiff's material indicated that the decision to add the City was based on the receipt of an expert engineering report in September 1996, but the court noted that there was nothing in that report to indicate any liability might attach to the Municipality, and concluded the report could not in fact have been the trigger that alerted counsel to the potential cause of action.

**92**  In those circumstances, the court concluded that there was no acceptable (that is, accurate) explanation for the delay.

**93**  The court weighed the prejudice to the defendants in the loss of the accrued limitations defence under the Municipal Act, and the prejudice to the plaintiffs, which the court considered to be slight as they still had their cause of action against the suppliers, the engineers, and their father. It concluded, on balance, that the new party should not be added in the infants' lawsuit.

**94**  With regard to the application of Mr. Kennedy, this application was, prima facie, barred by the Limitation Act as well as the Municipal Act. For similar reasons, his application to add the Municipality was also dismissed.

Olin v. Buiel, [*[1998] B.C.J. No. 498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S20H-00000-00&context=) (March 5, 1998) Vancouver Registry B974718.

**95**  The application was to add two new defendants in motor vehicle accident litigation. The accident occurred October 1995. The plaintiff's vehicle was rear-ended by the existing defendant's. The court concluded the plaintiff was unaware that that defendant's vehicle had, in turn, been struck by a third vehicle owned and operated by the proposed defendants. It appears that the defendants' insurers had written to the plaintiff's former solicitors at some unspecified date indicating the involvement of another vehicle, but that this information "went unnoticed".

**96**  Plaintiff's current counsel were told of the involvement of the third vehicle soon after the expiration of the limitation period, and immediately brought the application to add the new defendants.

**97**  The court concluded there was no prejudice to the prospective defendants, and the inaction of the plaintiff's first lawyer "does not....figure significantly in my consideration of what is just and convenient." The court concluded it was just and convenient to add the new defendants.

The Owners, Strata Plan VR2000 v. Shaw, [*[1998] B.C.J. No. 1086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22F0-00000-00&context=) (May 6, 1998) Vancouver Registry C946094 (S.C.), per Levine, J.

**98**  This was leaky condo litigation. The building was declared substantially complete December 1987. Action was commenced November 1994. The application to plead new causes of action against an existing defendant was heard April 1998. The new cause of action was closely linked to existing issues. The court found "little, if any, prejudice" to the defendant. The plaintiff did not explain the delay in commencing the action, but did say it only learned of the facts on which the new cause of action was based at a (presumably recent) examination for discovery.

**99**  The court was unable to determine when the limitation period had expired. But it concluded that if it had expired after the writ was issued, the amendments should nevertheless be allowed under s. 4(4), but subject to the right of the defendants to argue that the causes of action would have been statute-barred even if they had been included in the original writ.

Bukmeier v. Creyke, [*[1998] B.C.J. No. 1319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22T8-00000-00&context=) (May 25, 1998) New Westminster Registry S024798 (S.C.).

**100**  The application was to add the Crown as a new defendant, as the employer of the defendant police officer. The accident occurred in April 1993, the writ was issued in April 1995, and the application was brought in January 1998. The reason for not joining the Crown in the first place was not explained. The court inclined to the view that the reason was solicitor's inadvertence. Plaintiff's counsel was, or should have been, alerted to the issue by a statement of defence filed in May 1996 but did nothing for about two years. The excuse for this delay was lack of funds on the part of the plaintiff, which the court concluded was "not a very satisfactory explanation." Apart from the loss of the limitation defence there was no prejudice, as the Crown had been defending its employee all along. The only difference in the causes of action against the police officer and the Crown was the need to prove gross ***negligence*** against the former.

**101**  The court ordered the addition of the new party.

Johnson v. Damien, [*[1998] B.C.J. No. 2270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0WF-00000-00&context=) (September 11, 1998) Kamloops Registry 24203 (S.C.).

**102**  The bulk of this decision, dealing with the application of the plaintiff Johnson, is not really relevant to the present application, as the limitation period had not expired against that infant plaintiff.

**103**  However, the action of the plaintiff Siemens against the Crown would have been barred by the Limitation Act. The court allowed the addition of the new defendants on facts and reasoning very similar to the Bukmeier v. Creyke case referred to above.

Sheppard v. Rodenbush, [*[1998] B.C.J. No. 2880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2M4-00000-00&context=) (December 9, 1998) Vancouver Registry C975054 (S.C.).

**104**  The action was for injuries sustained in a hockey game in October 1995. The plaintiff believed he had been struck by player number 22, who was the defendant Rodenbush. By about April 1996, evidence had surfaced that perhaps it was player number 2, a Branden Murphy, who had caused the injury. For reasons that are not explained, when he issued his writ the plaintiff named Mr. Rodenbush and "Branden Doe" as defendants. The plaintiff did not take obvious steps to resolve the issue of the identity of the player who struck him, such as making enquiries of the opposing team's coach. Full enquiries were not commenced until seven months after the expiration of the limitation period, and as a result the plaintiff concluded that the proper defendant was Branden Murphy, and an application was brought to join him as a defendant.

**105**  The court found that there was no explanation why the plaintiff took no steps to pursue the evidence about player number 2. It concluded that the delay in bringing the application almost one year after the expiry of the limitation period was inordinate. The application to add the new defendant was refused.

Canadian Glacier Beverage Corp. v. Barnes & Kissack Inc., [*[1999] B.C.J. No. 1272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4DW-00000-00&context=) (June 2, 1999) Vancouver Registry C971849 (S.C.).

**106**  The action was to add a new plaintiff in procedurally complex litigation. The application was made in April or May 1999. The limitation period "probably" expired in 1998. The defendant had known about the potential claim since 1993. The only prejudice described by the defendant was time and money spent on a Rule 18A application which would be wasted if the new plaintiff were added. The only substantive difference between the original action and the proposed new action was the identity of the person alleged to have suffered a loss as a result of the actions of the defendant. The delay was caused by a "misconception" by plaintiff's counsel which was not appreciated until after the probable expiration of the limitation period. There was no unreasonable delay in commencing or prosecuting the original action, and no delay following the discovery of the "misconception".

**107**  The court concluded it was just and convenient to add the new party.

Letvad v. Finley, [*[1999] B.C.J. No. 1282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4F0-00000-00&context=) (June 3, 1999) Vancouver Registry C953845 (S.C.).

**108**  The action was for medical ***negligence*** during surgery in July 1993. The action was commenced in July 1995 naming only the surgeon and his employer as defendants. In about April 1999, the plaintiff applied to add as defendants two more doctors, who had been involved in his care. It appears that the court was not referred to the decision of the Court of Appeal in the Tri-Line case, and the court did presume some prejudice to the proposed defendants. The court also concluded that an explanation proffered by the plaintiff's solicitors, that they were unable to identify the involvement of the proposed defendants until May or July 1997, was not satisfactory. First, because documents disclosing their involvement had been produced in the late spring of 1994, and second, because this still left unexplained a delay from May or July 1997 to about April 1999. The court concluded that "the evidence shows that for whatever reason, counsel for the plaintiff overlooked the adding of these parties until recently." Despite the court's conclusion that there was no satisfactory explanation, and the absence of any apparent difficult legal issues, the court adopted the reasons of Finch, J.A. in the Teal Cedar case:

I do not consider that an honest error of judgment by a lawyer on a difficult legal question should be fatal to an application to amend or should outweigh all other relevant considerations.

**109**  The court held that this was not a case where the evidence would be dependent on the recollection of the parties, and concluded that the new defendants should be added.

**110**  It is apparent from the results of these cases that the courts have still not reconciled the opposing views of the proper purpose and effect of limitation periods, described by Southin, J.A. in Cementation Co. (Canada) Ltd. v. American Home Assurance Co. [*(1989), 37 B.C.L.R. (2d) 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1MX-00000-00&context=):

There are, in matters of limitation, two views which may fairly be characterized as opposing. The first, and what might be thought the more modern view, is that limitations are a bad thing for they defeat claims which are good in law and fact even when the lapse of time has not materially prejudiced the defendant in his defence. ....

The other view, is that a statutory limitation when it has accrued creates a vested, and therefore, valuable right of which a person is not to be deprived unless, perhaps, he himself has done some act depriving him of that right.

**111**  Looking at these decisions as a whole, it does not seem to me that any "modern" view has prevailed to the point that all questions of fault or responsibility should be ignored whenever a respondent has suffered no prejudice other than the loss of the limitation defence. I do not find the weight of other decisions to be sufficient to compel me to set aside my opinion that in this case the prejudice to the parties is equally balanced and, that being so, the fact that plaintiff's counsel were told of the need to amend a full year before they applied to do so, and have not provided an acceptable reason that might excuse the delay, requires that the balance of justice be resolved in favour of the defendant.

RESULT

**112**  The application to amend is denied. Costs to the defendant City of Vancouver in any event of the cause.

MASTER BOLTON

**End of Document**

[***Smith v. Knudsen, [2002] B.C.J. No. 685***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0MF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Bouck J. (On Costs)

Heard: February 15, 2002.

Judgment: March 14, 2002.

Victoria Registry No. 99/0701

**[2002] B.C.J. No. 685** | 2002 BCSC 383 | 17 C.P.C. (5th) 169 | 112 A.C.W.S. (3d) 1038

Between David A. Smith, plaintiff, and Kelly Michael Knudsen, defendant

(41 paras.)

**Case Summary**

**Practice — Costs — Offers to settle — What constitutes — Effect of.**

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| Determination of costs in an action by Smith for personal injuries. Smith was injured when he swerved on his bicycle to avoid a collision with the defendant Knudsen's truck. As part of his claim, he asserted losses suffered by a corporation that he controlled because of his inability to manage it. Knudsen served three offers to settle. The last one was for $50,000. In a letter accompanying the form, his lawyer indicated that if the matter proceeded to trial and Smith recovered less than the previous offers, he would take the position that Knudsen's costs started running from the date of the relevant previous offer. The jury awarded Smith $100,000 for pain and suffering and apportioned liability equally. It declined to award anything for the corporate losses. Four days of trial had been devoted to the corporate losses. Smith stated that the offer by Knudsen was conditional and thus a nullity. Also at issue was the effect of the ***Negligence*** Act on the award of costs.  HELD: The offer to settle was not conditional.  The letter accompanying the offer form had no legal consequence under Rule 37. However, there was a conflict between the ***Negligence*** Act and the Rules. Under the ***Negligence*** Act, Smith was entitled to 50 per cent of his costs both before and after the offer. Knudsen was not entitled to any costs because he did not suffer any damage. The provisions of the ***Negligence*** Act could not be reconciled with Rule 37. The Rules were subordinate legislation and the ***Negligence*** Act prevailed. Accordingly, Smith was entitled to 50 per cent of his costs and disbursements throughout. However, the court exercised its discretion to exclude the time spent arguing the corporate loss claim from the award of costs. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 1(4), 37, 37(2), 37(3), 37(8), 37(15), 37(22)(b), 37(24)(a), 57(9).

Court Rules Act, [*R.S.B.C. 1996, c. 80, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5NRH-6S91-JP4G-63MX-00000-00&context=)(1).

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, ss. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B067-00000-00&context=)(c), 3(1), 3(2).

**Counsel**

Michael Scherr, for the plaintiff. Harold F. Turnham, for the defendant.

[Quicklaw note: A Corrigendum was released by the Court March 19, 2002. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **BOUCK J.** |

INTRODUCTION

**1**  This judgment tries to resolve a dispute between the parties over the issue of costs. It arises from a civil jury verdict given on 21 January 2002.

FACTS

**2**  On 22 June 1997, Mr. Smith was competing in a triathlon. As part of the race, he was riding his bicycle southbound on East Saanich Road in Saanichton. When he approached Mr. Knudsen's residence on his right, Mr. Knudsen began backing his pick-up truck out of his driveway. He also intended to travel south on East Saanich Road.

**3**  Mr. Smith came up behind Mr. Knudsen's truck just as it started moving foreword. Mr. Smith could not stop his bike in time to avoid a collision so he veered right toward the sidewalk. The maneuver caused him to fall off his bike injuring the right side of his body. Neither he nor the bike contacted Mr. Knudsen's pick-up truck.

**4**  At that time, Mr. Smith was the sole shareholder, director and officer in a company called Professional Components Ltd. (Professional). It manufactured buses, ambulances and other products in its plant at Sidney, B.C. As a result of the accident, Mr. Smith alleged Professional lost $1,393,801.00 up to the date of the trial. He contended this happened because he was unable to manage Professional properly due to his injuries. Mr. Smith argued that Professional's loss was a past loss of income claim to him personally since he was Professional's "alter ego."

**5**  Mr. Knudsen's counsel made 3 offers to settle the action, on 6 April 2001, 18 May 2001 and 4 December 2001. On 6 April 2001, he offered Mr. Smith $20,000.00. Defence counsel's accompanying letter contained these words:

Just so there are no surprises, in the event the plaintiff accepts this offer, on the assessment of the plaintiff's costs we will contend that the cost of the Wiseman report is not recoverable on the basis it was not "necessarily and reasonably incurred."

**6**  Mr. Smith did not accept the offer. In the second offer of 18 May 2001, Mr. Knudsen increased the offer to $30,000.00. His counsel's accompanying letter contained these words:

This is our final word on the subject.

**7**  Mr. Smith also rejected this offer. The third and last offer on 4 December 2001 was for $50,000.00. Defence counsel's accompanying letter contained these words:

If the case proceeds to trial and the plaintiff recovers a judgement less than the amounts offered in the previous offers to settle dated May 18th or April 6th, 2001 we will be taking the position that the defendant's costs start to run from the appropriate earlier date.

**8**  Mr. Smith declined to accept the third offer and Mr. Knudsen did not withdraw it. The action then proceeded to trial on 14 January 2002.

**9**  The jury had to determine 4 main issues:

1. Was Mr. Knudsen negligent?
2. If he was, did Mr. Smith contribute to his own damages by his ***negligence***?
3. What damages, if any, should Mr. Knudsen pay Mr. Smith for his pain, injury, suffering and loss of enjoyment of life?
4. What damages, if any, should Mr. Knudsen pay Mr. Smith for his past loss of income?

**10**  The jury awarded Mr. Smith the sum of $100,000.00 for his pain, injury, suffering and loss of enjoyment of life. It apportioned liability equally between the parties. The jury declined to award him anything for his "alter ego" past loss of income claim totalling $1,393,801.

ISSUES

**11**

1. Was Mr. Knudsen's offer to settle of 4 December 2001 for $50,000.00 conditional, thus making it a nullity?
2. If there is a conflict as to costs between Rule 37 and the ***Negligence*** Act, *R.S.B.C. 1996, c. 333*, which enactment should prevail?

ANALYSIS

1. Did the 4 December 2001 Letter make the Form 64 Offer conditional?

**12**  Counsel for Mr. Knudsen relies on Rule 37(24)(a). By reason of that rule, he says Mr. Smith should get his costs up to 4 December 2001 and Mr. Knudsen should get his costs thereafter. Rule 37(24)(a) reads in part:

1. If the defendant has made an offer to settle a claim for money and the offer has not expired or been withdrawn or been accepted,
2. if the plaintiff obtains judgment for the amount of money specified in the offer or a lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date ...

**13**  Counsel for Mr. Smith contends that the 4 December 2001 offer was "conditional" and therefore a nullity. If it is a nullity then, subject to the ***Negligence*** Act and Rule 57(9), Mr. Smith should get all of his costs and Mr. Knudsen should get none. I will deal with the ***Negligence*** Act provisions later in this judgment. Rule 57(9) gives judge discretion when fixing costs. It reads:

1. ... costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

**14**  As I understand Mr. Smith's counsel, he contends the letter accompanying the last offer of 4 December 2001 for $50,000, made the offer conditional and therefore a nullity. He relies on Rule 37(2) and (3). They read:

1. A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceeding in the terms specified in the offer.
2. An offer to settle for a sum of money includes, in that sum, all interest under the Court Order Interest Act to the date of the delivery of the offer, but does not include costs.

**15**  Form 64 reads in part:

The \_\_\_\_\_\_ [party] \_\_\_\_\_\_\_ offers to settle this proceeding ... on the following terms [set out terms in consecutively numbered paragraphs] and costs in accordance with Rule 37[22] and [37]...

**16**  Mr. Smith's counsel argues the 4 December 2001 letter suggests that even if Mr. Smith accepted the Form 64 offer, Mr. Knudsen's counsel would not agree to Mr. Smith recovering all of his costs up to that date as indicated by Rule 37(22)(b). It reads:

1. If an offer is accepted,...
2. if the offer was made by the defendant, the plaintiff is entitled to costs assessed to the date the offer was delivered to the plaintiff, and the defendant to costs assessed from that date.

**17**  In effect, the 4 December 2001 letter of Mr. Knudsen's counsel said that he would only agree to pay Mr. Smith's costs up to the date of the earlier offers should the jury verdict be less than $20,000 or $30,000, as the case may be. Mr. Smith's counsel submits the combined effect of the Form 64 offer of $50,000 and the accompanying 4 December 2001 letter, made the Form 64 offer conditional. Thus, he says it was incapable of an unconditional acceptance by Mr. Smith under Rule 37(15). That rule reads in part:

1. ... an acceptance of an offer to settle must be unconditional.

**18**  Rule 37(8) allows a party to withdraw an offer to settle by delivering a written notice in Form 65. However Rule 37 is silent on the effect of successive offers on the issue of costs. Hence, the question arises as to whether the two earlier offers of $20,000 and $30,000 should receive any consideration with respect to costs after Mr. Knudsen's counsel delivered his last offer of $50,000? For two reasons I do not think so.

**19**  It seems common sense that a plaintiff would never accept an earlier Form 64 settlement offer from a defendant for a lesser amount after receiving a later offer for a greater amount. When defendants deliver successive Form 64 offers in increasing amounts they effectively withdraw or revoke any earlier offer for all purposes, including costs.

**20**  Kapoor v. Hundle [*(1987), 19 B.C.L.R. (2d) 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M42X-00000-00&context=) (B.C.C.A.) discusses conditional offers. It involved a dispute over the interpretation of Rule 37. At that time, the scheme of the rule required a defendant to pay into court the amount set out in the offer rather than just make an offer in writing as happens today. However, the Rule had the same objective.

**21**  In Kapoor, the plaintiff ignored the offer's condition that the payment included costs and accepted the amount paid in as satisfaction of the claim. He then proceeded to tax his costs. The defendant argued that since the notice of payment in included costs, the plaintiff could not tax them, having accepted the offer. The court disagreed. It allowed the plaintiff his costs in addition to the amount of the payment in. At page 43, the court criticized conditional offers:

... a court should not encourage a defendant to impose conditions when making a payment of money into court. If a defendant wishes to impose conditions regarding the payment of funds in settlement of the plaintiff's claim, he should do this by negotiation, not by imposing conditions when he makes a payment pursuant to the rules. If a defendant chooses to impose any special conditions in a notice of payment in, he does so at his peril. To facilitate the attainment of the object of the rules, a court should insist that when a defendant makes payment into court, he does so unconditionally as to costs.

**22**  In summary, defence counsel's letter of 4 December 2001 did not make the Form 64 offer conditional. Mr. Smith obtained a judgment against Mr. Knudsen for the amount of the $50,000 offer. Subject to the ***Negligence*** Act, Rule 37(24)(a) gives Mr. Smith all of his costs up to 4 December 2001 and Mr. Knudsen his costs thereafter. In other words, the unconditional Form 64 offer governs. Whatever may be in a letter accompanying a Form 64 offer has no legal consequence under Rule 37.

1. If there is a Conflict between the ***Negligence*** Act and Rule 37 Which Enactment Prevails?

**23**  Section 3(1) and (2) of the ***Negligence*** Act *R.S.B.C. 1996, c. 333*, state that when a court divides liability equally, the defendant must pay 50% of the plaintiff's costs throughout the action. Those sections read:

3 (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

1. Section 2 applies to the awarding of costs under this section.

The relevant part of section 2 reads:

1. The awarding of damages or loss in every action to which section 1 applies is governed by the following rules:

...

1. as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

**24**  In the context of this case, the combined effect of these sections seems to say that:

1. As between Mr. Smith who has sustained damage or loss and Mr. Knudsen who is liable to make good the damage or loss;
2. Mr. Smith who sustained the damage or loss is entitled to recover from Mr. Knudsen the percentage of the damage or loss that corresponds to the degree of fault the jury apportioned to Mr. Knudsen.

**25**  In other words, the combined effect of ***Negligence*** Act ss. 3(1) and (2) and 2(c) entitles Mr. Smith to 50% of his costs both before and after the offer of 4 December 2001. Mr. Knudsen is not entitled to any costs because he did not suffer any damages.

**26**  Flatley v. Denike [*(1997), 144 D.L.R. (4th) 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21G4-00000-00&context=) (B.C.C.A.) discussed similar issues. In that case, there was an offer to settle and payment into court shortly before trial. The plaintiff did not accept the offer. She recovered judgment for less than the offer's amount. The trial judge divided liability equally. He ordered each party to pay 50% of the other party's costs incurred before the offer and set one off against the other. He also ordered the plaintiff to pay all the defendant's costs after the offer.

**27**  The issue on appeal was the defendant's entitlement to pre-offer costs. Since the defendant did not suffer any damages in the accident, the court held that he could not recover any costs from the plaintiff arising before the offer. The court confined the defendant's liability for costs to 50% of the plaintiff's costs, up to the time of the offer: [21] and [22].

[21] In cases where the defendant has not suffered damage, the plaintiff is under no liability for costs because the plaintiff's liability, if any, would only be the same proportion as his or her liability to make good the defendant's damage or loss, of which there is none.

[22] As a result, I would hold that in cases such as this, where the defendant suffers no damage or loss, but liability is divided, the defendant must pay the plaintiff's same proportion of the plaintiff's costs as the defendant is liable for the plaintiff's damages, but the plaintiff is not liable to pay any portion of the defendant's costs.

**28**  Mr. Knudsen suffered no damage from the 22 June 1997 accident. Under Flatley v. Denike Mr. Smith may only recover 50% of his pre-offer costs that he incurred to 4 December 2001.

**29**  Flatley v. Denike dealt mainly with pre-offer costs. In passing the court upheld the trial judge's discretion ordering that the plaintiff pay 100% of the defendant's post-offer costs: [24], [25]:

[24] Next, Mr. Goepel argued that in the circumstances of this case, the trial judge should have exercised a discretion to ameliorate against the harshness of the order made against the plaintiff for all costs subsequent to the date of the payment into court. Mr. Goepel argued that the plaintiff was largely successful on the issue of damages and her recover fell only slightly short of the payment into court.

[25] We do not have reasons for judgment by the trial judge but as the disposition was discretionary, I would not interfere with it.

**30**  Rule 37 and the ***Negligence*** Act conflict when it comes to the issue of costs. For example, assuming there was no ***Negligence*** Act and the court did not rule otherwise under Rule 57(9), Rule 37 would entitle Mr. Smith to all of his costs to 4 December 2001 and Mr. Knudsen to all of his costs thereafter.

**31**  On the other hand, if there were no Rule 37 then, under the ***Negligence*** Act, Mr. Smith would recover 50% of his costs throughout the action. Mr. Knudsen would not recover any costs since he did not suffer any damages.

**32**  Do the ***Negligence*** Act provisions prevail over Rule 37 where there is a conflict? In Friends of Oldman River Society v. Canada (Minister of Transport), *[1992] 1 S.C.R. 3*, at page 38, the court held that statute law prevails over subordinate legislation but, where possible a court should prefer an interpretation that permits reconciliation of the two:

Just as subordinate legislation cannot conflict with its parent legislation ... so too it cannot conflict with other Acts of Parliament, ... unless a statute so authorizes ... Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two.

**33**  The Rules of Court are "subordinate legislation" since they are not part of a statute enacted by the provincial legislature. They are only regulations enacted by the Lieutenant Governor in Council under the Court Rules Act, [*R.S.B.C. 1996, c. 80 s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5NRH-6S91-JP4G-63MX-00000-00&context=)(1). It reads in part:

1. The Lieutenant Governor in Council may, by regulation, make rules ... governing the conduct of proceedings in the ... Supreme Court...

**34**  That means the ***Negligence*** Act passed by the Provincial Legislature must prevail over Rule 37, where there is any inconsistency between them. Additionally, Rule 1(4) of the Supreme Court Rules seems to make the Rules subject to other provincial statutes such as the ***Negligence*** Act. Rule 1(4) reads:

1. These rules govern every proceeding in the Supreme Court except where an enactment otherwise provides.

**35**  Apparently, counsel in Flatley v. Denike did not refer the Court of Appeal to the comments of the Supreme Court of Canada decision in Friends of Oldman River Society v. Canada (Minister of Transport) or to Rule 1(4). Therefore, I am entitled to apply them to the facts of this case.

**36**  I am unable to find any way of reconciling or harmonizing the relevant ***Negligence*** Act sections with Rule 37. The ***Negligence*** Act provisions give Mr. Smith 50% of his costs throughout the action and Mr. Knudsen no costs at all. Rule 37 gives Mr. Smith his costs up to the time of the offer to settle and Mr. Knudsen his costs thereafter.

**37**  Accordingly, I hold that where there is an apportionment of liability between the parties, the ***Negligence*** Act provisions as to costs must prevail over the costs provisions of Rule 37. Hence, Mr. Smith should get 50% of his costs throughout the action and Mr. Knudsen should get none.

**38**  All of this is subject to a judicial discretion in awarding costs under the ***Negligence*** Act s. 3(1). It seems reasonable to examine authorities interpreting the extent of judicial discretion under Rule 57(9), when determining the extent of a similar discretion given to the court under the ***Negligence*** Act.

**39**  Bailey v. Victory [*(1995), 4 B.C.L.R. (3d) 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2C0-00000-00&context=) (B.C.C.A.) was a case where the court denied a successful plaintiff part of his costs when he had proved the defendant liable and recovered judgment substantially in excess of the amount the defendant paid into court [35]. However, the plaintiff failed to recover damages for his alleged future income loss [25]. The court exercised its discretion under the Rules by awarding the plaintiff his trial costs. It then denied him the costs and disbursements he incurred over the estimated 3 days of trial spent trying to prove his future income loss claim [37].

**40**  Adopting that reasoning to the facts before me, I award the plaintiff 50% of all his costs and disbursements up to the date of trial and any post trial costs and disbursements. That includes his costs and disbursements for the estimated 3 days of trial he successfully spent in achieving an award for his non-pecuniary damages. However, he will not recover any costs and disbursements for the estimated 4 days of trial he unsuccessfully spent trying to prove his alter ego claim.

JUDGMENT

**41**

1. Mr. Knudsen will pay 50% of Mr. Smith's costs and disbursements except for those costs and disbursements related to the 4 days of trial Mr. Smith spent trying to prove his alter ego claim.
2. Mr. Knudsen will not recover any of his costs from Mr. Smith.
3. Each side will pay their own costs of this motion.

BOUCK J.

\* \* \* \* \*

CORRIGENDUM

Released: March 19, 2002

[1] My reasons in this matter wre handed down March 14, 2002. There is a correction to para. 22, p. 9, the first sentence, which should have read:

In summary, defence counsel's letter of 4 December 2001 did not make the Form 64 offer conditional.

BOUCK J.

**End of Document**

[***Tucci v. Peoples Trust Co., [2017] B.C.J. No. 1707***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PDG-D481-FJDY-X20H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.M. Masuhara J.

Heard: June 27-29, August 5, November 4, 2016.

Judgment: August 29, 2017.

Docket: S138544

Registry: Vancouver

**[2017] B.C.J. No. 1707** | 2017 BCSC 1525

Between Gianluca Tucci, Plaintiff, and Peoples Trust Company, Defendants

(285 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Application by plaintiffs to certify action as class proceeding allowed in part — Plaintiff claimed damages for breach of contract, *negligence*, breach of confidence, and breach of privacy on behalf of proposed class who completed online account applications with defendant and whose personal information contained on defendant's database was compromised — Not plain and obvious there were no reasonable causes of action available under federal common law — Claim for breach of confidence struck as misuse element not properly pleaded — Several common issues were approved — Class was objectively identifiable — Class proceeding was preferable procedure — Class Proceedings Act, ss. 4(1), 4(2).**

**Information technology — Personal information and privacy — Protection of privacy — Civil liability — Application by plaintiffs to certify action as class proceeding allowed in part — Plaintiff claimed damages for breach of contract, *negligence*, breach of confidence, and breach of privacy on behalf of proposed class who completed online account applications with defendant and whose personal information contained on defendant's database was compromised — Not plain and obvious there were no reasonable causes of action available under federal common law — Claim for breach of confidence struck as misuse element not properly pleaded — Several common issues were approved — Class was objectively identifiable — Class proceeding was preferable procedure — Class Proceedings Act, ss. 4(1), 4(2).**

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| Application by the plaintiffs to certify the action as a class proceeding. The plaintiffs claimed damages for breach of contract, ***negligence***, breach of confidence, and breach of privacy and instruction upon seclusion on behalf of the proposed class of 11,000 to 13,000 members, who completed an online account application with the defendant, a federally regulated trust company, and whose personal information was contained on an online database controlled by the defendant, which was compromised or disclosed to others on the internet. Both plaintiffs had applied online for a savings account with the defendant. They were subsequently notified by the defendant that they might be at risk of identity theft because its online database had been accessed by unauthorized individuals located in China. The federal Privacy Commissioner found the defendant had not implemented sufficiently strong safeguards to protect personal information. The Commissioner further found the defendant had implemented new measures that sufficiently addressed the privacy concerns. The defendant's website had terms and conditions, including a limitation of liability clause.  HELD: Application allowed in part.  It was not plain and obvious that there were no reasonable causes of action available under federal common law. The plaintiffs' claims were not foreclosed by the Personal Information Protection and Electronic Documents Act, which was not a complete code. The plaintiff's pleadings could arguably support claims in breach of contract and ***negligence*** for the obligations alleged. It was not plain and obvious that the limitation of liability clause excluded the defendant's liability. The plaintiff's claim for breach of confidence was struck as the misuse element had not been properly pleaded. It was not plain and obvious that there was no federal common law tort of intrusion upon seclusion. The plaintiff had pleaded sufficient material facts capable of establishing damages. Several common issues were approved. The class was objectively identifiable. A class proceeding was the preferable procedure. The plaintiffs were appropriate representative plaintiffs. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, *S.B.C. 2004, c. 2*,

Class Proceedings Act, [*R.S.B.C. 1996, c. 50, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-F2TK-240T-00000-00&context=)(1), s. 4(1), s. 4(1)(a), s. 4(1)(b), s. 4(1)(c), s. 4(1)(d), s. 4(2), s. 4(2)(a), s. 4(2)(b), s. 4(2)(c), s. 4(2)(d), s. 4(2)(e), s. 7(a), s. 16, s. 16(2)

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Personal Health Information Protection Act, S.O. 2003, c. 3, Sch. A,

Personal Information Protection Act, [*S.A. 2003, c. P-6.5, s. 5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-7G51-FGJR-21RH-00000-00&context=), s. 6(1), s. 34, s. 35

Personal Information Protection Act, [*S.B.C. 2003, c. 63, s. 34*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F2TK-204M-00000-00&context=), s. 35

Personal Information Protection and Electronic Documents Act, [*S.C. 2000, c. 5, s. 5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB81-DYMS-621J-00000-00&context=), s. 5(1), s. 11(2), s. 12(1), s. 12(1) (a), s. 12(1)(b), s. 12(1)(c), s. 14, s. 14(1), s. 16, s. 16(c)

The Privacy Act, [*C.C.S.M., c. P125*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYC-10Y1-JYYX-6059-00000-00&context=),

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Privacy Act, *R.S.N.L. 1990, c. P-22*,

Sale of Goods Act, *R.S.B.C. 1996, c. 410*,

Supreme Court Rules, Rule 9-5

Trust and Loan Companies Act, [*S.C. 1991, c. 45*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9Y1-F528-G2HB-00000-00&context=),

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Counsel for the Defendant: R. Hira, Q.C., A.N. Bultz.

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**Reasons for Judgment**

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

**I. INTRODUCTION**

**1**  These Reasons deal with an application for an order certifying this action as a class proceeding under the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* (the "*CPA*").

**2**  The essence of the action is that the defendant, Peoples Trust Company ("Peoples Trust"), did not adequately secure personal information collected on its online application portal and stored in online databases. As a result, it is asserted that unauthorized persons were able to access the personal information, putting the proposed class members at risk of identity theft, cybercrime, and "phishing". The action is founded on (a) breach of contract, (b) ***negligence***, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

**3**  The proposed class, estimated at 11,000-13,000 members, is described as:

All persons residing in Canada who completed an online account application with PTC and whose personal information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

**4**  There are two sub-classes proposed:

1. The "Resident Sub-Class":

All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and

1. The "Non-Resident Sub-Class":

All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

**5**  Subsequent to the filing of the application, Mr. Taylor was added as a plaintiff to this action. His qualifications are dealt with later in these Reasons. These Reasons refer to Mr. Tucci and Mr. Taylor collectively as the plaintiff or the applicant, unless the context requires otherwise.

**II. BACKGROUND**

**A. The parties**

**1. The defendant Peoples Trust**

**6**  The defendant Peoples Trust is a federally regulated trust company incorporated pursuant to the *Trust and Loan Companies Act*, [*S.C. 1991, c. 45*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9Y1-F528-G2HB-00000-00&context=). As such, it is subject to federal privacy legislation, as overseen by the Office of the Privacy Commissioner of Canada (the "Privacy Commissioner"). Peoples Trust's head office is in Vancouver and it has branch offices in Vancouver, Toronto, and Calgary. It provides financial products and services such as savings accounts, mortgages, and credit cards across Canada. Many of its services are provided online.

**2. The plaintiffs**

**7**  The plaintiff Mr. Tucci is an individual residing in Windsor, Ontario. In about October 2012, he applied online for a Peoples Trust tax-free savings account. Peoples Trust approved his application and opened his account.

**8**  The plaintiff Mr. Taylor is a retiree residing in Richmond, B.C. In about March 2009, he applied online for a savings account at Peoples Trust.

**9**  Both plaintiffs were notified by Peoples Trust that they may be at risk of identity theft because an online database containing personal information they provided had been accessed over the interest by unauthorized individuals located in the People's Republic of China.

**B. The online applications**

**10**  The plaintiff, like all applicants for deposit services, provided personal information including name, address, telephone number, email address, date of birth, Social Insurance Number, and occupation. Applicants for Peoples Trust credit card and other services must provide the same personal information and their mother's maiden name.

**11**  According to the plaintiff, the plaintiff and proposed class members entered agreements with the defendant related to the use of the defendant's website and the defendant's collection, retention, use, and disclosure of personal information. The terms of the agreements incorporated Peoples Trust's "Website Terms & Conditions" and "Terms & Conditions".

**12**  The Website Terms & Conditions included the following:

1. Privacy and Security

PTC is committed to ensuring that personal information you have provided to us is accurate, confidential, and secure. Our privacy policies and practices have been designed to comply with the Personal Information Protection and Electronic Documents Act (Canada) or corresponding provincial privacy acts, as applicable (collectively, "Privacy Laws").

1. Applicable Law

These terms and conditions, your access to and use of the Website, and all related matters are governed solely by the laws of British Columbia and applicable federal laws of Canada, excluding any rules of private international law or the conflict of laws that would lead to the application of any other laws. Any dispute between PTC and you or any other person arising from, connected with, or relating to the Website, this Agreement, or any related matters (collectively, "Disputes") must be resolved before the Courts of the Province of British Columbia, Canada, sitting in the City of Vancouver, and you hereby irrevocably submit and attorn to the original and exclusive jurisdiction of those Courts in respect of all Disputes. Any proceeding commenced by you or on your behalf regarding a Dispute must be commenced in a court of competent jurisdiction in Vancouver, British Columbia within six months after the Dispute arises, after which time any and all such proceedings regarding the Dispute are barred.

**13**  The Terms & Conditions included:

1.24 Privacy Policy

We are committed to ensuring that the personal information you have provided to us is accurate, confidential, and secure. PTC's privacy policies and practices have been designed to comply with the federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable (collectively "Privacy Laws").

**14**  Finally, Peoples Trust's privacy policy stated:

1. The security of your personal information is a priority for Peoples Trust

We take steps to safeguard your personal information, regardless of the format in which it is held, including:

Physical security measures such as restricted access facilities and locked filing cabinets;

Shredding of documents containing personal information;

Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers;

Organizational processes such as limiting access to your personal information to a selected group of individuals;

Requiring third parties given access to your personal information to protect and secure your personal information.

**C. The security breach**

**15**  In about September 2013, cybercriminals gained unauthorized access to the defendant's databases and stole website users' personal information. As a result, unsolicited text messages were sent to users of the defendant's website purporting to be from the defendant. The messages asked the recipients to call a telephone number based in the state of Utah. According to the plaintiff, these text messages were attempts at "phishing": soliciting money or information from individuals by pretending to be a trusted company.

**D. Defendant's investigation and notification of authorities**

**16**  The defendant says it became aware of a possible breach in the week of October 7, 2013. The defendant initiated a forensic investigation that confirmed that a database had been compromised in the attack, which originated from China. According to the plaintiff, the investigator informed the defendant of this on October 11, 2013.

**17**  The defendant notified the Vancouver Police Department, the RCMP, and affected patrons of the security breach. The defendant reported the security breach to the Privacy Commissioner on October 15, 2013.

**E. Defendant's notification of customers**

**18**  By letter dated October 25, 2013, the defendant informed all potentially affected persons of the security breach and of steps the defendant had taken to mitigate the risk of fraud and theft. The plaintiff estimates that the letter was sent to 11,000-13,000 individuals, including himself.

**19**  The letter advised that the defendant had arranged for flags to be placed on the customers' credit files to alert companies that the customers' data may have been compromised and that the companies should take additional steps to verify their identity. The letter stated that the flags would stay on the credit files for six years unless cancelled earlier by the customer.

**20**  The letter advised the customers to:

1. never respond to unsolicited requests for banking or personal information;
2. treat as fraudulent emails or text messages purporting to be from the defendant asking for account or other information;
3. monitor for and report suspicious activity in their Peoples Trust accounts; and
4. obtain a copy of their credit report to ensure there has been no fraudulent use of their credit information.

**F. Privacy Commissioner of Canada's investigation**

**21**  As noted, the defendant reported the breach to the Privacy Commissioner on October 15, 2013. The Privacy Commissioner also received several complaints from affected individuals.

**22**  On January 7, 2014, the Privacy Commissioner initiated a complaint pursuant to s. 11(2) of the *Personal Information Protection and Electronic Documents Act*, [*S.C. 2000, c. 5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S21X-00000-00&context=) [*PIPEDA*]. The Commissioner's findings were reported on April 13, 2015. The Commissioner's findings were reported in the Office of the Privacy Commissioner's 2014 annual report to Parliament: *Privacy Protection:* A Global Affair, *Annual Report to Parliament 2014, Report on the* Personal Information Protection and Electronic Documents Act (Gatineau: Minister of Public Works and Government Services Canada, 2015).

**23**  The Annual Report addressed the security breach as follows (at p. 19):

Our investigation observed that the company did not implement sufficiently strong safeguards in developing its online application web portal in order to protect the sensitive personal information being collected from customers. As well, when the breach occurred, the company lacked a comprehensive information security policy.

There was also a lack of ongoing monitoring and maintenance to identify and address evolving digital vulnerabilities and threats. As a result, unbeknownst to the organization, a copy of the customer information--a duplicate of data held in the company's internal database --was being stored unnecessarily, unencrypted, and in perpetuity, on a web server that had not been updated to address a well-known vulnerability. Had this unnecessary duplicate not been on the web server in the first place, it would not have been compromised during the breach.

We also noted that during our investigation, Peoples Trust was very cooperative with our Office and demonstrated a timely and comprehensive breach response. For example, it immediately hired a consultant to identify the breach's cause and "plug the leak." It also implemented new measures to help affected individuals and reduce the risk of a future breach.

These included:

1. providing clear and comprehensive notifications and offering credit alerts to those affected by the breach;
2. ending the unnecessary retention of customers' personal information on the web server;
3. enhancing technological safeguards to protect information collected online; and
4. developing procedures and associated internal communications to support privacy protection practices, such as requiring greater diligence in selecting and hiring third parties for developing information management systems.

As a result, we concluded that the matter was well-founded and resolved.

**G. History of this proceeding**

**24**  The plaintiff's notice of civil claim was filed on November 18, 2013 and an amended notice of civil claim was filed on March 26, 2015.

**25**  The defendant served a notice of application to strike the claim under Rule 9-5 on July 30, 2014. The defendant filed this application on April 24, 2015.

**26**  For Reasons dated July 11, 2015, and indexed at [*2015 BCSC 987*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2DJ-00000-00&context=), I ordered that the application to strike the claim be heard concurrently with the certification application, which at that time was scheduled to begin on April 18, 2016.

**27**  Subsequent amendments to the pleadings have been filed by the applicant. The pleadings reviewed are the plaintiff's Third Amended Notice of Civil Claim.

**III. DISCUSSION**

**28**  The goals of the *CPA* are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:

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.

**29**  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 (s. 4(2)):

1. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
2. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
3. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
4. whether other means of resolving the claims are less practical or less efficient;
5. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**30**  The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at 980; *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=) at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24-25; *Dow Chemical Company v. Ring, Sr.*, [*2010 NLCA 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8Y1-FCSB-S04R-00000-00&context=) at para. 14, leave to appeal refused [*2010 CanLII 61130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JWXF-21T1-00000-00&context=) (S.C.C.). The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) at para. 102 [*Microsoft*].

**31**  In this respect, I note (as I have in the past) the observation of Rothstein J., for the Court, in *Microsoft* at para. 105:

Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

**32**  While not deciding the merits of the action, the court must equally avoid only symbolic scrutiny of the adequacy of the evidence. The court acting as a gatekeeper is to use the certification process as a meaningful screening device: *Microsoft* at para. 103.

**33**  If the five requirements under s. 4(1) have been established the court must certify the action.

**A. Cause of action**

**34**  The plaintiff pleads (a) breach of contract, (b) ***negligence***, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

**35**  The defendant says that the civil claim does not disclose a cause of action. The defendant takes issue with each individual cause of action, saying that the plaintiff's pleadings suffer from numerous deficiencies. The defendant also says that its liability is limited by terms in the contracts the plaintiff seeks to rely on.

**36**  There are two issues that touch on multiple causes of action, and which I will address first: (1) forum selection and choice of law, and (2) whether *PIPEDA* is a complete code that precludes common law claims for breach of privacy.

**1. Forum selection & choice of law**

1. **Plaintiff's position**

**37**  The plaintiff says that this proceeding is brought in this Court based on the forum selection clause in the contract (stated at para. 11 above), which provides that disputes concerning the contract or the website must be brought in this Court.

**38**  The plaintiff says that "the federal laws of Canada, including the common law" are available to found the class members' claims because (a) Peoples Trust is a federally-licenced trust company; (b) the choice of law clause provides that federal common law applies; (c) Peoples Trust is subject to *PIPEDA*; and (d) Peoples Trust entered into contracts with class members across Canada.

**39**  In the alternative, the plaintiff says that the choice of law clause is invalid for ambiguity or "the circumstances" are such that the Court should disregard it, and that the laws of British Columbia apply to all claims other than intrusion upon seclusion. The plaintiff does not specify what "the circumstances" may be. The plaintiff says in the further alternative that the law of the place in which the class member resided applies to intrusion upon seclusion (although as the plaintiff did not plead a primary alternative for intrusion upon seclusion I do not think this is a "further" alternative).

1. **Defendant's position**

**40**  The defendant does not take issue with the plaintiff's choice of forum and does not expressly counter the plaintiff's submissions on choice of law. However, as will be seen, the defendant submits that the common law of British Columbia, not "federal common law", applies to the plaintiff's common law claims. The defendant also submits that the Applicable Law clause is "invalid and inapplicable" because it would result in contracting out of *PIPEDA*, which is binding public interest legislation.

1. **Analysis**

**41**  ln my view, it is not plain and obvious that there are no reasonable causes of action available under federal common law.

**42**  The choice of law provision refers to "applicable federal laws". This is certainly broad enough to potentially include federal common law. The real issue is whether there exists any "applicable" federal common law with respect to any of the claims: breach of contract, ***negligence***, breach of confidence, intrusion upon seclusion, unjust enrichment, and waiver of tort. On this point I note that although the plaintiff asserts that the federal common law founds the claims, nowhere in the submissions is any cause of action differentiated from provincial common law other than the tort of intrusion upon seclusion.

**43**  There is no doubt that some federal common law exists: *Roberts v. Canada*, [*[1989] 1 S.C.R. 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23N7-00000-00&context=) at 339-340. Defining what is and is not federal common law for the purpose of determining whether any applicable federal common law exists is more difficult. Most recently, in *Windsor (City) v. Canadian Transit Co.*, [*2016 SCC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N82-XP61-JX8W-M51G-00000-00&context=), the Supreme Court of Canada referred, at para. 41, to federal law as including "a rule of the common law dealing with a subject matter of federal legislative competence".

**44**  Counsel's submissions on this point were limited. The plaintiff referred to *Condon v. Canada*, [*2014 FC 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4G1-JBT7-X0X2-00000-00&context=), varied [*2015 FCA 159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GF3-B3V1-K054-G36C-00000-00&context=), as an example of the application of the federal common law of intrusion upon seclusion. However, the mere fact that the Federal Court applied a common law doctrine does not mean that that doctrine constitutes federal common law. *Condon* was not concerned with whether the tort of intrusion upon seclusion was part of federal common law. Although the Federal Court's jurisdiction is limited to administering the "laws of Canada", there was no challenge to its jurisdiction in *Condon*, and in any event "[w]here a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties": *ITO-Int'l Terminal Operators v. Miida Electronics*, [*[1986] 1 S.C.R. 752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B6-00000-00&context=) at 781.

**45**  The case law discloses a number of examples of federal common law: the law of aboriginal title: *Roberts* at 339-340; federal crown liability: *Quebec North Shore Paper v. C.P. Ltd.*, [*[1977] 2 S.C.R. 1054*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24W4-00000-00&context=) at 1063; the execution of Federal Court judgments: *British Columbia (Deputy Sherriff) v. Canada*, [*[1992] 4 W.W.R. 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B15C-00000-00&context=) (B.C.C.A.); and even, perhaps, a federal common law of contributory ***negligence***: *Gottfriedson v. Canada*, [*2013 FC 545*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4G1-FCYK-24C1-00000-00&context=), aff'd [*2014 FCA 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4G1-FBFS-S30H-00000-00&context=) (finding it unnecessary to express an opinion on this issue, however), at paras. 33-35.

**46**  The case law does not, however, disclose much in the way of method. A "rule of the common law dealing with a subject matter of federal legislative competence" cannot include every rule of the common law that Parliament could modify: *Roberts* at 338-339. It has been speculated by some that the test is exclusive legislative competence: *R v. Prytula*, [1979] F.C. 516 at 523-525 (C.A.), aff'd in *Rhine v. The Queen*, [*[1980] 2 S.C.R. 442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1X8-00000-00&context=) (SCC not expressing an opinion on this point). I do not purport to express a definitive opinion on the merits of this test.

**47**  As a rule of thumb, it may be true that common law torts are "matters of provincial law": *Canadian Transit Company v. Windsor (Corporation of the City)*, [*2015 FCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J8F-WH51-F5KY-B1B1-00000-00&context=), rev'd in *Windsor* though not on this point. But "legal institutions, such as 'tort' cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law": *Rhine* at 447.

**48**  It appears at least arguable, then, that the federal common law is available.

**49**  With respect to intrusion upon seclusion in particular, although a number of decisions have held that there is no common law tort of breach of privacy in British Columbia, those decisions cannot fairly be read as addressing whether such a cause of action is recognized under federal common law: *Hung v. Gardiner*, [*2002 BCSC 1234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2033-00000-00&context=), aff'd [*2003 BCCA 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X32C-00000-00&context=), at para. 110; *Bracken v. Vancouver Police Board*, [*2006 BCSC 189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1W8-00000-00&context=) at paras. 28; *Mohl v. University of British Columbia*, [*2009 BCCA 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2JG-00000-00&context=), leaved to appeal ref'd [*[2009] S.C.C.A. No. 340*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-JCRC-B55J-00000-00&context=), at para. 13; *Demcak v. Vo*, [*2013 BCSC 899*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20ND-00000-00&context=) at para. 8; *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. 63 [*Ari BCSC*]; *Ari v. Insurance Corporation of British Columbia*, [*2015 BCCA 468*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HFW-HWN1-JT99-21XF-00000-00&context=) at para. 9 [*Ari BCCA*]; *Cook v The Insurance Corporation of British Columbia*, [*2014 BCSC 1289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16J-00000-00&context=) at paras. 48, 72.

**50**  The issue simply does not appear in any of these cases. While provincial superior courts may address federal common law, the reasons behind not recognizing a common law privacy tort in British Columbia appear to arise mainly from concerns about the legislative intention behind provincial legislation such as the BC *Privacy Act*, *R.S.B.C. 1996, c. 373*, or the *Freedom of Information and Protection of Privacy Act*, *R.S.B.C. 1996, c. 165*. Whether the provincial legislature intended to abolish or preclude the development of federal common law, and if it did whether it is constitutionally capable of doing so, appear to me to be very different issues from whether the provincial common law recognizes this tort.

**51**  The absence of consideration of the federal common law is significant, as although the tort of ***negligence***, for example, may in general be a matter of provincial law, maritime ***negligence*** falls within exclusive federal legislative competence: *Ordon Estate v. Grail*, [*[1998] 3 S.C.R. 437*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M412-00000-00&context=). It is therefore possible for a cause of action to be characterized as federal common law in one context and not in others.

**52**  The question remains open whether there may be applicable federal common law. In my view, such a novel claim involving the resolution of complex and undecided questions of constitutional law should be allowed to proceed.

**53**  The facts pleaded on this point are somewhat thin. The fact that Peoples Trust entered into contracts across Canada is irrelevant. By this logic, when Peoples Trust entered into its first contract concerning the matters at issue, federal common law could not apply; but once it entered into a second (or perhaps, third, or hundredth) similar contract with a person somewhere else in the country, federal common law became applicable. To hold that the law applicable to a contract changes because an unrelated third party enters into a similar contract in a different location does not make sense. Further, as described above, being within federal legislative competence is not, on its own, sufficient to ground federal common law. Reading the pleadings generously, however, being federally licensed and subject to *PIPEDA* appear to advert to more than simple legislative competence. Given the uncertainty around the test for federal common law, and the lack of argument on this point, I cannot conclude that this is bound to fail. Further, it seems at least arguable to me that the choice of law provision has incorporated federal common law.

**54**  For these reasons, it is not plain and obvious to me that there is no reasonable cause of action under federal common law.

**55**  The defendant's submissions on the applicability and validity of the choice of law term appear to conflate forum selection with choice of law. The clause may or may not be valid to the extent that it might bar recourse to the procedures under *PIPEDA*, but that has nothing to do with what law applies.

**56**  Turning to the plaintiff's alternative argument, it appears that if this is the case, the parties will be essentially in agreement on what law applies except for the law related to the tort of intrusion upon seclusion. I note, however, that the plaintiff has not made the ambiguity or validity of the choice of law provision a common issue. In my view, if this alternative argument is to proceed, that will need to be an issue as it affects many of the claims. I address the choice of law submissions on intrusion upon seclusion below.

**2. Is** ***PIPEDA*** **a complete code?**

1. **Defendant's position**

**57**  The defendant says that *PIPEDA* is a complete code that ousts common law claims for breach of privacy. As the substance of the plaintiff's complaint is that the defendant failed to take reasonable steps to maintain the security of the plaintiff's data, the plaintiff can only pursue his complaint using the remedies and procedures provided by *PIPEDA*. In other words, the plaintiff's civil causes of action are foreclosed by *PIPEDA* "because it is the only statute which applies to the alleged causes of action and it constitutes a complete code to the substance of the plaintiff's complaint".

1. **Plaintiff's position**

**58**  The plaintiff says that *PIPEDA* is not a complete code that ousts common law breach of privacy claims. He points to three cases that concluded that *PIPEDA* was not a complete code: *Condon* at para. 115; *Chandra v. CBC*, [*2015 ONSC 5303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-MH21-DYFH-X17X-00000-00&context=) at para. 33; *Romana v. The Canadian Broadcasting Corporation et al*, [*2016 MBQB 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J6J-S9W1-JF1Y-B2MC-00000-00&context=) at paras. 22-24.

**59**  The plaintiff also notes that in *Hopkins v. Kay*, [*2015 ONCA 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G4B-FM41-JWJ0-G07R-00000-00&context=), leave to appeal refused [*2015 CanLII 69422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCD-KK01-JS0R-21H0-00000-00&context=) (S.C.C.), the Court held that the Ontario *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sch A ("*PHIPA*") is not a complete code that ousts common law breach of privacy claims. The plaintiff says that *PIPEDA* is similar to *PHIPA* because both statutes only permit a complainant to seek damages in court after the Commissioner has made a report or an order. One reason the Court gave for finding that *PHIPA* is not a complete code is that a complainant cannot seek damages under *PHIPA* absent a Commissioner's order (I note that a person may also seek damages following a conviction under *PHIPA*, but I do not think this would alter the argument).

**60**  Further, according to the plaintiff even if *PIPEDA* were a complete code, it would not oust the plaintiff's breach of contract or ***negligence*** claims.

**61**  With respect to the breach of contract claim, the plaintiff alleges that the contracts between the class members and the defendant incorporated certain statutory provisions from *PIPEDA* and provincial privacy legislation by reference. The exhaustive code doctrine "cannot apply to a breach of contract" because "[t]he parties are free to make a contract including a contract to provide security and privacy measures" that incorporates statutory provisions.

**62**  As to ***negligence***, the plaintiff says that "the allegations of ***negligence*** do not arise from *PIPEDA*"; rather, "[t]he framework for the ***negligence*** claim is the defendant's failure to adhere to its own privacy policy and the security measures set out in the contract". The plaintiff says that *PIPEDA* merely informs the standard of care, and that "***negligence*** actions in the common law provinces for breach of an organization's own privacy policies and security measures have unanimously been allowed to proceed and certified as common issues", citing *Condon*; *John Doe*, [*2015 FC 916*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HHK-RTW1-DXPM-S52K-00000-00&context=) at paras. 33-36; *Hynes v. Western Regional Integrated Health Authority*, [*2014 NLTD(G) 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCD-JP81-DXHD-G3NJ-00000-00&context=) at paras. 27-30; *Evans v. The Bank of Nova Scotia*, [*2014 ONSC 2135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SG11-FGJR-20DY-00000-00&context=) at paras. 31-34.

1. **Analysis**

**63**  I agree with the plaintiff's submissions that *PIPEDA* is not a complete code and therefore no claims are barred.

**64**  The "complete code" doctrine is described in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 537, 554:

The key feature of a code is that it is meant to offer an exhaustive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution.

[...]

Legislation constitutes a complete code if it provides a comprehensive regulation of the matter in question, leaving no room for the operation of the common law. A code may take the form of a series of rules set out in a statute or it may confer powers on an institution or office to establish, administer and enforce a program.

**65**  For helpful considerations in determining whether and to what extent legislation is a complete code, Sullivan refers to *Pleau v. Canada (Attorney General)*, [*1999 NSCA 159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1WF-M2N6-00000-00&context=) at paras. 50-52:

[50] First, consideration must be given to the process for dispute resolution established by the legislation... Relevant to this consideration are, of course, the provisions of the legislation...particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.

[51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation...should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation... What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative...scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

[52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.

[Emphasis in original.]

**66**  The Court of Appeal addressed this issue recently in the context of its jurisprudence regarding the *Competition Act*, R.S.C. 1985, c. C?34 in *Godfrey v. Sony Corporation*, [*2017 BCCA 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P9X-V571-JTGH-B121-00000-00&context=) at paras. 164-186. The essential distinction in the jurisprudence appears to be that while a simple breach of the *Competition Act* could not in itself ground relief in restitution, a breach could nonetheless form an element of a distinct cause of action, such as conspiracy.

**67**  Legislation, if it forms a complete code, does so not at large but in respect of some matter. Depending on how that matter is defined, legislation may be a complete code with respect to the specific rights it grants but not with respect to all common law principles with which it may overlap to any extent. Thus legislation may preclude restitution based on a simple statutory breach but not civil causes of action, an element of which involves breach of a statute. Even more broadly, it may not preclude a cause of action which involves facts which may also establish a breach of statute, although no element of the cause of action involves establishing a statutory breach.

**68**  The fundamental concern is respect for the division of powers, which is achieved by accurately determining legislative intent. That task is guided by two principles: the legislature is presumed not to intend to alter the common law but is also presumed not to intend to create a parallel cause of action where legislation contains an adequate enforcement regime for the rights it grants. Ultimately, the legislation must be examined as a whole in accordance with the modern principle of statutory interpretation.

**69**  Dealing with breach of contract first, in my view the "complete code" doctrine cannot apply to this cause of action in any event.

**70**  The defendant refers to two cases in support of the proposition that *PIPEDA* is a complete code, excluding all claims, including breach of contract: *Ari BCCA* and *Macaraeg v. E Care Contact Centers Ltd.*, [*2008 BCCA 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4CT-00000-00&context=).

**71**  *Ari BCCA* concerns the enforcement of a statutory breach by way of an action in ***negligence***. In my view it is not applicable here. As set out below, this case is not about the enforcement of *PIPEDA* through civil causes of action, and this case does not address the permissibility of incorporating legislation into a contract.

**72**  *Macaraeg* does not stand for the asserted proposition. It deals with whether the rights granted by the *Employment Standards Act*, *R.S.B.C. 1996, c. 113* are implied by law into employment contracts. The Court of Appeal holds at para. 73 that "the general rule is there is no cause of action at common law to enforce statutorily-conferred rights", except where the legislature intends those rights to be enforceable by civil action. The Court of Appeal goes on to find that the terms of the *ESA* are not implied by law into employment contracts because the legislation provides an adequate enforcement regime. The Court of Appeal says nothing about whether parties may agree to incorporate statutory requirements into a contract.

**73**  The rights here are distinct from those in *Macaraeg* as they are not alleged to be "statutorily-conferred". Rather, they are alleged to be conferred by the agreement between the parties. The plaintiff alleges various express or implied terms, referring to various express provisions of the contract. While the pleadings could have been drafted more clearly, as I read them, the plaintiff is not alleging that the provisions of *PIPEDA* are implied by law into all contracts between entities regulated by *PIPEDA* and persons to whom they owe a duty under *PIPEDA*. Rather, it is alleged that the contracts contained a number of freestanding obligations relating to the protection of privacy, and in addition that by express incorporation, and/or by necessary implication, the contracts contained certain terms related to the protection of privacy, some of which required compliance with *PIPEDA*. It is always open to parties to incorporate legislative requirements into their contracts, absent of course some defence such as illegality.

**74**  Further, the effect of the defendant's argument with respect to breach of contract would be to turn *PIPEDA* into a statutory ceiling. Parties would not be able to contract for protections other than those already provided by statute. I can find nothing in the legislation that would suggest such an intention.

**75**  For these reasons, it is not plain and obvious to me that *PIPEDA* forecloses a claim for breach of contract.

**76**  Turning to ***negligence***, it is also not plain and obvious to me that *PIPEDA* forecloses this type of claim.

**77**  In my view there is no suggestion in the legislation of any intention to preclude common law claims with respect to the violations of a company's own policies and contractual security measures which result in reasonably foreseeable harm. The same set of facts may or may not result in a violation of both those policies and *PIPEDA*, but that is not the test. The source of the duty and the nature of the inquiry are distinct. Further, the legislation expressly provides at s. 12(1)(b) for the Privacy Commissioner to decline to investigate in favour of other procedures where:

the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province[.]

**78**  I do note that, in my view, the enforcement regime is adequate.

**79**  The legislation provides for a hearing *de novo* in the Federal Court, where among other remedies damages may be claimed, including for humiliation: ss. 14, 16; *Englander v. Telus Communications Inc.*, [*2004 FCA 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FD4T-B00K-00000-00&context=) at para. 48. While a person may only apply after first filing a complaint with the Commissioner, they may then apply to the Federal Court regardless of the disposition of the complaint and even if the investigation was discontinued: s. 14(1). There is a narrow set of circumstances where a person seemingly will not be entitled to a hearing because the investigation will never start. *PIPEDA s.* 12(1) states that the Commissioner shall investigate a complaint unless:

1. the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;
2. the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; or
3. the complaint was not filed within a reasonable period after the day on which the subject matter of the complaint arose.

**80**  None of these render the enforcement regime in any way inadequate. Subsection (a) merely delays an investigation by requiring a person to *first* access reasonably available review procedures. It does not permanently deprive a person of access to a remedy. Under subsection (b), allowing matters to be dealt with under other more appropriate procedures similarly does not deprive a person of access to a remedy - on the contrary, it facilitates access. Finally, penalizing unreasonable delay cannot be seen as so unfair as to render the enforcement regime inadequate.

**81**  The plaintiff has referred to a number of cases which address the adequacy of the enforcement regime in *PIPEDA* in the context of the tort of intrusion upon seclusion. In my view none of them assist the plaintiff.

**82**  First is the statement of the Ontario Court of Appeal in *Jones v. Tsige*, [*2012 ONCA 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4PK-00000-00&context=) at para. 50:

[50] *PIPEDA* is federal legislation dealing with "organizations" subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province. While BMO is subject to *PIPEDA*, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a *PIPEDA* complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under *PIPEDA* do not include damages, and it is difficult to see what Jones would gain from such a complaint.

**83**  None of the reasons referred to by the Ontario Court of Appeal can justify a finding in this case that *PIPEDA* is inadequate. Peoples Trust is the alleged wrongdoer here and it is an organization to which *PIPEDA* applies. There is no suggestion in the pleadings or anywhere else of a rogue employee. Finally, the remedies available under *PIPEDA* do include damages: s. 16(c).

**84**  In *Chandra v. Canadian Broadcasting Corp.*, [*2015 ONSC 5303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-MH21-DYFH-X17X-00000-00&context=) at para. 33, the court held that *PIPEDA* did not oust the Ontario common law privacy tort:

[33] Under *PIPEDA*, upon completion of the Privacy Commissioner's investigation, he or she issues a report containing recommendations on how to resolve the complaint. But, as already noted, the legislation specifically leaves open to a complainant the option of bringing a civil proceeding. Because of that feature, PIPEDA does not, in my view, constitute the "complete code" which the CBC defendants advocate it does.

**85**  I respectfully cannot agree with this reasoning. It seems rather to support the opposite conclusion: *PIPEDA* provides for an enforcement regime that involves civil proceedings in the Federal Court which can result in monetary damages for a breach of privacy. Such a process cannot be seen as inadequate, though it does not provide for proceedings in other courts. More significant to the case, I think, is that *PIPEDA* does not apply to the collection of information for journalistic purpose as noted by the court at paras. 32-37.

**86**  In *Romana*, Master Berthaudin held, in the context of a motion to strike pleadings, that it was not plain and obvious that a claim pursuant to *The Privacy Act*, [*C.C.S.M., c. P125*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYC-10Y1-JYYX-6059-00000-00&context=) was precluded by *PIPEDA* or the federal *Privacy Act*, [*R.S.C. 1985, c. P-21*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-F22N-X4VP-00000-00&context=). This case essentially followed *Chandra* and for that reason is not assistive.

**87**  The final case referred to is *Condon. Condon* concerned the federal *Privacy Act*. Further, the portion referred to by the plaintiff was discussing the issue of preferable procedure, not whether the enforcement regime of the federal *Privacy Act* was adequate. It is simply not relevant.

**88**  Nonetheless, given the distinct source of the duty at issue, the distinct nature of the interest protected, and the express provision for other procedures to deal with matters which may also constitute a violation of *PIPEDA*, I am not prepared to infer from an adequate enforcement regime that parliament intended to abolish all common law remedies which may overlap to any extent.

**89**  Given my conclusion above, it is also not plain and obvious to me that *PIPEDA* forecloses any other type of claim.

**3. Breach of contract**

1. **Plaintiff's position**
2. **Contract terms**

**90**  The plaintiff alleges that he and the proposed class plaintiffs entered identical or substantially similar contracts with the defendant for the provision of services and use of the defendant's website and with respect to the collection, retention, and disclosure of personal information. As part of the agreement, the plaintiff was required to provide the personal information to the defendant. The plaintiff says that the Website Terms & Conditions of Use and the Terms & Conditions posted on the defendant's website are incorporated into the agreement.

**91**  The plaintiff says that the contract contained the following express or implied terms:

1. PTC would comply with all relevant statutory obligations regarding the collection, retention, and disclosure of the Plaintiff's and Class Members' Personal Information, including the obligations set out in (collectively, the "Statutes"):

*i. PlPEDA*;

1. The *Personal Information Protection Act*, *SBC 2003, c 63* ("BC *PIPA*"); and
2. The *Personal Information Protection Act*, [*SA 2003, C P-6.5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-4SH1-JW09-M264-00000-00&context=) ("AB *PIPA*").
3. PTC would not collect, retain, or disclose the Personal Information except in the manner and for the purposes expressly authorized by the Contract or the Statutes;
4. PTC would keep the Personal Information of the Plaintiff and the Class Members secure and confidential;
5. PTC would take steps to prevent the Personal Information from being lost, disseminated, or disclosed to unauthorized persons;
6. PTC would not disclose the Personal Information without consent;
7. PTC would protect the Personal Information from compromise, disclosure, loss, or theft;
8. PTC would delete, destroy, or not retain the Personal Information and would not disclose the Personal Information when the Plaintiff or Class Members no longer required PTC's services, except as required by law, and
9. PTC would exercise care and caution in selecting its outside technology providers or vendors to ensure that the Personal Information would be protected from compromise, disclosure, or theft.

**92**  The plaintiff then cites s. 5(1) of *PIPEDA*. Section 5 provides:

Compliance with obligations

5 (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

1. The word *should*, when used in Schedule 1, indicates a recommendation and does not impose an obligation.

Appropriate purposes

1. An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

[Emphasis in original.]

**93**  The plaintiff then cites the following portions of Schedule 1 to *PIPEDA*:

4.5 Principle 5 --Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

...

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| --- | --- |
| 4.5.3 |  |

Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.

...

4.7 Principle 7 -- Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

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| 4.7.1 |  |

The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.

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| --- | --- |
| 4.7.2 |  |

The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.

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| --- | --- |
| 4.7.3 |  |

The methods of protection should include

1. physical measures, for example, locked filing cabinets and restricted access to offices;
2. organizational measures, for example, security clearances and limiting access on a "need-to-know" basis; and
3. technological measures, for example, the use of passwords and encryption.

...

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| --- | --- |
| 4.7.5 |  |

Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information (see Clause 4.5.3).

**94**  The plaintiff cites ss. 34-35 of BC *PIPA*:

Protection of personal information

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| --- | --- | --- | --- |
| 34 |  | An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks. |  |

Retention of personal information

35 (1) Despite subsection (2), if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

1. An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that
2. the purpose for which that personal information was collected is no longer being served by retention of the personal information, and
3. retention is no longer necessary for legal or business purposes.

**95**  Finally, the plaintiff cites portions of AB *PIPA*:

Compliance with Act

5 (1) An organization is responsible for personal information that is in its custody or under its control.

1. For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person's compliance with this Act.

...

1. In meeting its responsibilities under this Act, an organization must act in a reasonable manner.
2. Nothing in subsection (2) is to be construed so as to relieve any person from that person's responsibilities or obligations under this Act.

Policies and practices

6 (1) An organization must develop and follow policies and practices that are reasonable for the organization to meet its obligations under this Act.

...

Protection of information

|  |  |  |  |
| --- | --- | --- | --- |
| 34 |  | An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction. |  |

...

Retention and destruction of information

35 (1) An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes.

1. Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must
2. destroy the records containing the personal information, or
3. render the personal information non-identifying so that it can no longer be used to identify an individual.
4. **Breach**

**96**  The plaintiff says that the defendant breached the contract by:

1. Recklessly and improperly maintaining, securing, disseminating, disclosing, or releasing the Personal Information of the Plaintiff and the Class Members;
2. Failing to comply with the obligations set out in the Statutes;
3. Retaining the Personal Information of Class Members who did not require PTC's products or services and who are not PTC customers, and for no proper purpose;
4. Failing to implement sufficiently strong safeguards in developing its online application web portal;
5. Failing to treat security as its most important priority;
6. Failing to ensure that the online banking site was secure;
7. Failing to strictly manage access to its online databases;
8. Failing to implement, manage and/or update systems for ongoing monitoring and maintenance to address evolving digital vulnerabilities and threats and specifically to ensure that security was not breached;
9. Failing to encrypt the breached database containing the Personal Information; and
10. Failing to destroy the online applications of Class Members who did not open a PTC account.

**97**  In written submissions, the plaintiff adds that Peoples Trust also breached the contract by not adhering to its own internal policy for the protection of personal information, and in particular the Privacy Policy, and by not destroying the personal information as required by contract. The Privacy Policy states, in part:

**7. The security of your information is a priority for Peoples Trust**

We take steps to safeguard your personal information, regardless of the format in which it is held, including:

Physical security measures such as restricted access facilities and locked filing cabinets.

Shredding of documents containing personal information.

Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers.

Organizational processes such as limiting access to your personal information to a selected group of individuals.

Requiring third parties given access to your personal information to protect and secure your personal information.

**(iii) Limitation of liability clauses**

**98**  The plaintiff says that a defence based on limitation of liability clauses "cannot be raised to determine if the pleadings disclose a reasonable cause of action" and, at most, the clauses "may form a proposed common issue of contract interpretation", citing *Charlton v. Abbott*, [*2013 BCSC 1712*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-239R-00000-00&context=) at paras. 64-65, rev'd [*2015 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-FK0M-S01N-00000-00&context=).

**99**  The plaintiff says it will be up to the trial judge to construe the clauses. However, the plaintiff adds that:

1. the contract is one of adhesion and must be interpreted strictly against the defendant, citing *Manulife*, [*[1996] 3 S.C.R. 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S5-00000-00&context=) at paras. 7-9, 15 and others;
2. clause 8 in the Website Terms & Conditions does not mention a security breach or theft of personal information and is therefore of no assistance to the defendant; and
3. clause 1.22 assists the plaintiff because it allows for claims for direct damages resulting from "gross ***negligence***, fraud or wilful misconduct", does not prohibit civil actions or claims arising from the agreement, and is "under inclusive, vague, ambiguous and unworkable".
4. **Defendant's position**

**100**  The defendant says that the plaintiff's breach of contract claim is bound to fail because:

1. the plaintiff has not pleaded material facts that would constitute a breach of contract;
2. the plaintiff has not suffered compensable damages, in part because the alleged damages are too remote from the alleged breach; and
3. the limitation of liability clauses precludes the plaintiff's claims.
4. **Breach**

**101**  The defendant says that the plaintiff has not pleaded material facts that would constitute a breach of contract. The defendant says that, assuming the pleaded facts are true, the defendant agreed to take reasonable steps to protect personal information. However, the plaintiff has not pleaded that the contract contained a term that there were be no unauthorized access to the information; thus, "[t]he mere fact that the plaintiff's security was breached cannot constitute a breach of a contractual (or statutory) commitment to take reasonable steps to prevent such a security breach". According to the defendant, the plaintiff has merely pleaded that a security breach occurred and has not pleaded any material facts to support the conclusion that Peoples Trust did not take reasonable steps to prevent a security breach.

**102**  The defendant says that the plaintiff's pleading that the defendant breached the contracts by "recklessly and improperly maintaining...the Personal Information of the Plaintiff" and "[f]ailing to comply with the obligations set out in the Statutes" are not material facts but are conclusions of law, citing *Watson*, [*2015 BCCA 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GSP-CPF1-JB7K-2008-00000-00&context=) at para. 10; *Operation Dismantle*, [*[1985] 1 S.C.R. 441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-236M-00000-00&context=) at 491.

**103**  The defendant summarizes its argument as follows:

1. The plaintiff has, in essence, pleaded only the following material facts in relation to his claims for breach of contract or warranty: the defendant had a contractual commitment to take reasonable steps to prevent a security breach; and a security breach occurred. This is not a pleading that the contractual commitment at issue was actually breached. Taking the factual (not legal) pleadings as true, it is submitted that the plaintiff has not pleaded the specific facts that would establish that the security steps taken by the defendant were unreasonable. This is a necessary element of establishing a breach of contract or warranty. As there are no such material facts pleaded it is plain and obvious that the claims in contract and warranty must fail and should not be certified.

**104**  Finally, the defendant says that paragraphs 54(a)-(b) of the plaintiff's certification submissions are not properly pleaded and do not disclose a cause of action.

**(ii) Compensable damages & remoteness**

**105**  With respect to remoteness, the defendant cites *C.P. v. RBC Life Insurance Company*, [*2015 BCCA 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G5W-G1N1-F8D9-M0Y2-00000-00&context=) at paras. 59-62, leave to appeal refused [*2015 CanLII 56681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCD-KK01-JS0R-21FX-00000-00&context=) (S.C.C.). The defendant says that the alleged damages "are elusive because they are too remote to have been contemplated by the alleged class members at the time they provided their personal information".

**106**  The defendant also says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained ... regarding damages for ***negligence***". These reasons are discussed below under the "Damages" heading.

1. **Limitations of liability**

**107**  With respect to limitations of liability, the defendant points to a portion of the Website Terms & Conditions of Use, attached as Exhibit C to Mr. Tucci's affidavit, including in part:

1. Warranties and Limitation of Liability

...

Your use of this Website is at your own risk. In no event will PTC, its Affiliates and Providers, and any other parties involved in creating and delivering this Website's contents be liable for any damages, losses or expenses of any kind arising from or in connection with this Website or its use.

...

PTC is not responsible in any manner for direct, indirect, special or consequential damages, howsoever caused, arising out of use of this Website including but not limited to, damages arising from or related to the installation, use, or maintenance of personal computer hardware, equipment software, or any Internet access services.

**108**  The defendant also refers to the "Terms and Conditions", which are Exhibit D to Mr. Tucci's affidavit and provide in part:

**1.22 Limitation of Liability**

You understand and agree that, except as specifically provided by these Agreement Terms, PTC will be liable to you only for direct damages resulting from gross ***negligence***, fraud or willful misconduct of PTC arising directly from the performance by PTC of its obligations under these Agreement Terms and PTC will not be liable to you for any other direct damages. In addition, PTC will not under any circumstances be liable to you for any other damages, including without limitation, indirect, incidental, special, punitive or consequential losses or damages, even if PTC was advised of the possibility of damages or was negligent.

**109**  Thus, the defendant says that even if the contractual damages are not too remote, the plaintiff must demonstrate that these limitation of liability clauses "do not exclude any possible contractual liability", citing *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=) at paras. 121-123; *Felty v. Ernst & Young LLP*, [*2015 BCCA 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H9V-0GJ1-JSJC-X3SK-00000-00&context=) at paras. 45-52.

1. **Analysis**

**110**  First, I do not think it is plain and obvious that there is no cause of action for breach of contract here, particularly if the plaintiff's pleadings are amended to further particularize the alleged obligations and breaches thereof. The material facts pleaded include a failure to have a comprehensive information security policy, the lack of ongoing monitoring and maintenance, storage of an unencrypted, perpetual copy of personal information, and a failure to immediately notify class members of the breach. These could all arguably support a claim in breach of contract for the obligations alleged.

**111**  I do not agree with the defendant's submissions on compensable damages. Proof of damages is not a required element of a breach of contract claim: *Fraser Park South Estates Ltd v. Lang Michener Lawrence & Shaw*, [*2001 BCCA 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2RS-00000-00&context=) at para. 46, leave to appeal to SCC refused [*[2001] S.C.C.A. No. 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G4DF-00000-00&context=).

**112**  Regarding the limitation of liability clause: according to *Tercon*, there is a three-step analysis for exclusion of liability clauses: (1) interpret the contract to see if it the clause applies; (2) if it does apply, determine if it was unconscionable and therefore invalid at the time of contract formation; (3) if it was valid at formation, determine if overriding public policy factors make the clause unenforceable. These questions are not for determination at this stage. It is not plain and obvious that the clause excludes the defendant's liability here. In my view, given that this may affect so many aspects of this litigation, the interpretation of the limitation of liability clause ought to be a common issue as well.

**4. *Negligence***

1. **Plaintiff's position**

**113**  The plaintiff says that the defendant owed a duty of care that required the defendant to: (a) store the personal information securely; (b) not to disclose the personal information except as permitted by the contract; and (c) to destroy the personal information securely and in a timely manner.

**114**  The plaintiff says that the defendant knew or ought to have known of the serious risk of disclosure of personal information but took inadequate steps to prevent disclosure. The plaintiff particularizes the acts and omissions that he says constitute a breach of the standard of care at para. 9 of Part 3 of the notice of civil claim.

**115**  The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed" citing *Condon FCA* at para. 20.

**116**  The plaintiff says that similar ***negligence*** claims have been certified in the past, such as *Rowlands v. Durham Health Region, et al.*, [*2011 ONSC 719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFH1-FBV7-B3PY-00000-00&context=).

1. **Defendant's position**

**117**  The defendant says that the plaintiff's ***negligence*** claim is premised on a negligent breach of privacy, and that there is no such tort in British Columbia, cite *Ari BCCA* at para. 63; *Ari BCSC* at paras. 80-86; *Cook* at paras. 144-156. Therefore, it is plain and obvious that the plaintiff's ***negligence*** claim does not disclose a reasonable cause of action.

**118**  The defendant goes on to say that the plaintiff has not sufficiently pleaded material facts with respect to damages. The defendant's submissions on this point are discussed below. Since damage is an essential element of any ***negligence*** claim, the defendant says that it is plain and obvious that this claim will fail: *Davidson v. Lee, Roche and Kelly*, [*2008 ONCA 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-F873-B1GB-00000-00&context=) at para. 6.

1. **Analysis**

**119**  In my view, it is not plain and obvious that the claim in ***negligence*** is bound to fail.

**120**  The plaintiff alleges the duty of care in this case arises from the defendant's own policies and the contracts, not from its statutory obligations. That distinguishes this case from others involving a claim based in a duty of care said to arise from a statutory duty, such as *Ari BCCA* and *Cook*, as well as *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=), which sets out the more general framework for assessing statutory breaches in the context of civil liability.

**121**  As no duty of care appears to have been recognized in this context, the appropriate framework is the test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined 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=) at para. 30:

At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

**122**  The issue here is whether it is plain and obvious that Peoples Trust did not owe the class a duty of care respecting their personal information.

**123**  In my view it is not plain and obvious that the first stage of the *Anns/Cooper* test is not met. The plaintiff has pleaded sufficient facts capable of establishing that harm was reasonably foreseeable. The information collected by Peoples Trust was sensitive and collected in the course of online applications for financial services. It is arguably reasonably foreseeable that harm such as identity theft could result if such information were disclosed or not securely stored, and it was again arguably foreseeable to Peoples Trust given the various policies and contractual terms it developed. Further, the plaintiff has pleaded sufficient facts that could establish a close and direct relationship between Peoples Trust and individuals who applied to it for financial services.

**124**  The more difficult issue is whether there are countervailing policy concerns.

**125**  In *Ari BCCA*, the Court of Appeal held that ICBC, a public entity, did not owe a duty of care to the plaintiff. The duty of care in this case was said to arise based solely on the statutory duty imposed on public entities by s. 30 of *FIPPA* see e.g. paras. 2, 6, 12, 50.

**126**  The Court of Appeal held that a duty of care was negated based on four policy considerations. First, the alleged duty of care raised the spectre of indeterminate liability because:

the source of the alleged duty or obligation arises solely out of *Freedom of Information and Protection of Privacy Act, s.* 30, [so] every public body collecting personal information could be subject to the same private law duty of care.

(para. 50)

**127**  Second, the legislation was drafted in a purposive manner, raising issues around the exercise of discretion, policy decisions, indeterminacy of the standard of care, and the extent to which the legislation could be said to suggest it should found a private law duty of care:

Other reasons arise out of the broad and purposive manner in which s. 30 is drafted. Section 30 does not legislate a specific standard of care. The duty is to "make reasonable security arrangements". "Reasonableness" denotes a range of acceptable conduct. This suggests a public body may make its own policy decisions as to the manner in which it fulfills this statutory obligation. The duty is therefore a contextual one, and would no doubt vary depending on the nature of the business of the particular body. Furthermore, there is nothing in the broad wording of the section that suggests it should found a new private law duty of care to an individual, as opposed to the public at large.

(para. 51)

**128**  Third, the claim related to policy rather than operational decisions of ICBC, and "policy decisions of public bodies are not actionable in ***negligence***": para. 52.

**129**  Finally, "the availability of administrative remedies under [*FIPPA*] militate[d] against the recognition of a duty of care"; *FIPPA* provided a:

comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend common law remedies to exist[.]

(para. 53)

**130**  In *Cook*, Steeves J. similarly rejected a duty of care respecting the collection, use and disclosure of personal information. The basis of his rejection was that the substance of the plaintiff's claim was violations of *FIPPA* (para. 153), and "[i]t would be conjecture to conclude that the legislature intended to include a private right (and private damages) in *FIPA*" (para. 154). Further, the plaintiff's claim concerned policy rather than operational decisions:

In general, the respondent here claims that the applicants were negligent when they collected, used and disclosed his personal information. As discussed above, the Commissioner is authorized by FIPA to investigate and make decisions (including reviews) about these matters. In his claim the respondent urges this court to make them. Applying the case law discussed above, that is not the role of this court. Once those decisions are made by the proper authority there may be claims in ***negligence*** about how they are implemented but that is not the claim here; those decisions have not yet been made.

(para. 155)

**131**  In my view, this case is distinguishable from both *Ari BCCA* and *Cook*. This case involves a duty of care said to arise from the organization's own privacy policies and security measures rather than a duty of care said to arise from a legislated standard applicable to public authorities. I agree with the statement of Crawford J. that the finding that the duty of care in *Ari BCCA* was based on a statutory breach which was "[f]undamental to Madam Justice Garson's reasons": *McIvor v. M.L.K. Pharmacies Ltd.*, [*2016 BCSC 2249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MB8-C7W1-JJ1H-X2JV-00000-00&context=) at para. 16.

**132**  It is for that reason that the same concerns about indeterminate liability do not arise. The same duty is not legislated for all private entities. Similarly, concerns about purposive drafting do not arise because there is no legislative provision at issue, nor does the policy/operational distinction because Peoples Trust is not a public entity.

**133**  The only policy concern potentially at play is the availability of administrative remedies. In my view, this does not negate a duty of care, for the reasons already set out above.

**134**  The parties directed my attention to *McIvor*, in which Crawford J. declined to strike out a claim in ***negligence*** for the wrongful disclosure of pharmacy records. The plaintiff framed her allegation of ***negligence*** as follows:

The Incident was caused or contributed [to] by the Defendant MLK, or its servants, agents or employees and/or the Defendant Kidd, and the Defendant [sic, Plaintiff] pleads the provisions of *PIPA* and other statues in alleging the Defendants were negligent in disclosing the Plaintiff's personal information.

**135**  Crawford J. found that medical professionals owed a duty of care to keep client information in confidence under the common law (para. 26), and even a fiduciary duty to do so (paras. 27-28). *PIPA* did not remove those duties for the individual pharmacist defendant, Mr. Kidd (para. 29). However, *PIPA* did cover the field with respect to the corporate defendant (para. 31).

**136**  The basis for the distinction between Kidd and the corporate defendant is not expressly stated, but the plaintiff framed the ***negligence*** claim as a breach of a statutory duty, and the bulk of Crawford J.'s discussion of the law is concerned with *Ari BCSC* and *Facilities Subsector Bargaining Assn. v. British Columbia Nurses' Union*, [*2009 BCSC 1562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2C9-00000-00&context=). Both of those cases involved duties of care said to arise from statutory duties. In my view, this case is again distinguishable as the corporate defendant's duty of care was said to arise from a statutory duty, whereas Crawford J. found that Kidd's duty instead arose from his professional duties.

**5. Breach of confidence**

1. **Plaintiff's position**

**137**  The plaintiff says breach of confidence has been properly pleaded. It requires that confidential communication be communicated in confidence and that the information communicated was misused by the party receiving it to the detriment of the plaintiff: *Lac Minerals 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 608, 635; *Rodaro v. Royal Bank of Canada*, [*2002 CanLII 41834*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1W1-00000-00&context=) (Ont. C.A.) at para. 48.

1. **Defendant's position**

**138**  The defendant says that "misuse" for the purpose of this tort requires the intentional use for the purpose of obtaining a benefit, and the defendant cannot be said to have intentionally been victimized by cybercriminals: *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, [*2005 ABQB 927*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-DXHD-G4WF-00000-00&context=) at para. 28.

**139**  The defendant also says that damage is an essential element of this tort, and that for the reasons given for the ***negligence*** claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of confidence: *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 paras. 52-54; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, [*2015 BCSC 1698*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H2B-YKT1-FGY5-M3SN-00000-00&context=) at paras. 30-31.

1. **Analysis**

**140**  The key issue here seems to be whether the information was "misused". In *Lac Minerals*, La Forest J. said "[a]ny use other than a permitted use is prohibited" (at p. 642). As stated at 638-639, this cause of action focuses not on the manner of use, but the purpose:

The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any other purpose than that for which it was conveyed. If the information is used for such a purpose, and detriment results, the confider will be entitled to a remedy.

[Emphasis added.]

**141**  While this cause of action is not so narrowly defined as the defendant argues in that the non-permitted purpose need not be specifically to obtain a profit, it is clear that in order for there to be misuse, there must be use for a non-permitted purpose. The plaintiff has not pleaded any facts capable of establishing that the information was used for a non-permitted purpose.

**142**  As to damages, it appears that whether or not "detriment" is a necessary element of breach of confidence is not entirely clear: see *No Limits*. However, in *Cadbury*, Binnie J. said at para. 53 that "La Forest J. [in *Lac Minerals*] regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information". I think the plaintiff has pleaded a "detriment" here.

**143**  As the misuse element has not been properly pleaded, this cause of action must fail and is therefore struck.

**6. Breach of privacy and intrusion upon seclusion**

1. **Plaintiff's position**

**144**  The plaintiff says that *Jones* confirmed the existence of the tort of intrusion upon seclusion. The plaintiff cites the elements in paras. 70-71 of *Jones*:

[70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

**145**  The plaintiff says that the Court in *Jones* said that the breach need not be wilful, and recklessness will suffice. Here, the plaintiff says that the defendant's conduct was reckless. Further, the plaintiff says that he need not prove harm to an economic interest.

**146**  The plaintiff also cites *Hynes* at para. 25, where the court certified a claim for intrusion upon seclusion because the *Privacy Act*, *R.S.N.L. 1990, c. P-22* did not occupy the field.

**147**  The plaintiff acknowledges that the common law tort of breach of privacy has not been recognized in British Columbia but says that the choice of law clause "adopts federal common law". The plaintiff points to *Condon*, where the Federal Court certified a claim for the tort of intrusion upon seclusion after the defendant lost a hard drive containing the personal information of student loan recipients.

**148**  Alternatively, the plaintiff says that if "federal common law" does not apply, the applicable law for this claim is the law of the place where the injury occurred, and that a sub-class should be created for class members from provinces that recognize a common law breach of privacy tort, citing *Ladas v. Apple Inc.*, [*2014 BCSC 1821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0GF-00000-00&context=).

**149**  Finally, the plaintiff urges this Court to "keep in play" the intrusion upon seclusion claim in British Columbia, saying "there has not yet been a disposition by the court as to whether intrusion upon seclusion should be recognized in British Columbia.

1. **Defendant's position**

**150**  The defendant says that "it is indisputable that there is no common law tort of invasion of privacy or intrusion upon seclusion in British Columbia": *Ari BCCA* at para. 9 and others, and accordingly the plaintiff's claims for this tort do not disclose a cause of action. The plaintiff does not plead the statutory tort under the B.C. *Privacy Act*, s. 1.

1. **Analysis**

**151**  Dealing first with the plaintiff's primary submissions, for the reasons given above I have concluded it is not plain and obvious that there is no federal common law tort of intrusion upon seclusion.

**152**  Further, if the federal common law recognizes the tort of intrusion upon seclusion, the plaintiff has pleaded all the required elements. While it may be a stretch to call the disclosure here reckless, it is not plain and obvious that this must fail. It is also a stretch to say that the defendant invaded the plaintiff's private affairs, as that was done by a third party. However, it does not appear plain and obvious to me at this stage that being sufficiently reckless may not result in that conduct in effect being attributed to the defendant. This is a relatively new tort and it should be allowed to develop through full decisions. The information concerned here is also the type of information identified in *Jones* the disclosure of which might be regarded by the reasonable person as highly offensive.

**153**  Turning next to the submissions that the tort should be allowed to proceed under B.C. common law, it is plain and obvious that there is no reasonable cause of action under B.C. common law.

**154**  I agree with the plaintiff that the statements in the case law respecting the availability of this cause of action have been, in the main, conclusory: *Hung v. Gardiner*, [*2002 BCSC 1234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2033-00000-00&context=) at para. 110, aff'd [*2003 BCCA 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X32C-00000-00&context=); *Bracken v. Vancouver Police Board*, [*2006 BCSC 189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1W8-00000-00&context=) at para. 13; *Mohl v. University of British Columbia*, [*2009 BCCA 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2JG-00000-00&context=) at para. 13; *Demcak v. Vo*, [*2013 BCSC 899*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20ND-00000-00&context=) at para. 8. It is also true that these cases did not specifically consider the tort of intrusion upon conclusion. I do not however consider that either of these factors make it other than plain and obvious that there is no reasonable cause of action for breach of privacy or intrusion upon seclusion in British Columbia.

**155**  The rationale is obvious: British Columbia already has an intentional privacy tort in the B.C. *Privacy Act*: *Foote v. Canada (Attorney General)*, [*2015 BCSC 849*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G44-J3J1-JT42-S3KP-00000-00&context=) at para. 116. The plaintiff argues that intrusion upon seclusion is "an important one to keep in play" because while the B.C. *Privacy Act* prohibits intentional conduct, the tort of intrusion upon seclusion includes reckless conduct within its definition of intention. But defining the elements of the tort was a policy decision the legislature was entitled to make, and one which ought not to be undercut by this Court's development of a substantially identical but slightly broader common law tort. If, as the plaintiff argues, the B.C. *Privacy Act* requires updating to deal with societal changes, that is a task for the legislature.

**156**  On the plaintiff's alternative choice of law submission, it is plain and obvious that there is no cause of action based on the residence of class members.

**157**  There is a flaw in the plaintiff's submissions: residence does not necessarily correspond to where harm is experienced. Even if I were to accept that the applicable law was the law of the location where class members experienced harm, and I decline to comment on that point, it would only be by coincidence that this was the law of their residence. Without deciding what the predominant element of the tort is, I can see no element that would result in the choice of law rule being the law of a person's residence.

**158**  The plaintiff argued in the alternative that the choice of law rule for intrusion upon seclusion was a novel issue and should go forward on that basis. It is indeed a novel issue. But the plaintiff has pleaded that the law of the class members' residences give them a cause of action. This is bound to fail based on the present assertion.

**7. Unjust Enrichment and waiver of tort**

1. **Plaintiff's position**

**159**  In the alternative, the plaintiff waives the torts and claims restitution of and a constructive trust over the defendant's unlawful gains.

**160**  The plaintiff says that the issue of whether waiver of tort is an independent cause of action or merely a remedy for unjust enrichment should not be resolved at the certification stage and, as a benefits-based claim, the claim may be established without proof of any loss by the plaintiff, citing *Serhan Estate v. Johnson & Johnson*, [*(2006), 85 O.R. (3d) 665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1XM-00000-00&context=) at para. 68 (Div. Ct.); *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=) at para. 31, leave to appeal refused [*2010 CanLII 32435*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JWXF-21CM-00000-00&context=) (S.C.C.); *Pro-Sys* at paras. 93-97.

**161**  The plaintiff says, citing *Steele v. Toyota Canada Inc.*, [*2011 BCCA 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1BJ-00000-00&context=) at paras. 45-52, leave to appeal refused [*2011 CanLII 69654*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-F900-G2D8-00000-00&context=) (S.C.C.), that at the certification stage:

1. waiver of tort can be framed as an independent cause of action;
2. the plaintiff does not need to plead all the elements of an action in unjust enrichment; and
3. damages are not an essential element of a claim in waiver of tort.

**162**  The plaintiff says that the pleadings allege all three elements of a claim in unjust enrichment. With respect to the lack of juristic reason, the plaintiff seems to say that the due to the defendant's breach of contract, the contract is not a juristic reason for the enrichment: *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=) at para. 57; *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, [*2009 BCCA 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XB-00000-00&context=) at paras. 16-17, leave to appeal refused [*[2009] S.C.C.A. No. 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F8KH-X1Y9-00000-00&context=); *Buckley v. Tutty* (1971), 125 C.L.R. 353 at 376, [1971] HCA 71.

**163**  The plaintiff says he has properly pleaded waiver of tort both as an independent cause of action and as a remedy.

**164**  The plaintiff also says he has pleaded the elements of a constructive trust based on wrongful conduct and a constructive trust based on unjust enrichment, citing *Infineon* at paras. 31-33; *Garland* at para. 30; *ICBC v. Lo*, [*2006 BCCA 584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61J1-00000-00&context=) at paras. 59-63; Donald M. Waters, ed., *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Carswell, 2005) at 461.

1. **Defendant's position**

**165**  The defendant reiterates its submission that *PIPEDA* is a complete code and forecloses a claim in waiver of tort. I have already rejected this argument. The defendant says *PIPEDA s.* 16 clearly limits recovery to actual damages: *Koubi v. Mazda Canada Inc.*, [*2012 BCCA 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24SF-00000-00&context=) at paras. 64, 80, varying [*2010 BCSC 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6322-00000-00&context=), leave to appeal refused [*[2012] S.C.C.A. No. 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-FGY5-M51C-00000-00&context=); *Low v. Pfizer Canada Inc.*, [*2015 BCCA 506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HMB-VKP1-FCSB-S2RP-00000-00&context=) at paras. 93-97, leave to appeal refused [*[2016] S.C.C.A. No. 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J8P-2TS1-JX3N-B1BK-00000-00&context=).

**166**  The defendant also says that there is no connection between the alleged wrongful conduct and the alleged benefit flowing to the defendant. Thus, no "sufficient causal connection exists[s] between the wrongful conduct and the amount for which the defendants could be ordered to account": *Heward v. Eli Lilly & Company*, [*2007 CanLII 2651*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDW1-F57G-S132-00000-00&context=) (Ont. S.C.J.) at para. 101, aff'd [*2008 CanLII 32303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64K5-00000-00&context=) (Div. Ct.); cf. *Hill v. Canada (Attorney General)*, [*2007 CanLII 11729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDX1-F65M-64YB-00000-00&context=) (Ont. S.C.J.) at para. 6, aff'd [*2008 ONCA 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64C2-00000-00&context=), leave to appeal refused [*[2008] S.C.C.A. No. 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F22N-X2B5-00000-00&context=). There is no causal connection between the alleged inadequate security measures and "the gross revenue ... or alternatively the net income" received by the defendant "as a result of the fees, interest, and service charges generated on products or services" it provided: *Wakelam v. Johnson & Johnson*, [*2014 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1CY-00000-00&context=) at para. 69, leave to appeal refused [*[2014] S.C.C.A. No. 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SK1-JJ6S-64HW-00000-00&context=).

**167**  The defendant disputes the plaintiff's argument that damages are not an essential element for a claim of waiver of tort, saying that *Steele v. Toyota Canada Inc.*, [*2011 BCCA 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1BJ-00000-00&context=) has been overtaken by more recent SCC and BCCA jurisprudence: *Charlton v. Abbott Laboratories Ltd.*, [*2015 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-FK0M-S01N-00000-00&context=) at paras. 119-124; *Koubi CA*, at paras. 64-77; *Pro-Sys*, at paras. 130-135.

**168**  With respect to unjust enrichment, the defendant says the pleadings do not establish a deprivation that corresponds with the alleged enrichment. Further, the defendant says that the contract is a juristic reason for any enrichment and the plaintiff cannot simultaneously bring unjust enrichment and breach of contract claims: *Pro-Sys* at para. 85; *Garland* at para. 44.

**169**  Finally, the defendant says that there is no basis to impose a constructive trust because the claim is purely monetary and there is no referential property: *Pro-Sys* at paras. 91-92.

1. **Analysis**

**170**  The elements required to establish unjust enrichment are: (1) an enrichment to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland* at para. 30.

**171**  I agree with the defendant that there is no unjust enrichment claim here. A contract is a juristic reason for payment under the contract; an action in unjust enrichment fails if the contract explains the transfer. The plaintiff does not allege that the contract, or any part of it, is void or unenforceable (this distinguishes *Garland* and *Tracy*, which involved payments that were illegal under the *Criminal Code*).

**172**  In *Watson v. Bank of America Corporation*, [*2014 BCSC 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61XK-00000-00&context=), the Court certified the claim in waiver of tort and said the following:

[158] Waiver of tort is a doctrine that allows a plaintiff to disgorge a defendant's gains from tortious conduct rather than recover his or her own loss. It is a benefit-based claim as opposed to a loss-based claim. The doctrine is the subject of substantial judicial and academic debate (*Andersen v. St. Jude Medical, Inc.*, [*2012 ONSC 3660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-K0HK-237S-00000-00&context=) at para. 579 [*St. Jude*]):

[579] ...the primary debate about waiver of tort has been whether the doctrine exists as an independent cause of action in restitution (the independence theory) or is parasitic of an underlying tort (the parasitic theory). Under the parasitic theory, waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort. If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant's wrongful conduct, even if the plaintiff suffered no harm. It is also noteworthy that the independence theory of waiver of tort is not the same as an action for unjust enrichment, as the plaintiff does not have to demonstrate a deprivation that corresponds to the defendant's enrichment.

As a result, it may not be necessary for a plaintiff to establish every element of the underlying tort, including proof of loss.

[159] Given this controversy, courts have generally refused to strike the claim at the pleadings stage; usually in favor of deferring the decision to a trial judge with the benefit of a full factual record (*Koubi* at paras. 15-40; *St. Jude* at paras. 578-582). However, it is doubtful that a full factual record is necessary, or even helpful, when considering the debate (*St. Jude* at paras. 584-587). The Court in *Koubi* did impose a minimal constraint on the doctrine at the certification stage (at paras. 79-80). Nevertheless, the Court in *Microsoft*, despite being presented with an opportunity, held that the appeal was not the proper place to resolve the debate and instead merely found that it was not plain and obvious that the claim would fail (at paras. 93-97).

[160] I echo the comments in *Koubi* and *St. Jude* that the debate needs to be resolved, but if *Microsoft* was not a proper venue for resolution then neither is this certification motion where the debate has received little attention from the parties. The plaintiff has pled and argued for a very standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions. ...

[161] Accordingly, the plaintiff has properly pled a claim in waiver of tort.

**173**  I do not agree with the defendant's submission that the debate regarding whether loss must be proven for waiver of tort has been resolved by more recent jurisprudence. *Koubi CA* and *Charlton* simply state that neither the *Business Practices and Consumer Protection Act*, *SBC 2004, c. 2*, nor the *Sale of Good Act*, *R.S.B.C. 1996, c. 410*, can ground a claim in waiver of tort. *Pro-Sys* states that aggregate damages cannot stand in for proof of loss.

**174**  Nonetheless, it is my view that this claim is bound to fail whether it is a remedy or a cause of action. As a cause of action, it would require a legal wrong by the defendant and a benefit flowing to the defendant as a result: *Koubi CA* at para. 41. Here, the plaintiff has not pleaded that a benefit flowed to the defendant as a result of its failure to secure the personal information. The fees, service charges, etc. collected by Peoples Trust are not connected to the legal wrong. As a remedy, the plaintiff would recover the benefit the defendant obtained from the underlying wrong. But again, the underlying wrong is unconnected to the benefits that the plaintiff asserts.

**8. Damages**

1. **Plaintiff's position**

**175**  The plaintiff says that the proposed class members' damages include (a) damage to credit reputation; (b) mental distress; (c) costs incurred in preventing identity theft; (d) out-of-pocket expenses; (e) wasted time, inconvenience, frustration, and anxiety associated with taking precautionary steps to address the breach; (f) time lost taking these steps; and (g) likely, or a real and substantial possibility, of future damages due to identity theft and phishing attempts.

**176**  The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed": *Condon FCA* at para. 20.

**177**  The plaintiff Tucci says he and the proposed class suffered damages "including time-consuming, inconvenient, frustrating measures required to determine whether their Personal Information was involved in the Breach, and further steps to protect themselves from identity theft".

**178**  The plaintiff Tucci says he spent at least five hours taking steps to "address" the breach by calling the defendant and credit reporting agencies, taking the steps recommended by the defendant, and additional steps to protect against identity theft. He says that "thousands of [c]lass [m]embers" had similar experiences and wasted countless hours due to the privacy breach. The plaintiff says their losses should not go unremedied.

**179**  The plaintiff says that the contract offered peace of mind in that "in exchange for applying for [the defendant's] products and services, the [P]ersonal [I]nformation would not be lost, disseminated, or disclosed to unauthorized persons". Therefore, the proposed class members are entitled to damages for emotional upset, disappointment, and anxiety resulting from the breach: *Fidler v. Sun Life Assurance Co. of Canada*, [*2006 SCC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B175-00000-00&context=) at paras 38-49.

**180**  The plaintiff also says that the class is entitled to damages to pay for active credit monitoring services rather than the passive monitoring provided by the credit flags. The plaintiff says this recognizes the increased risk of identity theft resulting from the breach. The plaintiff cites Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation* (2011) 19:1 Geo. Mason L. Rev. 113.

**181**  The plaintiff points to U.S. cases where the court has awarded damages for credit monitoring or has ordered defendants to provide adequate credit monitoring services: *1-800-E. W. Mortg. Co. v. Bournazian*, No. 09CV2123, 2010 WL 3038962 at \*1-3 (Mass. Super. Ct., July 18, 2010); *Allstate Ins. Co. v. Linea Latina De Accidentes, Inc.*, No. 09-3681 (JNE/JJK), 2010 WL 5014386, at \*2-4 (D. Minn. Nov. 24, 2010). It is submitted that these damages are analogous to damages for medical monitoring due to increased risk caused by the defendant, citing *Johnson* at 152, which have been certified as common issues: *Andersen v. St. Jude Medical Inc*. [*(2003), 67 O.R. (3d) 136*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3NT-00000-00&context=) at paras. 45, 63 (S.C.J.), leave to appeal refused [*[2005] O.T.C. 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JGPY-X3JW-00000-00&context=) (Div. Ct.) (certifying as a common issue "Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?") and *Banerjee v. Shire Biochem Inc. et al.*, [*2010 ONSC 889*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-DXPM-S35K-00000-00&context=) at paras. 28, 33, 55 (certifying the same question).

**182**  The plaintiff also says they are entitled to nominal damages for breach of contract even if the breach did not cause them economic damages, citing *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, [*2001 BCCA 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2RS-00000-00&context=) at para. 46. The plaintiff also points to *Neil v. Equifax Canada Inc.*, [*2005 SKPC 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-JJ6S-62GM-00000-00&context=) at para. 29; *Stasiuk v. Boisvert*, [*2005 ABQB 798*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKPJ-G4NY-00000-00&context=) at para. 18; and *Tanglewood (Sierra Homes) Inc. v. Bell Canada*, [*2010 CarswellOnt 7687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFB1-JJYN-B3XR-00000-00&context=), [*[2010] O.J. No. 2344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFB1-JJYN-B3XR-00000-00&context=) at paras. 71-78 (S.C.J.) as examples of damages of this nature to recognize a variety of non-quantifiable harms.

**183**  With respect to the breach of privacy tort claims, the plaintiff says that damage should be awarded to remedy "intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses", citing *Jones* at para. 77. The plaintiff says "[m]arking the wrong that has been done is especially important in ... actions for invasion of privacy that involve violations of the *PIPEDA*, which has quasi-constitutional status *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [*2002 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4D1-00000-00&context=) at paras. 24-25.

**184**  The plaintiff cites *Nammo v. TransUnion of Canada Inc.*, [*2010 FC 1284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-JFSV-G040-00000-00&context=) at paras. 71 and 77, for the proposition that damages may be awarded for *PIPEDA* breaches even where the plaintiff cannot quantify the harm suffered, and that damage awards should assessed with a view to vindicating the right violated and deterring future breaches, in addition to compensation.

1. **Defendant's position**

**185**  The defendant says that the plaintiff has not properly pleaded the damages element of his claims in breach of contract, ***negligence***, and breach of confidence:

1. The defendant says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained... regarding damages for ***negligence***".
2. The defendant says that the plaintiff has not sufficiently pleaded material facts with respect to damages. Since damage is an essential element of any ***negligence*** claim, it is plain and obvious that this claim will fail: *Davidson* at para. 6.
3. The defendant says that damage is an essential element of the tort of breach of confidence, and that for the reasons given for the ***negligence*** claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of : *Cadbury*, at paras. 52-54; *No Limits* at paras. 30-31.

**186**  The defendant says that the damages pleaded by the plaintiff in paras. 20-21 of Part 1, and paras. 14-15 of Part 3, of the Notice of Civil Claim are not material facts supporting a claim for damages but are mere conclusory assertions that damages exist. The remainder of the damages claims are for, in essence, damages for lost time, inconvenience, and the risk of identity theft.

**187**  The defendant cites *Mazonna c. DaimlerChrysler Financial Services Inc./Services financiers DaimlerChrysler Inc.*, [*2012 QCCS 958*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JMS1-F1WF-M48S-00000-00&context=), in which the Court refused to certify a proposed class action arising from the defendant's loss of a data tape containing personal information. In *Mazonna*, the Court concluded that the plaintiff failed to meet the threshold of showing *prima facie* the existence of compensable damages:

[56] In the Court's view, the Petitioner fails to meet the test that she has suffered damages.

[57] She did indeed suffer anxiety; she has had to change, minimally, some of her habits. However, these inconveniences were negligible, so much so that she never felt the need to take any steps to alleviate her anxiety. The most she did was to keep the minimum amount of money in the account from which her lease payments were made and to check, twice a month, rather than once a month, on the Internet, whether her account had been tampered with.

[58] This is not enough to meet the threshold, however *prima facie*, of the existence of "compensable" damages.

**188**  The defendant cites *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. 9:

[9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* [*(1999), 48 O.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4T6-00000-00&context=) (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

**189**  The defendant says that, as in *Mazonna*, the plaintiff's pleaded damages are "in the nature of ordinary annoyances and anxieties and do not constitute compensable damages".

**190**  The defendant says that the mental distress and wasted time and inconvenience amount to psychological upset, anxiety, or agitation that are not compensable injury: *Koubi BCSC* at paras. 131-146; *Healey v. Lakeridge Health Corporation*, [*2011 ONCA 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-234N-00000-00&context=) at paras. 60-66.

**191**  With respect to the risk of identity theft, the defendant says that the claim is entirely speculative.

**192**  With respect to out-of-pocket expenses, the defendant says that the nature of these expenses is "entirely unclear" and that the plaintiff has not pleaded any material facts suggesting that such expenses were actually incurred. The defendant cites *Perestrello E Companhia Limitada v. United Paint Co. Ltd*. (1968), [1969] 1 W.L.R. 570 (C.A.), leave to appeal refused [1969] 1 W.L.R. 580 (H.L.), and in particular the Court's statement at 579:

The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.

The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

**193**  In response to the plaintiff citing *Rowlands*, the defendant says that in the reasons for approving the settlement ([*2012 ONSC 3948*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FGRY-B09M-00000-00&context=)) the Court "highlighted its approval of [*Mazonna*] in concluding that the pleaded damages were minor, transient and non-compensable".

**194**  The defendant says that the plaintiff's pleadings on punitive damages are conclusion of law; and the only remedies available for a breach of *PIPEDA* are those provided on *PIPEDA*: *Koubi CA* at paras. 63-65; *Wakelam* at para. 66; *Unlu v. Air Canada*, [*2015 BCSC 1453*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GTH-W621-FCYK-2004-00000-00&context=) at para. 63.

1. **Analysis**

**195**  In my view, the plaintiff's pleadings are sufficient for the cause of action requirement in respect to breach of contract. Proof of damages, as stated above, is not a requirement for breach of contract. Similarly, the element of detriment for breach of confidence was adequately pleaded, although that claim failed on the misuse element.

**196**  Turning to ***negligence***, the plaintiff has pleaded sufficient material facts capable of establishing damages. I will deal with each type of loss alleged in turn.

**197**  In my view, it is not plain and obvious that damage to credit reputation cannot constitute a compensable harm.

**198**  I agree with the defendant that the types of mental distress alleged by the plaintiff do not rise to the level of harm which is "serious and prolonged and rise[s] above the ordinary annoyances" referred to in *Mustapha* at para. 9. Inconvenience, frustration and anxiety are part of normal life. More importantly, there are no material facts alleged which could rise to the required level.

**199**  Out of pocket expenses are clearly a type of compensable harm. The defendant appears to have conflated the loss element of ***negligence*** with principles regarding pleading certain heads of damages. It may be that the plaintiff ought to particularize the expenses claim further, but that is not an element of the tort of ***negligence***. Costs incurred in preventing identity theft appear to be substantially similar to this.

**200**  It is also not plain and obvious that wasted time and inconvenience associated with taking precautionary steps to address the breach are not compensable harms. I consider that the issue of anxiety and frustration are better dealt with under mental distress, above. I note that the court in *Rowlands* did not, in fact, "approve" *Mazonna*, but simply noted it was useful for assessing the risks of the action. Further, the finding in *Mazonna* was based on an examination of the representative plaintiff in advance of the certification hearing. That is not the case here. The plaintiff cannot be faulted for not having provided detailed evidence of this kind of damages when such was never required. This may need to be further particularized later, however.

**201**  The likelihood of the risk of identity theft is not a matter that can be determined at this stage. The plaintiff has pleaded that there is a "real and substantial chance" that the information will be used to engage in a number of forms of identity theft. Given that the information is said to have been stolen by cybercriminals, it is certainly not plain and obvious that this risk will not be proven to be a sufficiently significant risk to be compensable in some manner. The analogy to medical risks does not appear to me to be so lacking in merit that this must fail. Further, the novel issue of credit monitoring services as a remedy does not appear bound to fail.

**202**  For these reasons the plaintiff has sufficiently pleaded the loss element of ***negligence***.

**203**  As to punitive damages, no damages are claimed for a violation of *PIPEDA* and so the defendant's submissions are misdirected on this point. Even if they were not misdirected, however, they would still be wrong. All of the cases referred to (*Koubi CA, Wakelam* and *Unlu*) concerned statutory regimes that prescribed specific remedies. *PIPEDA*, on the other hand, provides a wide discretion as to remedy:

16 The Court may, in addition to any other remedies it may give,

1. order an organization to correct its practices in order to comply with sections 5 to 10;
2. order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and
3. award damages to the complainant, including damages for any humiliation that the complainant has suffered.

[Emphasis added.]

**204**  It is nonetheless plain and obvious to me that there is no claim for punitive damages here. Punitive damages are awarded for misconduct which is high-handed, malicious, or which otherwise merits condemnation: *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=). The pleadings here do not allege anything remotely approaching that level. I agree with the defendant that the pleadings on punitive damages also essentially plead conclusions of law rather than material facts.

**B. Identifiable class**

**205**  Section 4(1)(b) of the *CPA* requires an identifiable class of two or more persons to certify a class proceeding. Defining the scope of the class is crucial: it identifies individuals who have a possible claim against the defendant, it identifies those individuals entitled to notice of the certification and, if relief is rewarded, it identifies those who are bound by the judgment: *Western Canadian Shopping Centres v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) at para. 38.

**206**  A class should be defined so that it is not overly broad; all attempts to narrow the class, without doing so arbitrarily, should be made: *Hollick* at para. 21. Where the scope of the class is not obvious, it is the putative representative of the class who bears the burden of ensuring the scope is appropriately narrowed. The Court in *Hollick* also noted that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues: para. 20.

**207**  The class definition must state objective criteria from which class members could be identified: *Western Canadian Shopping Centres* at para. 38.

**208**  The proposed class is stated as:

All persons residing in Canada who completed an online account application with PTC [Peoples Trust Company] and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

**209**  The plaintiff proposes two sub-classes:

1. The "Resident Sub-Class":

All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and

1. The "Non-Resident Sub-Class":

All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

**210**  In the notice of application, the plaintiff asks that the class be certified in an opt-out basis for B.C. class members and on an opt-in basis for non-resident class members. However, in submissions the plaintiff asks that it be certified on an opt-out basis for both subclasses.

**1. Plaintiff's position**

1. **2 or more persons**

**211**  The plaintiff estimates that the class contains about 11,000 to 13,000 members and points to the following:

1. Mr. Hislop's admission that there was an unauthorized intrusion into a database containing the personal information of about 11,000 persons.
2. the Privacy Commissioner's report which states that the personal information of "some 12,000 customers was compromised" by the breach.
3. a November 9, 2013 Toronto Star article stating that "about 12,000 to 13,000 customers have been notified in writing" of the breach.

**212**  The plaintiff says that the defendant sent the letter to about 12,000-13,000 individuals and that Peoples Trust has records about the class members to whom it sent the letter advising of the breach, which can be made available in document discovery and therefore the identity of the other class members can be determined from the defendant's records.

1. **Objectively identifiable**

**213**  The plaintiff says that the class is defined by reference to objective criteria: the class includes those who completed an online account application with Peoples Trust and whose personal information was in a database in Peoples Trust control that was compromised and/or disclosed to others on the internet by the breach.

**(c) Opt-out class for non-resident members**

**214**  The plaintiff acknowledges that normally, class members residing outside of British Columbia must opt-in to a B.C. class proceeding. However, the plaintiff says that this case is exceptional because, by entering into their contracts with the defendant, the non-resident class members agreed that the contract would be governed by B.C. law and submitted and attorned to the jurisdiction of this Court and/or agreed to be bound by a decision of this Court.

**215**  The plaintiff citing *Bisaillon v. Concordia University*, [*2006 SCC 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16S-00000-00&context=) at para. 16; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [*2013 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X248-00000-00&context=) at para. 109 submits, that a flexible and generously interpretation of the *CPA* militates in favour of certifying a national opt-out class. Specifically, it is argued that:

1. members of the non-resident subclass have agreed to be bound by judgments of this Court and therefore future suits will be *res judicata*, citing *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. 74;
2. jurisdictional issues do not arise (*Lee v. Direct Credit West Inc.*, [*2014 BCSC 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61V2-00000-00&context=) at para. 52) because, in addition to there being a real and substantial connection between the proceeding and this jurisdiction, all proposed class members submitted and attorned to the jurisdiction of this Court;
3. requiring non-residents to opt-in after they have already attorned to the exclusive jurisdiction of the B.C. courts works to their disadvantage and is contrary to the goals of the *CPA*: *Lee* at para. 58.

**216**  The plaintiff points to *Lee* at paras. 59-65, where Griffin J. certified a non-resident class on an opt-out basis for the class members who agreed that any claims would be brought in B.C. and governed by B.C. law. I also note that in *Lee*, the representative plaintiff was not a B.C. resident.

**2. Defendant's position**

**217**  The defendant says the class definition does not meet the requirements because:

1. there is insufficient evidence of two or more class members
2. it is merits based because it is based on an individual's subjective experience and/or it is overbroad because it includes individuals who have suffered no compensable damage;
3. it is a national opt-out class, contrary to s. 16 of the *CPA*.
4. **Two or more persons**

**218**  As noted, the defendant says that there is insufficient evidence of two or more class members. In particular, the defendant says that this requirement is not met because "[t]here is no direct evidence from any person other than Mr. Tucci that has allegedly been affected in this case" and "[n]o affidavit evidence has been put forward setting out the grievances of any other potential class member".

**219**  The defendant cites *Ladas* at paras. 163-168, and says that the first affidavit of Mr. David Robins, sworn March 20, 2015, "suffers from deficiencies like Ms. Marcia's Affidavit #5 referred to in *Ladas* at paras. 153-157" and "offers no substantive evidence proving who could be part of the proposed class".

**(b) Objectively identifiable & merits based**

**220**  The defendant says that it is not possible to objectively identify class members because the proposed class is merits based: *Frohlinger v. Nortel Networks Corporation*, [*2007 CanLII 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JG02-S1CW-00000-00&context=) (Ont. S.C.J.) at paras. 19-23; *Ragoonanan v. Imperial Tobacco Canada Ltd*. [*(2005), 78 O.R. (3d) 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1C7-00000-00&context=) (S.C.J.).

**221**  At one point, the defendant submits that the class is defined based on whether a class member has suffered damages: *Cotter v. Levy*, [*[2000] O.T.C. 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F27X-61RP-00000-00&context=) at paras. 6-7 (S.C.J.); *Chadha v. Bayer* [*(2001), 54 O.R. (3d) 520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J0-00000-00&context=), [*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=) (Div. Ct.).

**222**  However, the defendant also argues that the proposed class definition is unnecessarily broad because it includes individuals who have suffered no damages. The defendant provides this example: *Unlu* at para. 80, *Jiang v. Peoples Trust Company*, [*2016 BCSC 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J8P-FFP1-FBN1-23XB-00000-00&context=) at paras. 114-117, *Ladas*, [*2014 BCSC 1821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0GF-00000-00&context=) at paras. 144-146; *Hollick* at para. 21; and *Ileman v. Rogers Communications Inc.*, [*2014 BCSC 1002*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2VP-00000-00&context=) at paras. 122-128, aff'd [*2015 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G7S-1GH1-JBDT-B3F9-00000-00&context=), leave to appeal refused [*2016 CanLII 6850*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H1X-STF1-FK0M-S402-00000-00&context=) (S.C.C.):

Suppose a person whose information was breached is simply unaffected. That person spent no time reviewing their credit records and suffered no stress as a result of the cyberattack. That person has suffered no damages. The class definition, however, would include this person.

**223**  The defendant points to *Ileman* at paras. 122-128, saying the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims." The defendant says that this reasoning was adopted in *Unlu* at paras. 81-84 and *Jiang* at paras. 96-103, 114-117. The defendant says that the class definition here suffers from a similar problem.

**(c) Opt-out class for non-resident members**

**224**  The defendant says that the plaintiff's request that both B.C. residents and non-residents be required to opt-out of the proceeding offends a basic requirement of the *CPA*, namely, that provided in s. 16(2):

16(2) ... a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

**225**  The defendant says that non-residents cannot be automatically included in a B.C. class proceeding because the *CPA* does not authorize "national" classes. The defendant contrasts this with the Ontario *Class Proceedings Act, 1992*, [*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 the Alberta *Class Proceedings Act*, [*S.A. 2003, c C-16.5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-4SF1-F27X-640H-00000-00&context=).

**226**  The defendant says that this court "should not unnecessarily extend its authority over residents of other provinces who have taken no steps to bring themselves before it". The defendant also makes a policy argument: to avoid unnecessary conflicts between courts, "when there is concurrent jurisdiction between provinces, certification should be limited to permitting non-residents to opt-in": *Morguard Investments Ltd. v. De Savoye*, [*[1990] 3 S.C.R. 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=); *Meeking v. Cash Store Inc.*, [*2013 MBCA 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DM1-JNCK-238F-00000-00&context=), leave to appeal granted [*2014 CanLII 8254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SK1-FGJR-24BD-00000-00&context=) (S.C.C.).

**227**  The defendant seeks to distinguish *Lee* on the basis that the claims cannot be adjudicated by this court, i.e. there is no cause of action because *PIPEDA* is a complete code. The defendant says that non-residents should pursue their complaint through *PIPEDA* or, if the class is certified, on an opt-in basis.

**3. Analysis**

**228**  I agree with the plaintiff's submissions. The class is objectively identifiable and there is some basis in fact that there are two or more members. With respect to the non-resident opt-out class, I follow Griffin J.'s reasoning at paras. 48-67 in *Lee*. The plaintiff is however incorrect on the point of *res judicata*. Attorning to a jurisdiction is not the same as agreeing to be bound by a suit in that jurisdiction to which one is not a party. It is only when the class is certified that the principle of *res judicata* applies beyond the plaintiff, and then only to members of the defined class.

**229**  I am not persuaded by defendant's submissions on this topic. The defendant seems to say that the proposed class membership is limited to those who suffered damage as a result of the privacy breach, and that the issue of damage in this case is "entirely dependent on a subjective analysis". Thus, says the defendant, the definition is subjective and merits-based.

**230**  The defendant seems to conflate "subjective" and "merits-based" and seems to misread *Jiang, Ileman* and *Unlu*. The defendant says that in *Ileman*, the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims". But *Ileman, Jiang*, and *Unlu* were BPCPA cases where the class definition problems were related to subjectivity (regarding consumer transactions), not to being merits-based.

**231**  Further, even if there were not now direct evidence of two or more persons by way of the two plaintiffs, the first Robins affidavit in no way resembles the affidavit in *Ladas*. There, the affidavit was a mere three paragraphs. It attached two exhibits, one a list of individuals interested in being part of the class and the other a number of signed retainer agreements. It did not specify how the former was compiled or that the affiant had had any contact with them. The retainers provided no information about the operating system used on various devices, and the case was based around a certain application used by a certain operating system. Thus, the information in the affidavit could not even be logically connected with the proposed class definition.

**232**  The requirement is some basis in fact. Here, the first Robins affidavit points to a *Toronto Star* article stating that 12,000-13,000 people were notified by Peoples Trust of the breach, and a website set up by the affiant's law firm, through which 109 individuals have registered and submitted responses to a questionnaire about the impact of the breach on them. While on its own the article may have been insufficient, in my view the website and questionnaire responses suffice to bring this into the "some basis in fact" territory.

**C. Common issues**

**233**  At the heart of any class proceeding is the resolution of common issues: *Thorburn v. British Columbia (Public Safety and Solicitor General)*, [*2013 BCCA 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3W9-00000-00&context=) at para. 35. The critical factors and considerations in determining whether an issue is common to the proposed class members are:

1. whether resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres* at para. 39;
2. the common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each member's claim: *Western Canadian Shopping Centres* at para. 39; *Hollick* at para. 18; and
3. success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, [*2014 SCC 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X24V-00000-00&context=) at para. 45; *Watson BCCA* at para. 151.

**234**  In general, the threshold to meet the commonality requirement is low; there must be a rational connection between the class and the proposed common issues and each common issue must be a triable legal or factual issue. An issue can be common even if it is a very limited aspect of the liability question. The issue need not dispose of the litigation but rather; whether it has a reasonable prospect of advancing the litigation through its determination. Commonality may be satisfied "whether or not common issues predominate over issues affecting only individual members": s. 4(1)(c). While the plaintiff must show "some basis in fact" to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class: *Microsoft* at para. 110.

**1. Proposed common issues**

**235**  The common issues proposed by the plaintiff are set out in Schedule A to the plaintiff's notice of application as follows:

**Breach of Contract and Warranty**

1. Did the Class Members enter into a Contract with the Defendant regarding the collection, retention and disclosure of Personal Information?
2. Did the Contract between the Defendant and the Class Members contain terms that the Defendant would:
3. Keep the Personal Information confidential;
4. Take steps to secure the Personal Information and prevent it from being lost, stolen, disseminated, or disclosed except as provided by the Contract or applicable statutes;
5. Not disclose the Personal Information except as provided by the Contract and applicable statutes;
6. Ensure third parties given access to the Personal Information also secured the Personal Information and ensured that it would not be lost, stolen, disseminated, or disclosed except as provided by the Contract and applicable statutes;
7. Delete, destroy, or otherwise not retain the Personal Information when the Class Members no longer required the Defendant's services, except as provided by the Contract and applicable statutes?
8. As a result of its collection, retention, loss, or disclosure of the Personal Information, did the Defendant breach any of the terms of the Contract or Warranty particularized in paragraph 2? If yes, why?

***Negligence***

1. Did the Defendant owe the Class Members a duty of care in its collection, retention, loss, or disclosure of the Personal Information?
2. If the answer to #4 is yes, did the Defendant breach its duty of care in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

**Breach of confidence**

1. Did the Class Members communicate the Personal Information to the Defendant?
2. Did the Defendant misuse the Personal Information in its collection, retention, loss, or disclosure of the Personal Information, and was that misuse to the detriment of the Class Members?
3. If the answers to #6 and #7 are yes, did the Defendant breach the confidence of the Class Members in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

**Invasion of privacy and intrusion upon seclusion**

1. Did the Defendant willfully or recklessly invade the privacy of or intrude upon the seclusion of the Class Members in its collection, retention, loss, or disclosure of the Personal Information in a manner that would be highly offensive to a reasonable person?
2. If the answer to #9 is yes, did the Defendant commit the tort of invasion of privacy? If yes, why?

**Unjust enrichment**

1. Was the Defendant unjustly enriched by its receipt of fees, interest, and service charges from the Class Members?

**Damages**

1. Is the Defendant liable to pay damages to the Class Members for:
2. Breach of contract or warranty?
3. ***Negligence***?
4. Breach of confidence?
5. Invasion of privacy or intrusion on seclusion?
6. Unjust enrichment?
7. Can the Class Members' damages be assessed in the aggregate pursuant to section 29 of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*? If so, in what amount?
8. Does the Defendant's conduct justify an award of punitive damages? If so, why and in what amount?
9. Are the Class Members entitled to pre- and post-judgment interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996 c. 79*? If so, at what rate?

**2. Plaintiff's position**

**236**  The plaintiff's claim raises a number of issues that are common to the class.

**(a) Common issues: breach of contract (1-3)**

**237**  The plaintiff says that questions relating to the interpretation and enforceability of standard form contracts are regularly certified as common issues and that this case should be no exception. The plaintiff says the question of what obligations were imposed by the contracts can be determined on a class-wide basis because the agreements are of a standard form that is essentially the same for all the class members. With respect to breach, the plaintiff says that the alleged privacy breach relates to one incident that affected all class members. Therefore, the court can answer these questions by reference to the People Trust application process, the contract language, the statutory provisions, and the defendant's conduct. No evidence or participation from the class members will be required.

**238**  The plaintiff points out that the answer to the common questions need not be identical for each class member, and the answer can be nuanced to account for variations over time or across the class, citing *Vivendi Canada Inc. v. Dell'Aniello*, [*2014 SCC 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X24V-00000-00&context=) at para. 46; *Stanway v. Wyeth Canada Inc.*, [*2012 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CF-00000-00&context=) at paras. 14-15, citing *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=) at para. 32.

1. **Common issues: *negligence* (4-5)**

**239**  The plaintiff says that ***negligence*** issues are regularly certified as common issues, including in data breaches or loss of personal information claims. As examples, the plaintiff points to *Rowlands* at para. 6(a) (the defendant lost a USB key containing personal information) and *Larose c. Banque Nationale du Canada*, [*2010 QCCS 5385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JKS1-FH4C-X550-00000-00&context=): personal information was stored unencrypted by the defendant and subsequently stolen.

**240**  The plaintiff says that the existence of a duty of care, the standard of care, and the existence of a breach can be answered in common for the class because they focus on the defendant's conduct.

**(c) Common issues: breach of confidence (6-8)**

**241**  The plaintiff says proposed issues 6-8 can be considered by reference to the defendant's conduct, which was identical with respect to each proposed class member.

1. Question 6 considers whether the class members' provision of the personal information, which was done pursuant to a contract and application process that was substantially the same for all members, constitutes a "communication" for the purposes of this tort.
2. Question 7 can be assessed by considering the defendant's use of the personal information, the nature of the information itself, and whether the breach caused detriment to the class members; and
3. Question 8 considers whether communication and misuse to the class members' detriment amount to a breach of confidence.
4. **Invasion of privacy and intrusion upon seclusion (9-10)**

**242**  The plaintiff says that these questions can be answered on a class-wide basis and that the answer depends solely on the defendant's conduct, the nature of the class members' privacy interest, and on the expectations of a reasonable person. He says that a similar question was certified in *Rowlands* at para. 6(d). He says that proof of damage is not a required element of the cause of action, citing *Jones* at para. 71.

1. **Unjust enrichment (11)**

**243**  The plaintiff claims in the alternative "waiver of tort and restitution of and a constructive trust over the unlawful gains" of the defendant. The plaintiff says this question focuses solely on the defendant's conduct.

**244**  The plaintiff points to prior certification of unjust enrichment claims: *Infineon*; *Steele v. Toyota Canada Inc.*, [*2011 BCCA 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1BJ-00000-00&context=); *Serhan*.

1. **Damages (12-15)**

**245**  The plaintiff says that these questions consider whether damages are an appropriate remedy for each cause of action, and that "basic entitlement to an award does not require evidence from individual [c]lass [m]embers" and can be done on a common basis.

**246**  With respect to aggregate damages, the plaintiff points out that an aggregate damage assessment does not require "mathematical accuracy". The plaintiff quotes from *Story Parchment Co. v. Paterson Parchment Paper Co*. (1931), 282 U.S. 555 at 563:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. ...[T]he risk of uncertainty should be thrown upon the wrongdoer instead of the injured party.

**247**  The plaintiff says a nominal award, in recognition of time wasted, inconvenience, frustration, anger, or stress, is "well-suited to aggregate calculation or partial aggregate calculation" because it is a general recognition of harm suffered rather than a calculation of the financial value of a loss. The plaintiff says that a nominal award for an individual "can be easily extrapolated to the class as a whole". The plaintiff says that this assessment can be aided by information from the defendant's "database of information from putative [c]lass [m]embers they have maintained, which could be queried to determine the typical experience of [c]lass [m]embers as far as telephone calls to contact the [d]efendant, time spent on hold, time spent dealing with banks and credit reporting agencies, and so on".

**248**  The plaintiff also says that class proceedings are "particularly well-suited for the hearing of a claim for punitive damages", citing *Chace v. Crane Canada Inc.*, [*1997 CanLII 4058*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2D6-00000-00&context=) (B.C.C.A.) at para. 24 because it reflects the overall culpability of the defendant and need not be linked to the harm caused to any particular claimant: *L.R. v. British Columbia*, [*1999 BCCA 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22T7-00000-00&context=) at para. 48, aff'd [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=). For this reason, the plaintiff says punitive damages are regularly certified as common issues: *Jones v. Zimmer GMBH*, [*2011 BCSC 1198*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-623M-00000-00&context=), aff'd [*2013 BCCA 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M32G-00000-00&context=); *Stanway v. Wyeth Canada Inc.*, [*2011 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22T8-00000-00&context=), aff'd [*2012 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CF-00000-00&context=); *Fulawka v. Bank of Nova Scotia*, [*2010 ONSC 1148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-2317-00000-00&context=) at para. 152, aff'd [*2012 ONCA 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4XK-00000-00&context=), leave to appeal refused [*[2012] S.C.C.A. No. 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-FGY5-M4V8-00000-00&context=). The plaintiff says that the defendant's conduct is more important to the assessment than the impact on any individual class members.

**249**  The plaintiff says that court order interest is a common issue.

**3. Defendant's position**

**250**  The defendant says that the plaintiff has not proposed appropriate common issues.

1. **Cause of action issues (1-11)**

**251**  The defendant says there are no valid causes of action. The defendant also says that, even if there are causes of action, there are no compensable damages and hence "a common issues trial still cannot proceed". Further, even if compensable damages could be determined, "the problems arising from assessing a merits based class definition are encountered again because of the subjective inquiries that would be required to consider the proposed common issues": *578115 Ontario Inc. v. Sears Canada Inc.*, [*2010 ONSC 4571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-FG12-614P-00000-00&context=) at para. 43; *Chadha v. Bayer* [*(2003), 63 O.R. (3d) 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3C6-00000-00&context=) at para. 52 (C.A.); *Pro-Sys* at para. 118.

**252**  The defendant says that the generality with which the common issues are framed "masks the complexity and substance of the underlying factual issues necessary for their adjudication". "In order to properly address the alleged causes of action, there would need to be a much more detailed series of questions regarding the impact upon each putative class member and the damages actually experienced".

1. **Damages and remedies (12-14)**

**253**  The defendant says that "[i]n the absence of a common issue and success for the plaintiff and the class on that issue, a common issue about remedies is unfounded". The defendant says that as there is no cause of action disclosed, the damage and remedy issues are not common.

**254**  The defendant says that the aggregate damage issue should not be certified because the plaintiff has not put forth any basis in fact as to methodology for determining aggregate damage: *Charlton BCCA* at para. 112; *Clark v. Energy Brands Inc.*, [*2014 BCSC 1891*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M49K-00000-00&context=) at paras. 95-113. As there is no proposed methodology, there is no basis to certify this issue.

**255**  With respect to punitive damages, the defendant says that the plaintiff frames the question "too broadly, attempting to capture the defendant for any conduct arising out of response to the security breach". The defendant quotes the following from *Koubi BCSC* at para. 155 (also citing *Jiang* at para. 136):

[155] There is an absence of commonality necessary for a common issue. The results of the inquiry as to whether, in any particular circumstances, the defendants acted in a highhanded or reprehensible manner cannot be extrapolated to the experiences of other members of the proposed class. Therefore, in the particular circumstances of this case, the question of whether punitive damages would serve a rational purpose cannot be determined until after individual issues of causation and compensatory damages.

**256**  Finally, the defendant says that the court-order interest issue is parasitic and does not meaningfully advance the action in the absence of substantive common issues, citing *Jiang* at para. 137; *Clark* at para. 138.

**4. Analysis**

**257**  In my view, common issues 1-3 meet the threshold for commonality. Common issues 4 and 5 are approved as they deal mainly with the defendant's conduct. While issue 4 is stated quite generally, in my view the issue of the reasonable foreseeability of harm and proximity between the defendant and class members can be adjudicated based on facts sufficiently common to all class members. Issues 6-8 are not approved as breach of confidence has been struck. Issues 9 and 10 are approved, albeit only with respect to the potential federal common law tort. Issue 11 is not approved as unjust enrichment and waiver of tort have been struck. Issues 12 (a) and (d) are approved, but damages for ***negligence*** cannot go forward as loss and causation must be proven before damages are owed, damages for unjust enrichment cannot go forward as that cause of action was struck, and damages for invasion of privacy/intrusion upon seclusion is an individualized inquiry. With respect to aggregate damages, it seems that the plaintiff has only proposed a method to calculate aggregate nominal damages, not aggregate compensatory damages: querying a database to determine class members' typical experience in terms of time wasted, inconvenience, etc. Given the nature of nominal damages, this seems appropriate, and expert evidence is unnecessary for such a method. Without a method for compensatory damages, the common issue for compensatory aggregate damages is not certified. Issue 13 is approved with respect to nominal damages only. The common issue relating to punitive damages is not approved. Common issue 15 is also certified.

**D. Preferable procedure**

**258**  Section 4(1)(d) of the *CPA* states that the court must determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

**259**  Section 4(2) of the *CPA* identifies specific criteria that must be considered in assessing preferability:

1. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
2. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
3. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
4. whether other means of resolving the claims are less practical or less efficient;
5. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**260**  The preferability analysis should be conducted through the lens of the three principal aims of class actions: judicial economy, access to justice, and behaviour modification: *Hollick* at para. 27.

**261**  The test for preferability is two-fold: first, a court must assess whether the class action would be a fair, efficient and manageable method of advancing the claim; second, the court must determine whether the class action would be preferable to other reasonably available means of resolving the claims of class members: *Hollick* at paras. 27-28; *Knight v. Imperial Tobacco Canada Limited*, [*2006 BCCA 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25N-00000-00&context=) at para. 24.

**262**  In *AIC Limited v. Fisher*, [*2013 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X24N-00000-00&context=), Cromwell J., for the Court, wrote:

[21] In order to determine whether a class proceeding would be the preferable procedure for the "resolution of the common issues", those common issues must be considered in the context of the action as a whole and "must take into account the importance of the common issues in relation to the claims as a whole": *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court": para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

**1. Defendant's position**

**263**  The plaintiff has failed to show that a class action in this case would be the "preferable procedure" for the fair and efficient resolution of the common issues (*CPA*, s. 4(1)(d)). Here, any attempted common trial would flounder under inevitably individual issues and inquiries. This would not promote judicial economy or improve access to justice.

**264**  The defendant says that this action will quickly break down into individual enquiries into individual-specific issues; in particular, regarding each class member's entitlement to actual damages. The defendant cites the following from *Kumar v. Mutual Life Assurance Company of Canada*, *2003 CanLII 48334* (Ont. C.A.) at para. 54:

[54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. ... More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.

**265**  The defendant says the vague, general common questions of law would not meaningfully advance the litigation: citing *MacKinnon v. National Money Mart Company*, [*2005 BCSC 271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M41B-00000-00&context=) at para. 28.

**266**  The defendant says that there are other ways for the class to enforce their rights and, even if there were not, this is insufficient because a class proceeding would not be fair, efficient, and manageable: *Caputo v. Imperial Tobacco Ltd.*, [*2004 CanLII 24753*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-F5T5-M2K8-00000-00&context=) (Ont. S.C.J.) at paras. 62, 67-68; *Marshall v. United Furniture Warehouse Limited Partnership*, [*2013 BCSC 2050*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YS-00000-00&context=) at para. 235, aff'd [*2015 BCCA 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G68-9741-FCYK-21KH-00000-00&context=); *Clark* at paras. 137-138; *Unlu* at para. 93. The defendant says that a class proceeding "does not adequately address the individual issues and it would curtail the defendant's right to adequately defend itself, particularly on the issues of individual class member's entitlement to, and quantum of, any damages".

**2. Plaintiff's position**

**267**  Pursuing this action as an individual action would likely entail substantial costs that the plaintiffs would be unable to afford. The plaintiff has proposed a workable methodology for the determination of the claims advanced in this action. There are no other preferable means to resolve the claims of the class members.

**268**  As to s. 4(2)(a), the plaintiff says that the proposed common issues are at the heart of the litigation. In particular, the issue of whether the defendant "is liable for the Breach" is the predominant liability issue. The plaintiff points out that the application process, contracts, and security breach were substantially the same for all class members. The plaintiff notes that, even if damages cannot be determined in the aggregate, s. 7(a) of the *CPA* provides that this cannot itself be a basis to refuse certification.

**269**  With respect to s. 4(2)(b), the plaintiff says that there is no evidence that any class members have an interest in controlling separate actions and, given the small amount of damages for each member, it is unlikely that any class member would have a valid interest in individually prosecuting an action. The plaintiff lists many advantages of a class proceeding, such as the tolling of the limitation period for the entire class, the availability of class counsel through contingency arrangements, the ability of class members to participate in the litigation if desired, protection from adverse costs rulings, and the fact that any order or settlement will accrue to the benefit of the entire class without resorting to estoppel.

**270**  As to s. 4(2)(c), the plaintiff says that neither he nor class counsel are aware of any other proceedings in Canadian courts in relation to the breach, the only other process being undertaken is the Privacy Commissioner's investigation.

**271**  With respect to s. 4(2)(d), the plaintiff says that individual litigation is the only real alternative to a class proceeding and, given the cost of litigation compared to the low value of individual claims, that is an "illusory alternative". Thus, the other means of resolving the claims are less practical or efficient.

**272**  Finally, as to s. 4(2)(e), the plaintiff submits that there is no indication that a class proceeding will create greater difficulties than alternative means of seeking relief, especially if the aggregate damage provisions are available or if the Court adopts the proposed automated distribution method for distributing the monetary award: *Heward*; *Nanaimo Immigrant Settlement Society v. British Columbia*, [*2001 BCCA 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15J-00000-00&context=) at para. 20. The plaintiff says that all of the same issues would need to be considered in individual litigation, but in a less controlled procedural environment.

**3. Analysis**

**273**  I am persuaded by the applicant's submissions and find that class proceeding is the preferable procedure. I agree that there will be a need for individual inquiries here. However, the fact that individual inquiries will be required is not determinative of the question of preferability. In this case, my view is that the individual inquiries can be satisfactorily dealt with in a post-common issues process, should the case proceed to that stage.

**E. Representative plaintiff**

**274**  Section 4(1)(e) of the *CPA* mandates that the representative plaintiff must be able to fairly and adequately represent the class, must have developed a plan for proceeding, and must not have a conflict with the class on the common issues. The representative plaintiff must be prepared and able to vigorously represent the interests of the class.

**275**  Section 2(1) provides that "[o]ne member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class."

**1. Defendant's position**

**276**  The defendant submits that the plaintiff is not an appropriate representative plaintiff and has not proposed a workable litigation plan. The plaintiff is not a resident of British Columbia, as required by the *CPA*. Nor is the plaintiff's boilerplate litigation plan workable, as it fails to explain, and simply assumes away, how the critical and determinative individual issues will be adjudicated.

**277**  Since the commencement of the hearing, counsel for the plaintiff has identified Mr. Andrew Taylor, a resident of British Columbia. He is a retiree who formerly worked in operations and customer service in the airline industry. His affidavit indicates that he has retained counsel to advance the within action on his behalf and the proposed class members. Having read the materials I am satisfied as to his ability to serve as a representative plaintiff.

**278**  With respect to the litigation plan, the defendant says that the proposed litigation plan is not workable. The defendant says that the plan does not address how the individual issues would be resolved: *Koubi BCSC* at para. 195; *Singer v. Schering-Plough Canada Inc.*, [*2010 ONSC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=) at para. 223; *Miller v. Merck Frosst Canada Ltd.*, [*2013 BCSC 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2D6-00000-00&context=) at para. 217, aff'd [*2015 BCCA 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GNP-DGD1-JJYN-B1W2-00000-00&context=), leave to appeal refused [*[2015] S.C.C.A. No. 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBP-7JG1-JSRM-60R7-00000-00&context=). The defendant says that "there will be significant individual issues regarding the nature and scope of harm allegedly suffered by each class member. These issues will require full discovery and mini-trials will be required on an individual basis to provide a fair procedure for the determination of the individual issues".

**279**  The defendant says that only individual issues dealt with in the litigation plan relate to quantification of damages by a court-appointed administrator; the defendant says that a claims form will not address "substantive individual issues". The defendant says it has the right to challenge class members' evidence and lead responsive evidence before the court decides the questions at issue, and that the litigation plan assumes that liability and entitlement to damages will be established on a class-wide basis. The defendant says that "forms alone" cannot deal with the individual issues that will arise in this case and that the plaintiff proposes that "procedural fairness relevant to the defence of his claims be sacrificed for expediency". The defendant says that entitlement to and the quantum of damages cannot be left to an administrator even with an arbitrator as an avenue of an appeal and amounts to an inappropriate delegation of the court's adjudicative powers, citing *Keatley Surveying Ltd. v. Teranet Inc.*, [*2012 ONSC 7120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFT1-F7ND-G05S-00000-00&context=) at paras. 244-246, rev'd [*2014 ONSC 1677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S2F1-00000-00&context=) at paras. 122-123.

**2. Plaintiff's position**

**280**  The plaintiff is prepared to represent the interests of the class members. He is familiar with the substance of the claim and the role of the representative plaintiff. The plaintiff is not aware of conflicts with other members of the class with respect to the proposed common issues.

**281**  The plaintiff says the proposed litigation plan is a workable method for advancing the litigation. It addresses the issues and demonstrates that the plaintiff and class counsel have thought through the proceeding and its complexities, particularly if proof of damage and the quantum of restitution can be determined on an aggregate basis. The plaintiff says that this proceeding will proceed in two phases: the first will involve interpretation of the contracts and determination of the defendant's liability. If aggregate damages are determined, a "systematic computer method" can be used to determine and deliver the individual entitlements to the class members.

**282**  The plaintiff says he has a viable notification plan and that he does not anticipate that any class members will opt out of the proceeding.

**3. Analysis**

**283**  The addition of Mr. Taylor as a plaintiff addresses the issue raised by the defendant in respect to residency. I am also satisfied that the other qualifications have been met by Mr. Taylor.

**284**  On the question of addressing individual inquiries, the plan does not reflect a method. My view is that this aspect can be dealt with in an efficient and fair way. Individual inquiries are a frequent aspect of class proceedings. The plaintiff is required to file a proposal for dealing with this as a condition to certification. Otherwise, I find the plan satisfactory at this stage. Class proceeding are flexible and dynamic, and a litigation plan need only be a workable framework for moving the case forward: *Godfrey* at para. 255.

**IV. CONCLUSION**

**285**  For these reasons:

1. This action is certified as a class proceeding;
2. The class is approved on an opt-out basis, and defined as: All persons residing in Canada who completed an online account application with People Trust and whose personal information was contained on a database in the control of Peoples Trust which was compromised and/or disclosed to others on the internet.
3. Two subclasses are approved, defined as:
4. The "Resident Sub-Class": All persons residing in British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet; and
5. The "Non-Resident Sub-Class": All persons resident outside of British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet;
6. The common issues approved are 1-5, 9-10 for the purposes of the federal common law only, 12(a) and (d), 13 for nominal damages only, and 15;
7. A common issue regarding the effect of the Limitation of Liability clause is to be added;
8. The representative plaintiffs are approved;
9. The litigation plan is approved, subject to the requirement that the plaintiff file a revised litigation plan in the manner described above.

D.M. MASUHARA J.

**End of Document**

[***Ackermann v. Pandher, [2017] I.L.R. para. M-2998***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PMW-N271-JXNB-63KM-00000-00&context=)

Canadian Insurance Law Reporter Cases

Supreme Court of British Columbia

Before: Schultes J

Decision: May 29, 2017.

Docket No. M126906

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

**[2017] I.L.R. para. M-2998** | [*[2017] B.C.J. No. 1024*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NPW-RDN1-JXG3-X2B3-00000-00&context=) | [*2017 BCSC 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NPW-RDN1-JXG3-X2B3-00000-00&context=)

Jakob Ackermann v. Harmeet Singh Pandher, 2154781 Canada Ltd., C.D. Transport Corp., Victor Martens, and Oksana Martens; Viktor Martens, Harmeet Singh Pandher, 2154781 Canada Ltd., and C.D. Transport Corp. (Third Parties)

**Case Summary**

**Tort, motor vehicle — Personal injury damages — Wrist injury — Contributory *negligence* — Plaintiff was involved in motor vehicle accident in February 2011, at age 52 — Plaintiff was not wearing seatbelt at time of accident — Plaintiff suffered perilunate dislocation injury and had wrist operation — Plaintiff had minimal English skills — Until accident, plaintiff worked as tile setter in own business with son — Defendants claimed plaintiff was contributorily negligent for not wearing seatbelt — Plaintiff brought action for damages related to personal injuries — Defendants did not satisfy Court that wrist injury would not have occurred had plaintiff been wearing seatbelt — Court found plaintiff's injury affected his identity as "worker" — Non-pecuniary damages award of $90,000 was appropriate — Court awarded mid-point between average tile setter's earnings and plaintiff's actual earnings for past wage loss — Plaintiff was precluded from working as tile setter due to injury — Possibility of plaintiff finding employment in future was very low — Court awarded loss of earning capacity of $385,000 — Court awarded costs of future care of $3,700 — Action allowed.**

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| **Facts:** The plaintiff was involved in a motor vehicle accident in February 2011, at age 52. The defendants admitted liability. The plaintiff was not wearing a seatbelt at the time of the accident. He had surgery for bladder cancer in 2010 and claimed that wearing a seatbelt agitated him due to this procedure. It was not disputed that the plaintiff suffered a perilunate dislocation injury, which results in significant soft tissue disruption in the wrist, causing stiffness. The plaintiff had immigrated to Canada in 2004 and had minimal English skills. Until the accident, he worked as a tile setter in a business he operated with his son. Post-accident, he was unable to perform tile setting due to his wrist injury. He was also unable to perform activities such as gardening, home renovations, and sports. He brought an action for damages related to his personal injuries. The defendants claimed that the plaintiff was contributorily negligent for not wearing a seatbelt.  HELD: The action was allowed.  The Court could not find a valid medical justification for the plaintiff's failure to wear his seatbelt. The defendants, however, did not satisfy the Court that the wrist injury would not have occurred or not have been as severe had the plaintiff been wearing the seatbelt. The Court found that the plaintiff's injury affected his identity as a "worker" in his employment and home, which was extremely important to the plaintiff. A non-pecuniary damages award of $90,000 was appropriate. The Court accepted a figure at the mid-point between the average tile setter's earnings and the actual earnings of the plaintiff as a fair reflection of the rate increase that the plaintiff's business would have had in the years since the accident. The Court awarded $205,000 for past wage loss. Due to the wrist injury, the plaintiff was precluded from working as a tile setter. The Court found that in the absence of the accident, the plaintiff would have worked full-time to age 65 and part-time from 65 to 75. Due to his age and poor English skills, the possibility of him finding employment in the future was low and his remaining earning capacity was minor at best. To account for it, the Court deducted 5 per cent from the loss of earning capacity award, for a total of $385,000. The Court awarded costs of future care of $3,700 and special damages of $109. The total award was $683,810. |

**Counsel**

W.D. Mussio and D.J. Kautz for the plaintiff; P.J. Miller for the defendants

**Reasons for Judgment**

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| **T.A. SCHULTES J.** |

**1. INTRODUCTION**

**1**  This trial dealt with the consequences to Jacob Ackermann of an injury to his wrist that he suffered in a motor vehicle accident on Highway 1 near Sorrento on February 6, 2011. The defendants Harmeet Singh Pandher, 2154781 Canada Ltd. and C.D. Transport Corp. have admitted liability for the accident, although there is an argument by those defendants that Mr. Ackermann was contributorily negligent for failing to wear his seatbelt.

**2. EVIDENCE**

**a. Overview of Life before the Accident**

**2**  Mr. Ackermann was born in Russia in 1959 and moved to Kazakhstan with his family when he was a young child. His first language was Russian but his parents were ethnically German and spoke that language at home.

**3**  His father took him out of school when he was in Grade 8 to train him as a bricklayer. He then did building renovation work on his own.

**4**  In 1988 he immigrated to Germany, where he did a variety of painting and renovation-related jobs. Upon his arrival he received a year of German language training, through which he learned to read and write in that language.

**5**  He immigrated to Canada in 2004 and settled in the Kelowna area. He and his wife have a house on a small acreage. Two of their adult children -- a son and a daughter - - live with them, along with their daughter's husband and two young children.

**6**  Although the exact level of his language proficiency was an issue in the trial that I will discuss in more detail, it is common ground that his ability to speak English is limited. Except for minimal incidental contact when he is engaging in activities like shopping, since being in Canada he has confined his associations to people who speak German or Russian, and he attends a church that offers services in German. He testified through an interpreter at the trial.

**7**  Until his accident he worked as a tile setter, in a business that he operated with his son Andreas called Ackermann Installations. The division of labour was that Andreas, who speaks English fluently, would arrange the jobs and get instructions about the specific work to be performed and Mr. Ackermann, who also learned tile setting from his father, would carry it out. Two witnesses who are involved in the home building and renovation business in Kelowna testified about the very high quality of Ackermann Installations' work and of their desire to hire them whenever possible.

**8**  Mr. Ackermann had some ongoing health problems before the accident, but generally considered himself to be "strong and healthy". His problems included high blood pressure, diabetes and a "cold or a draft" (which I took to mean a pain of some kind) in his left shoulder that had bothered him for a few months. A more serious problem was that he was diagnosed with bladder cancer in 2010. He had surgery in December of that year, followed by several weeks of chemotherapy. His urologist said that there was no evidence of a recurrence of the cancer.

**9**  According to Mr. Ackermann his pre-accident life was very active. He completely renovated the family home in his spare time and was always working around the home on one task or another. His wife raises a large number of chickens and they grow produce for their own use, and he participated in the extensive amount of labour that each of those activities requires. On Sundays, his day off, he played sports such as soccer and volleyball, with his family and friends from church. He enjoyed spending time with his grandchildren. He also enjoyed going hunting in the fall with his friends and his sons.

**b. Circumstances of the Accident**

**10**  Mr. Ackermann accompanied two friends from his church, Viktor and Oksana Martens, from Kelowna to Salmon Arm on the afternoon of Sunday, February 6, 2011. They rode in Mr. Martens' Ford F150 pickup truck. The Martens are originally from Russia and like Mr. Ackermann they speak Russian and German. The purpose of the trip was for them all to see a massage therapist there, in Mr. Ackermann's case for the shoulder problem that he had recently developed. He said that he joined the Martens at their invitation and was not otherwise planning to go.

**11**  They left around 2:00 p.m. and it took about one and a half hours to get to Salmon Arm.

**12**  Their massages took about two hours and Mr. Ackermann said that it was "a bit dark" on the way home. It was snowing, the roads were icy and they were travelling slowly.

**13**  This trip was the first lengthy one he had taken since his bladder surgery. One effect of the surgery was that he had to urinate frequently. He initially testified that he did not "buckle" his seatbelt while riding in the Martens' truck because of this frequent urination problem, but then added that he did not remember if this was exactly the problem that had caused him not to wear it. He also did not remember either of the Martens telling him to wear it. He agreed in cross-examination that no doctor had told him after his surgery that he did not have to wear it.

**14**  He initially testified that he had worn a seatbelt "off and on" when driving his own vehicle between the surgery and the accident, although he also described times where he had to lie down in the back of that vehicle (and have someone else drive, I infer). In re-examination he clarified that he always wore a seatbelt when driving himself during that period, because the trips were short and there was a persistent beeping sound if the seatbelt was not worn.

**15**  Similarly, his son Peter said that he was surprised when he found out that his father had not worn his seatbelt at the time of the accident, because he "always remembered" him wearing it. The only times he had not were occasionally when they were still living in Germany. He had gotten used to doing it in Canada, according to Peter.

**16**  Mr. Ackermann's urologist, Dr. Carter, provided a report in November 2015 advising that lower abdominal discomfort is common during chemotherapy (which Mr. Ackermann would have concluded a few weeks before the accident) and offering the opinion that "it would be reasonable for Mr. Ackermann to avoid the use of the seatbelt, which may have exacerbated his lower abdominal/pelvic discomfort."

**17**  Mr. Ackermann said that he sat in the middle position of the backseat of the Martens' truck during the journey because it was easier to have a conversation with them from that position.

**18**  Mr. Martens and Ms. Martens both testified that she had told Mr. Ackermann to put on his seatbelt during the trip to Salmon Arm and that he had complied. Ms. Martens described some disapproval from her husband for giving this direction to Mr. Ackermann, because speaking to older people in that manner is frowned on in her culture. She said that she turned around at various points during the drive and did not notice that he was not wearing it -- if she had, she would have told him again to put it on. On the way to Salmon Arm the light was still sufficient to see well inside their truck. Neither of the Martens saw what he did with his seatbelt on the return trip. Their evidence was that Mr. Ackermann did not tell them during the trip that he was unable to wear it because of his cancer surgery.

**19**  Mr. Martens identified the seatbelt in Mr. Ackermann's position as the shoulder-harness type, from a photo of the inside of his truck that was taken after the accident.

**20**  When Mr. Martens was shown the following portion of a statement that he gave to an adjuster on February 11, 2001:

Jakob was not wearing his seatbelt as he had a bladder operation and was still recovering for it and didn't put his seatbelt [sic] because of his healing abdomen...

he said that was not accurate and that he had given a false statement on that point. He also clarified that when he said in his statement that Mr. Ackermann had "crouched to the right" before the impact, he was basing that on what Mr. Ackermann had told him, rather than his own observations of that action.

**21**  When Ms. Martens was shown a passage from her statement to an adjuster, also describing Mr. Ackermann's inability to wear his seatbelt stemming from his surgery, she agreed that it was correct at the time she had given it.

**22**  In re-examination Ms. Martens revealed that she and her husband had actually learned about Mr. Ackermann's medical inability to wear a seatbelt from him after the accident, but before she gave her statement to the adjuster. Her husband and Mr. Ackermann were both worried about the seatbelt issue, I infer because of the potential liability of each of them.

**23**  Mr. Ackermann's memory of the accident itself was that they were coming to a bend in the road, when he saw a truck skidding. He was "so scared" and thought "the end was coming", so he bent down and covered his head. He heard a crash.

**24**  He did not recall his movements within the vehicle after the accident or how he and the Martens exited from it. Mr. and Ms. Martens both described him ending up in the front passenger seat afterwards, essentially in Ms. Martens' lap.

**25**  He said that when he "came about" (which I took to mean, when he next became aware of his surroundings), he was in shock and a bone was sticking out of his right wrist. Ms. Martens had to tell him not to walk into the road or he would be run over.

**26**  Both Mr. and Ms. Martens agreed that the impact with the semi-truck and then a rock wall had been severe and that they had both suffered meaningful injuries themselves despite having been wearing their seatbelts. Ms. Martens also agreed that there is an outstanding lawsuit against Mr. Ackermann arising from injuries caused to her by his movement within the vehicle after the impact.

**c. Injuries, Prognosis, Functioning and Ongoing Care**

**27**  Mr. Ackermann was eventually taken to the hospital in Salmon Arm by ambulance. He experienced a lot of pain in his wrist. It was initially put in a cast and sling by the emergency staff and then a week later it was operated on by Dr. Miller, a plastic surgeon. He put metal plates in the wrist and Mr. Ackermann wore a cast for six weeks. He also experienced a lot of pain after this surgery, especially if he touched his wrist or banged it against something, and he had trouble sleeping until the plates were removed at the end of the six weeks. This procedure was followed by physiotherapy from April 2011 to January of the following year.

**28**  In addition to this wrist injury, which was the main focus of the trial, Mr. Ackermann suffered some less serious injuries -- bruising on the right of his body, bruises and cuts to his face and a stiff neck. These injuries all healed within a month.

**29**  The medical evidence about Mr. Ackermann's wrist injury and its effects was not disputed. It indicates that he suffered what is known as a "perilunate dislocation injury[**1**](#Forward_fnref_fnr-1)" in the accident. This results in "significant soft tissue/ligamentous disruption within the wrist.[**2**](#Forward_fnref_fnr-2)" Some degree of stiffness is usually seen in patients with this type of injury and his ongoing symptoms are considered to be "reasonable given the nature and extent of his injury.[**3**](#Forward_fnref_fnr-3)" When he was examined in May of 2015 he had flexion (moving the hand downward from a horizontal position) of only 20%, although his abilities to pinch and grasp were good[**4**](#Forward_fnref_fnr-4). His prognosis is for increasing arthritis in the joint as a result of the injury, "with gradually worsening pain and limitation.[**5**](#Forward_fnref_fnr-5)" A consulting orthopedic surgeon described his condition in 2015 as "chronic and static with a very high likelihood of deteriorating over time.[**6**](#Forward_fnref_fnr-6)"

**30**  If his pain worsens he may require a partial or total wrist fusion, which "typically improve[s] pain however at the cost of significant range of motion." A total fusion would mean that he could no longer flex or extend the wrist.[**7**](#Forward_fnref_fnr-7) For now his symptoms can be "slightly improved" by the intermittent use of a brace and by anti-inflammatory medication.[**8**](#Forward_fnref_fnr-8)

**31**  With respect to work prospects, the orthopedic surgeon offered the opinion that "[b]etween the associated pain and the limited range of motion to his wrist, [he does] not believe that there is any chance of Mr. Ackermann returning to a physical job involving extensive use of his right wrist." Nor did he believe that there were any "interventions" that would allow Mr. Ackermann to do so[**9**](#Forward_fnref_fnr-9).

**32**  During his evidence, Mr. Ackermann demonstrated the restrictions in his range of motion of his right wrist and how moving the wrist forward and backward or from side to side causes him pain.

**33**  When he attempted to return to work after the accident he quickly found that the pain in his wrist made it impossible to perform the essential tasks of tile setting.

**34**  This injury has also undermined his ability to engage in the extensive range of physical activities that made up his life outside of work. These have included gardening, shovelling manure for his wife's chickens, performing home maintenance tasks and minor renovations, playing sports as part of his Sunday social activities and playing with his grandchildren. He also cannot go hunting because of the effect on his wrist of firing a gun.

**35**  Using his wrist to do work of any kind causes a burning pain which is severe enough that it can also wake him up at night. He always feels pain to some extent but if he "takes it easy" it is lessened.

**36**  It had previously been "more or less [his] life" to work with his hands. He now becomes angry with himself for his reduced ability and does not like having to ask his sons for assistance with tasks that require using his wrist, such a changing a tire.

**37**  While he agreed in cross-examination that he has a van with a standard transmission that he is able to drive, he pointed out that the reason that he purchased it was that it cost only $600 and gives him something to drive himself when his wife needs to use their car. He had previously testified that using the gear shift in the van caused him pain to his wrist.

**38**  He also agreed that he still does some yard work and gardening, but said that it is now more difficult, as is trying to use his left hand to carry out tasks even though he is right-hand dominant. Using a wrist brace helps with some activities, such as pushing a lawnmower. It is hard to work with the brace though, because it makes the hand immobile He has looked into the possibility of buying one that would not cause that problem, which he understands would cost $700.

**39**  In their evidence both Andreas and Peter confirmed the difficulties that their father now experiences with tasks that were formerly within his capabilities and the significant impact that this has had on his sense of self-worth and his overall happiness.

**40**  Mr. Ackermann underwent functional capacity evaluations by two occupational therapists: Dana Hornibrook on his behalf in 2012 and 2015 and Alisha Morris on behalf of the defendants in 2015.

**41**  As Ms. Morris pointed out, there is general agreement in their opinions. The only meaningful differences are that she suggests some additional adaptations and modifications that could be made to increase his tolerance for lifting and carrying, the use of a pre-fabricated[**10**](#Forward_fnref_fnr-10) brace to stabilize his right wrist, and using his left hand and arm for carrying.

**42**  It is common ground between them that Mr. Ackermann is not able to perform some of the essential functions of a tile setter because of his injury. He is suitable for employment only in the "sedentary" and "light strength" categories, which will avoid placing strain on his wrist that will increase his pain. As Ms. Morris pointed out, although he can lift items in the light to medium range using his right arm, this is on a rare basis and he should usually remain in the sedentary level with respect to that arm.

**43**  At one point during the functional capacity testing Mr. Ackermann experienced an elevated heart rate and felt unwell. The defendants' counsel referred to this as a potential indication that his health apart from the injury was not as robust as he maintained.

**d. Pre-accident Earnings**

**44**  Andreas Ackermann handled the financial affairs of Ackermann Installations. The thrust of his evidence was that he and his father, who divided the profits equally, received substantially more income from the business than their declared income for tax purposes. Andreas also prepared his father's personal tax returns. He said that he never discussed with his father how he completed the returns; they only discussed the final amounts

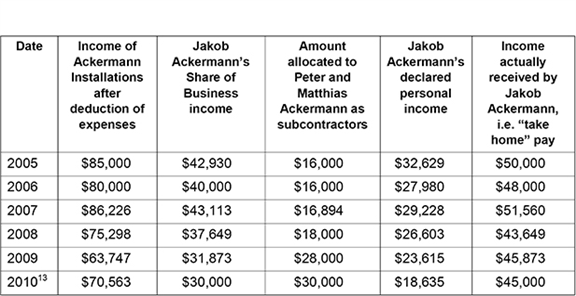
**45**  In addition to the usual deductions available to businesses, a key additional means of reducing their income for tax purposes was based on the wages that they notionally paid to Andreas' brothers Peter and Matthias for their part-time help whenever they were not in school. Andreas was able to legitimately include payments to them under the cost of "subcontractors" even though those amounts did not actually get paid to them, because they lived at home and the money generated by the business was all received and shared as a family.

**46**  Besides his usual work during school breaks, Peter said that in either 2009-10 or 2010-11 (he could not recall which) he took the entire year off of university to assist when the business got a large contract for strata homes. In terms of his role in the business he described himself as being "right beside my dad and Andreas laying tiles." In his view Matthias did "very minimal work[**11**](#Forward_fnref_fnr-11)."

**47**  Andreas agreed in cross-examination that Peter did "almost everything we did". He thought that over the whole time that Peter was with them he did 10% of the work. By the end he guessed it was "maybe 20%". He had some difficulty estimating what a replacement wage for Peter's work would have been, ultimately arriving at a range of $22-$25 per hour. He said that Matthias, who worked only on school breaks, did various ancillary tasks but not the actual tile installation. He would have had to pay someone about $10 an hour to replace that work.

**48**  Andreas confirmed in cross-examination that "write-offs" (that is, tax deductions) were taken on the business' vehicles each year, with new vehicles being purchased when that amount reached zero. Other equipment had to be purchased and intermittently replaced to carry on the business as well. An example given was their wet saws, which cost $3,000 each. Three of them had to be purchased during the six years between the start of the business and the accident. He agreed that he had also submitted his various receipts for usual business expenses such as gas, oil, repairs, insurance and maintenance to their accountant, for the purposes of calculating their taxes.

**49**  Based on his review of the business' and his father's tax returns, Andreas testified about his father's actual income vs. the amounts he declared for the years between the start of the company and the accident[**12**](#Forward_fnref_fnr-12):



[Editor's Note: Note[**13**](#Forward_fnref_fnr-13) is included in the image above]

**50**  Mr. Ackermann's income in his tax returns from 2011 onward conforms to his description of being unable to work following the accident. He had a taxable income of $1,449 in 2011, zero in 2012 and, once he became eligible for a CPP disability pension, $11,501 in 2013 and $6,681 in 2014, the last year for which returns were provided.

**51**  In the year following the accident Andreas hired a subcontractor to do the work that his father was now unable to do. He paid that subcontractor about $45,000 for the year. When that person had to leave the country his replacement proved, after a short period, to be unsuitable. Andreas was not able to do as much work and had to give up some jobs. (Peter described his father as being three times as fast a worker as a subcontractor whom they had hired previously to cope with a large influx of work.) Eventually Andreas realized that his father was not going to be able to return and so he carried on the tile-setting business on his own, doing the actual work himself.

**52**  There was also some evidence directed towards the capacity of the business before the accident and its potential for future growth.

**53**  Mr. Ackermann said that they usually worked Monday to Friday, eight hours per day, more if the specific job required it, and occasionally on Saturdays. He confirmed in cross-examination that they were busy from 2007 to 2011, except for a predictable slowdown in the larger jobs during January and February each year. He took a trip to Germany during this period in 2010. At times they were busy enough to require them to hire outside help. Andreas agreed that they used subcontractors for the bigger jobs.

**54**  Peter said that while some seasons were busier than others, there was no lack of work and that they could have worked "day and night" if they wanted to.

**55**  In Andreas' view if the accident had not occurred nothing would have prevented the business from growing, using a larger crew. He said that his father was always "driving him to hire more guys". He believed that they would have had to "find out how to market" their business, I infer to reach a greater number of potential customers. Mr. Ackermann's own evidence is that he did not "know" about that aspect of the business, which was entirely handled by Andreas, and that he himself was only the worker.

**56**  As a means of illustrating the lost potential earnings as a result of the accident, Andreas explained that in contrast to the rate of $3 per square foot that he and his father originally charged for the tiles, he is now able to charge $7 generally and $9 for walls. The rate that he and his father charged for labour was in the range of $50 per hour and he is now able to charge $65, although he charges less if he does a large number of hours on a job. In general he is getting better jobs, involving high-end houses, and is able to earn more money than previously. He could take on more work if he wanted to.

**57**  Jason Breares, a builder of high-end homes in Kelowna, described the Ackermanns' work as "phenomenal." He began using them in 2009 and said that he would have had a lot of work for them since 2011 if the accident had not occurred. Andreas now works almost exclusively for him and he is also very pleased with Andreas' work. It is rare that Andreas has anyone else to assist him in those jobs.

**58**  Harold Wellwood, the owner of a local flooring business, also praised the quality of the Ackermanns' work before the accident and said that he gave them higher-end, complicated jobs that required their particular skill set and ability to work as a team.

**59**  Darren Benning, an economist who provided an expert report for Mr. Ackermann, calculated his past wage loss, based the yearly earnings of an average tile setter in British Columbia, as $215,731. At an average annual income of $48,000 in 2013 dollars, it would be $197,559[**14**](#Forward_fnref_fnr-14).

**60**  Douglas Hildebrand, an economist who provided an expert report for the defendants, used Mr. Ackermann's declared income, which averages $26,175 per year from 2006 to 2010. Using that figure results in a past income loss of $122,785.

**61**  Both economists deducted from their projections the taxes that would have been payable on such earnings, as required by s. 95 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*.

**e. Future Work Plans**

**62**  Mr. Ackermann testified that he had no plans or savings for retirement and that he intended to keep working "as long as I live." His father had worked until he was 73, when he fell off of scaffolding and became disabled. Mr. Ackermann envisioned a similar or greater degree of longevity for himself. His evidence and that of his sons maintained the consistent theme that working was central to his self-image and that being in the workplace brought him a significant degree of happiness.

**63**  In an effort to counterbalance this optimistic projection, the defendants' counsel brought out on cross-examination the physical rigours of tile setting, which include carrying heavy items and spending a considerable portion of the work day on one's knees and bending over.

**64**  As in the case of past income loss, Mr. Benning provided projections for future earnings if the accident had not occurred, based on both the average wage of a tile setter and the $48,000 per year that can be deduced as Mr. Ackermann's actual pre-accident earnings in 2013 dollars. He then provided two options: full-time work until 75 (average: $569,723; actual: $559,388) or full-time work until 65 followed by part-time work until 75 (average: $411,491; actual: $404,550).

**65**  Mr. Hildebrand's projections were once again based on the much lower figure of Mr. Ackermann's declared income. He provided the options of full-time work until retirement at 65 ($130,041), full-time work until retirement at 70 ($230,897) and full-time until 65 and then part-time until 70 ($180,469).

**66**  He had several critical comments about Mr. Benning's projections. First, Mr. Benning did not include any contingency for Mr. Ackermann having to work part-time involuntarily before age 65 due to unforeseen factors. In addition, Mr. Benning did not include the decline in average earnings for tile setters between 60 and 65 (to only $24,000 per year) and did not take into account the fact that there are actually no statistics showing any tile setters working at all after the age of 65.

**f. Language Ability**

**67**  As I mentioned in the overview of Mr. Ackermann's pre-accident life, since coming to Canada he has confined his social contacts to German and Russian-speaking people in Kelowna. He attends a service in German at his church. He stays for the English service that follows and is able to understand about 30% of it. The text is displayed on a screen and he can get the gist of it, looking it up in his German bible.

**68**  As I also mentioned, his use of English in the workplace was extremely basic -- confined to things like "How are you?", "Good morning" and similar kinds of small talk. His lack of understanding has led to misunderstandings with other workers at the site.

**69**  He started to learn English in 2013. After the accident he hoped to eventually be able to go back to tile setting. When he realized that was not going to happen he was in despair, and a friend suggested that he take English training.

**70**  As of the trial dates he was attending English classes at the Ki-Low-Na Friendship Society. He attends Monday to Friday from 9:00 a.m. to 12:30 p.m. At first he found this training very difficult because he had never really learned to study, other than in his German classes when he immigrated to Germany from Russia. However, he believes that the classes are helping and he is finding it much easier to understand his teacher. However, he feels "very inexperienced" when he is speaking English to others, because he is not used to how they speak.

**71**  In cross-examination he explained that now that he has had some English training, he can ask simple questions in stores. When it was put to him that he had told his current employment counsellor that he can understand 50% of what he reads in newspapers, he explained that he can understand 50% of the advertisements in the local newspaper, which have photographs attached. They read newspaper articles and other texts at school and sometimes he can understand up to 80% of them. This includes the process of underlining and looking up words that he does not immediately understand. He clarified that the 80% applies to what he described as "Level 1" (I infer, the most basic) material.

**72**  As other examples of his level of proficiency he said that the dialogue in English movies is too fast for him, and when he talks to his neighbour he is confined to commenting on the weather.

**73**  Peter confirmed his father's "virtually non-existent" English ability at the time of the accident and characterized him as living within "a German bubble" in the Kelowna area, including the German-speaking subcontractors they hired for tile setting. He said that even in German and Russian his father is a quiet person who would rather listen than speak -- language "was never his forte".

**74**  According to Peter, his father's progress in English has been slow. When the conversations deal with things he is used to (such as taking an order on the phone to buy eggs from the family chickens) he can understand and express himself in "limited ways". If strangers deviate from subjects that he is accustomed to he understands "maybe 20-30%". If they talk too fast he just "blanks out".

**75**  Similarly, Andreas described his father's pre-accident English as "very bad" and said that he was unable to talk to the neighbours. He did not comment on his father's progress since he began taking language classes.

**76**  Alana Turigan is the co-ordinator of Language Services for Newcomers to Canada (LINC) at the Ki-Low-Na Friendship Society, where Mr. Ackermann takes his English classes. She has more than 20 years' experience teaching English as a second language and is a certified assessor of the Canadian Language Benchmarks (CLB), an accepted measure of determining proficiency in English. The areas of proficiency that it measures are listening, speaking, reading and writing.

**77**  The LINC classes teach the same proficiencies as are captured by the CLB system, but they use a slightly different numbering system for the various levels. The highest level that a student can achieve is CLB 8.

**78**  Ms. Turigan testified that since beginning his classes in February 2013, Mr. Ackermann had progressed, according to a test that was administered just before trial, to be eligible for classes LINC Level 5/CLB Level 4. This level was full when she testified but she said that he can be put on a waiting list for it. She hoped to get him in before June of 2016, but if not then in September. She agreed that to that extent his progress had "stagnated" due to the space restrictions.

**79**  To progress to each new level, the student has to be able to meet 60% of the criteria for it. The student spends the rest of their time at that level mastering the remaining 40%. The average student takes about a year to do that.

**80**  Given that he started in 2013, Ms. Turigan initially described Mr. Ackermann as "about average" in his progress. His attendance has been excellent and she agreed with the suggestion that he works hard and wants to learn English. She also agreed that older students do not fare as well in this language training and that students with higher levels of education will progress more quickly through it.

**81**  In his cross-examination Mr. Ackermann's counsel drew Ms. Turigan's attention to an apparent slowing of Mr. Ackermann's progress through the levels, in particular the one and a half years that he spent at LINC Level 4 before his recent progress. She agreed that it appeared that he had "plateaued" during that period.

**82**  Ms. Turigan said that to be "comfortable" in a customer service job a person would have to be at a Level 6. It would be "a struggle" to do such a job at Mr. Ackermann's current level. People at that level tend to do manual labour, kitchen work and other jobs that require very little public contact and no detailed instructions.

**g. Prospects and Efforts to Obtain New Employment**

**83**  Since the accident Mr. Ackermann has had assistance in finding new types of work that he would be capable of doing.

**84**  He saw Bruce Waldie, an employment counsellor, starting in November of 2012. Mr. Waldie met with him six to eight times, with the goal of preparing him to seek work. The preparation consisted of things like help with preparing a resume and tips for presenting himself in job interviews. He observed that Mr. Ackermann's English was poor and initially he made some inquiries with potential employers in the Russian and German communities on his behalf, without success. Potential jobs that his research suggested might be suitable for Mr. Ackermann were delivery driver, lot attendant, car jockey and ticket taker. When it was suggested in cross-examination that this type of work earns in the $30,000 per year range he said "that sounds about right". He ultimately concluded that language proficiency was Mr. Ackermann's main barrier to employment and that overall he "benefitted little" from their contact because of that barrier.

**85**  Stevie Wright, a job search specialist at a different agency, began meeting with Mr. Ackermann in January of 2016. She reviewed the results of his work with Bruce Waldie and decided to take a non-traditional approach -- trying to secure a volunteer work placement for him first, to assist him in eventually returning to paid employment. She made inquiries of 23 employers, without success. Those businesses that had tasks that he could perform did not have sufficient work available.

**86**  Having no success with volunteer positions in workplaces, she decided to try to obtain Mr. Ackermann a volunteer position in the community. As of the time she testified she had put forward applications at the Kelowna Hospital. By that point she had used up almost all of the hours of assistance that she had been authorized to provide him and had requested funding for an additional 40 hours. She agreed with the suggestion in cross-examination that this is not a situation in which he has no chance of becoming employed.

**87**  Like Mr. Waldie, Ms. Wright identified Mr. Ackermann's limited English skills as a barrier to employment, along with the level of his education and computer skills and the fact that he has done only labour-based jobs in his career. In cross-examination she declined to offer an opinion on whether his English skills were sufficient for him to work as a delivery driver or security guard, citing her lack of expertise in language assessment. She did agree that only one of the 23 employers whom she contacted had referred to communication as a barrier to taking him on and that she was able to communicate with him sufficiently to carry out her role.

**88**  She described the labour market in Kelowna as being quite competitive. Even candidates with no functional difficulties have problems finding work.

**89**  Niall Trainor, a vocational rehabilitation consultant, prepared an expert report on Mr. Ackermann's employment prospects in November 2012, which was based in part on an interview with Mr. Ackermann. There was a follow-up report in January 2016 that was based only on the material submitted to him.

**90**  In view of Mr. Ackermann's wrist injury Mr. Trainor felt that "his vocational rehabilitation will likely be a function of his capacity to learn the English language." The limited progress with English that he had made since arriving in Canada, meant that Mr. Trainor was not optimistic that he could make the substantial gains needed to access employment. While acquiring sufficient English would allow him to do jobs such as security guard or driver, he would likely still require a sympathetic employer, who would be willing to hire him in spite of his age, functional limitations, lack of experience in the position and lack of recent employment of any kind. While a return to the labour force was possible with "extensive rehabilitation", the more likely outcome in a case of this kind is "ongoing unemployment or under-employment."

**91**  Mr. Trainor recommended English as second language training (ESL) (which Mr. Ackermann had not yet started at that point) including informal discussion groups for ESL students that were offered by a local intercultural society, as well as a vocational case manager for assistance with Mr. Ackermann's job search.

**92**  By the time of his follow-up report, Mr. Ackermann had seen Mr. Waldie (but apparently had not yet begun seeing Ms. Wright). Mr. Trainor expressed the opinion that it was premature to have sent him for that kind of assistance before he had completed literacy training to a functional level, or at least to his maximum level of improvement.

**93**  At this point, except for his unsuccessful attempt to return to tile setting, Mr. Ackermann had not worked for almost five years. Such a hiatus, in combination with his other barriers "usually prefigures a poor vocational prognosis." This reflected his previous reliance on his physical abilities, the limited progress of his language training and the preference of employers "for able-bodied workers with recent, relevant work experience." While it was possible that Mr. Ackermann could find "non-competitive" work with a sympathetic employer in one of the roles that Mr. Trainor had previously identified, "the more probable outcome is ongoing unemployment." He said that such sympathetic employers "are out there, we just have to find them."

**94**  Dr. Dean Powers, the expert vocational consultant who provided reports on behalf of the defendants, arrived at a more optimistic view of Mr. Ackermann's prospects. His reports, prepared in October 2015 and February 2016, were both based only on his review of the material that had been submitted to him.

**95**  Taking into account Mr. Ackermann's background, both the barriers to employment that he faces and his pre-accident work experience, his opinion was that Mr. Ackermann could consider applying for jobs as a locksmith and key copier, a courier/delivery driver or a flooring advisor. Vocational counselling assistance should be provided to him in this process.

**96**  Dr. Powers conducted a job search in Mr. Ackermann's immediate labour market area and found "numerous" companies to which an application would likely be successful, especially with vocational support. Such positions would have starting wages in the $13-$15/hour range, and could last until age 67 "and potentially beyond".

**97**  In making these recommendations, Dr. Powers assumed that Mr. Ackermann "must obviously have a reasonable command of English after 11 years of residency".

**98**  In his follow up report Mr. Trainor had taken issue with several of these points. He described Dr. Powers' assumption about Mr. Ackermann's language proficiency as "purely speculative", and emphasized that his existing English would not equip him to function independently in customer service roles, although he could likely carry out some routine delivery tasks. He said that Mr. Ackermann cannot cope with the customer service requirements of being a key cutter because of his English level. The same is true of being a flooring advisor, to which Mr. Trainor added the further deficiency of having no previous work experience. And being a locksmith would require use of his wrist at a level that is too intensive for his injury.

**99**  In his second report, Dr. Powers sought to justify his initial positions. On the language issue, he pointed to Mr. Ackermann's recent attainment of Level 4 of LINC and reiterated his opinion that proficiency at that level is "sufficient" for the jobs that he has identified. He pointed out that Mr. Ackermann has previous work experience as a locksmith and "would be using his hands interchangeably". With respect to the flooring advisor position, he suggested that Mr. Ackermann's skills as a tile setter and painter would be "valued" at the time of hire by companies such as Home Depot, although some accommodation with respect to language "may be expected". With respect to the broader issue of "non-competitive" employment and the need for accommodation raised by Mr. Trainor, he agreed that such accommodation would be "advantageous" and said that it could be arranged in the private sector as part of the vocational assistance that is provided.

**100**  In cross-examination Dr. Powers agreed that in addition to not having had a chance to interview Mr. Ackermann, he also did not have the opportunity to speak to Mr. Waldie, Ms. Wright or anyone involved in his English training. Although he has province-wide expertise, he is not based in the Okanagan, as Mr. Trainor is.

**101**  He agreed that additional relevant factors on the question of employability are Mr. Ackermann's age, disability, level of previous education and the time that he has now spent out of the workforce.

**102**  If it ends up taking Mr. Ackermann seven to nine years to get his English skills to a level that he can gain employment, Dr. Powers said that he would need "good, skilled" vocational rehabilitation to assist him to get a job. On the question of vocational assistance, he thought that Mr. Ackermann would have benefitted from a lot more support than he received from Mr. Waldie, but he was not familiar with Ms. Wright or her involvement.

**103**  He believed that 25-30 hours of further vocational support would be needed to get Mr. Ackermann to a first job placement.

**104**  In re-examination he clarified that he has previously placed clients with language or educational shortcomings or physical disabilities successfully in jobs.

**3. DISCUSSION**

**a. Contributory *Negligence***

**105**  The defendants' counsel submits that Mr. Ackermann should be assigned at least 25% fault because of his failure to wear a seatbelt.

**106**  First of all, he says that Mr. Ackermann's claim not to have been able to wear it for medical reasons should be rejected. None of his treating physicians told him after his surgery that he did not need to do so; he wore it when driving his own vehicle before the accident and he wore it on the way out to Salmon Arm, at Ms. Martens' insistence. Not wearing it was also contrary to his son Peter's observations of his usual behaviour, to the extent that Peter expressed surprise at what had happened in this instance.

**107**  The defendants' counsel further argues that whatever his excuse might have been, if Mr. Ackermann could not wear a seatbelt without adverse effects he should not have gone on the trip at all. It required travelling a long distance in poor weather and road conditions, for the non-essential purpose of receiving a massage for a minor shoulder problem. Compounding the risks of this situation, he chose to sit in the middle of the rear seat, which I gather I am being asked to find would have rendered him more susceptible to moving around within the vehicle in the event of an accident.

**108**  On the question of what role wearing his seatbelt could have played in preventing Mr. Ackermann's injuries, the defendants' counsel submits that, despite the subjective impressions of the occupants, this was not such an extreme collision that wearing it would have been rendered useless. It was a side-swipe rather than head on collision; there was no major intrusion into the cabin area, and none where Mr. Ackermann was sitting; the occupants were able to leave the truck themselves; and Mr. Ackermann's other injuries were minor and healed soon after.

**109**  In particular, the defendants resist the suggestion that proof of the ability of the seatbelt to prevent or reduce the injury that he suffered required expert evidence on their part. Their counsel cites decisions in which findings that the plaintiff striking the dashboard, steering wheel or windshield could have been prevented by a seatbelt have been made on the basic of straightforward inferences from the proven facts, informed by common sense, even in the face of expert evidence to the contrary (see: *Lakhani v. Samson*, [*[1982] B.C.J. No. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G0X8-00000-00&context=) (S.C.) at para. 3; *Aujla v. Christensen*, [*[1992] B.C.J. No. 860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B16W-00000-00&context=) (S.C.) at paras. 14-15; *Mosimann v. Guliker*, [*2014 BCSC 492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61WP-00000-00&context=) at paras. 28-32). For example, in *Mosimann* the trial judge concluded:

[28] ...According to Craig Lukar, a professional engineer who gave an opinion to the court, however, the plaintiff would have suffered her facial injuries in any event, that is, even she had been wearing seatbelt.

...

[30] ...I am not substituting my own interpretation of the evidence for that of Mr. Lukar. I am simply saying that despite his qualifications, Mr. Lukar was not able to satisfy me that what he described displaced the inference the court might have drawn without assistance. His suggestions were simply unconvincing.

...

[32] Sometimes experts state the obvious, in which case they are superfluous. Sometimes they do not. On those occasions, it is up to the trier of fact to decide whether the inference the expert invited has the authoritative force of training or experience, or whether it is just not helpful. Having done my best to assess Mr. Lukar's surprising conclusion - that failure to wear a lap belt would have made no difference in this face-hit-the-dashboard collision - I am simply unable to say that I am persuaded that that is the correct inference.

**110**  In response, Mr. Ackermann's counsel points out that the urologist's opinion, although it was given after the accident, provides a medical justification for the decision not to wear the seatbelt. An analogy is drawn to the justification of a pregnant woman not wearing her seatbelt to protect the unborn child. In addition, I am urged to find that the Martens' original statements to the adjusters reflected their awareness of Mr. Ackermann's medical justification at the time of the trip[**15**](#Forward_fnref_fnr-15), despite their efforts to resile from those statements in their testimony. His counsel submits that I should take a dim view of their credibility in light of these efforts, which he says were made in the interests of upholding Ms. Martens' own personal injury claim.

**111**  More importantly, Mr. Ackermann's counsel stresses the burden on the defendants to prove on a balance of probabilities that his use of a seatbelt could have prevented his wrist injury or reduced its severity: *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. 24.

**112**  Although there are obvious situations, as in the cases cited by the defendants, in which inferences and common sense have led to that finding, it is clear that such an approach will be inappropriate when multiple inferences about how the injuries were caused are available, or where the finding would be speculative. As the extensive canvass of previous cases in *Schenker v. Scott*, [*2013 BCSC 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2F4-00000-00&context=), varied on other grounds [*2014 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2PW-00000-00&context=) demonstrates, defendants have failed to meet their burden even when there was expert evidence, if it could not address the specific question of the relationship between seatbelt use and the plaintiff's actual injury.

**113**  This requirement of evidence on the specific issue was addressed in *Terracciano (Guardian ad litem of) v. Etheridge* [*(1997), 33 B.C.L.R. (3d) 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B16X-00000-00&context=) (S.C.):

[64] This opinion, the only evidence directly on the issue, is of a general nature and essentially unhelpful in resolving the factual issue in this case. It states no more than what most well-read individuals know, that if one is belted, one will not sustain injury from ejection. It does not assist in showing, in this case, whether the injuries were sustained inside the vehicle or as a result of ejection from the vehicle. In the event the injuries were sustained inside the vehicle by, for example, contact with the roof, it is possible a seat belt would not have prevented or lessened the injuries. If, on the other hand, the injuries were sustained as a result of ejection, then failure to wear a seat belt is likely causative, in part at least, of the injuries.

[65] ...The defendants refer to common sense. However, common sense tells one that a wedge compression fracture may occur inside a small vehicle, even with lap belt restraint, or on landing outside the vehicle. So too, a head injury may occur inside or outside the vehicle.

...

[67] Counsel for the defendants relied upon [*Lakhani* and two other decisions in which contributory ***negligence*** had been found based on lack of seatbelt use]. However, in all three cases there was evidence before the Court of the likely mechanism of the accident and a connection to the failure to wear a seat belt. Such is not the case here.

[Emphasis added.]

**114**  Another illustration of the correct analysis is said to be found in *Naidu (Guardian ad litem of) v. Welter*, [*[1995] B.C.J. No. 2176*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1Y0-00000-00&context=) (S.C.):

21 ...The Court of Appeal has acknowledged: "There may be cases where common sense leads to the conclusion that injuries were more severe because of the failure to wear or use some restraining device ..." (*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=) at 151 per Hollinrake J.A.), but generally evidence must show "... that the particular injuries suffered by the plaintiff would have been prevented or their severity lessened had the seat belt been properly operating." (*Hooiveld v. Van Biert* [*(1993), 36 B.C.A.C. 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B106-00000-00&context=) at 23).

22 In this case there was no medical evidence that the injuries complained of, which were essentially neck and referred shoulder pain, were caused or made worse by Nancy Naidu head striking the windshield, so the question I must ask myself is whether this is one of those cases where common sense leads to that conclusion. I am unable to say that it does and, accordingly, I find that there was no contribution by Nancy Naidu to the injuries she complains of by reason of her failure to wear a seat belt.

[Emphasis added.]

**115**  Or, as the Court of Appeal reasoned in *Schenker*:

[42] At first sight it may seem obvious that Ms. Schenker was injured as a result of being ejected from the van and that her seatbelt would have prevented her from being thrown from the vehicle. Indeed, Ms. Scott contends this is a matter of common sense.

[43] Ms. Scott's argument cannot succeed. There was no evidence that Ms. Schenker's injuries were the result of being ejected from the van. Ms. Schenker suffered compression fractures in her back from "axial loading", as forces were transmitted along her vertebrae. There is no way to know when, in the course of the accident, those injuries occurred. They may have occurred as the van careened down the embankment or when it hit Main Street below the embankment. Had Ms. Schenker been restrained in the passenger seat, she may still have been subject to the axial loading that caused the injuries. Furthermore, if she was restrained by a seatbelt, she may have been as seriously injured when the van came to rest with its passenger side embedded in the ground. Given the mechanics of this accident and the nature of the injuries suffered, this is not a case where a seatbelt defence could be made out by relying on common sense inferences.

[Emphasis added.]

**116**  In addition to the absence of evidence from the defendants to meet their burden on this point, Mr. Ackermann's counsel points to the fact that Mr. and Ms. Martens also suffered reasonably serious injuries in the accident, despite having been properly restrained, as a further indication that failure to wear the seatbelt cannot safely be found as a causative factor.

**117**  First of all, I cannot find any valid medical justification for Mr. Ackermann failing to wear his seatbelt. He could not clearly recall or articulate that supposed justification in his evidence, whether it was his frequency of urination or some other cause. In particular he could not link his motivations to the subsequent opinion offered by Dr. Carter.

**118**  I am also satisfied that he did not communicate this condition to the Martens at the time of the trip. They refused to adopt during cross-examination the portion of their statements to the adjusters that implied that they were aware at that time, and quite straightforwardly admitted that it was not true. Certainly their willingness to provide information that was at best misleading in terms of its chronology (Mr. Martens also added the detail that Mr. Ackermann "crouch[ed] to the right" to his statement based on what Mr. Ackermann told him, even though he had not seen it), and the existence of Ms. Martens' lawsuit against Mr. Ackermann, dictate caution when assessing their evidence. But Ms. Martens' description of the discussion with Mr. Ackermann that led them to put the seatbelt explanation in their statements seemed to me like an unforced narration of actual events. Significantly, she included her husband being motivated by worry about his own liability as the driver, rather than putting all of the responsibility on Mr. Ackermann. And I think it would have been illogical for her to direct Mr. Ackermann to wear the seatbelt, an aspect of her testimony that was not challenged and for which she endured some criticism from her husband, if the explicit medical excuse that they mentioned in their statements had really been given by him.

**119**  I noted an absence of any hostility from either of them towards Mr. Ackermann, and an overall quite guileless approach to the giving of their testimony.

**120**  I would not put any weight on the fact that Mr. Ackermann seems to have worn a seatbelt in his own post-surgery driving however. He explained that in a satisfactory way by reference to the beeping of the safety equipment in his car if he did not wear it and the short duration of the trips he took. His son Peter's previous observations and surprise about his failure to wear the seatbelt on this trip in light of those observations are not of much help either, since the questions posed to Peter did not deal specifically with the post-surgery period, and it was not disputed that this was Mr. Ackermann's first lengthy trip since the surgery.

**121**  As to the relationship between the lack of seatbelt use and Mr. Ackermann's particular injuries, I think that the arguments of the parties on this issue are really reflecting different aspects of the same governing principle. Where the mechanism of injury and its link to the lack of restraint of the plaintiff within the vehicle is obvious, as in the cases relied on by the defendants, it will be possible to draw the clear factual inference that presents itself, without requiring the assistance of an expert opinion. Where the dynamics of the accident are more complex and the source of the plaintiff's injuries within the sequence of events is less clear, the causative role of their failure to wear the seatbelt may not be a finding that can be made solely on the basis of common sense. In certain situations, like *Terracciano*, even expert evidence may not be specific enough to meet the defendants' onus.

**122**  I feel comfortable finding on the basis of the current evidence that Mr. Ackermann would not have ended up in the front passenger seat with Ms. Martens if he had been wearing his seatbelt. Where I conclude that the defendants fall short is my ability to be satisfied on a balance of probabilities that his wrist injury would not have occurred, or not been as severe. We do not know, because Mr. Ackermann could not describe it, where in the course of the accident his wrist was injured. We know, because it was Ms. Martens' evidence and the basis of her injury claim, that some part of his body struck her shoulder, but no specific probable mechanism of injury to him emerges. And balanced against the theory that it occurred due to his ejection from his position is his evidence that he bent down and covered his head before impact, which adds a reasonable possibility that his wrist was injured when he was still in a position to which a seatbelt would have confined him. I think a resolution of this question to the required standard would have required some evidence of the post-accident dynamics of a person in Mr. Ackermann's location and bodily position, with and without the seatbelt, and an attempt to link his wrist injury with his likely route of travel to his resting position.

**123**  On the current evidence I conclude that the defendants have not met their burden and I am therefore unable to attribute fault to Mr. Ackermann for his injuries to any degree.

**b. Non-pecuniary Damages**

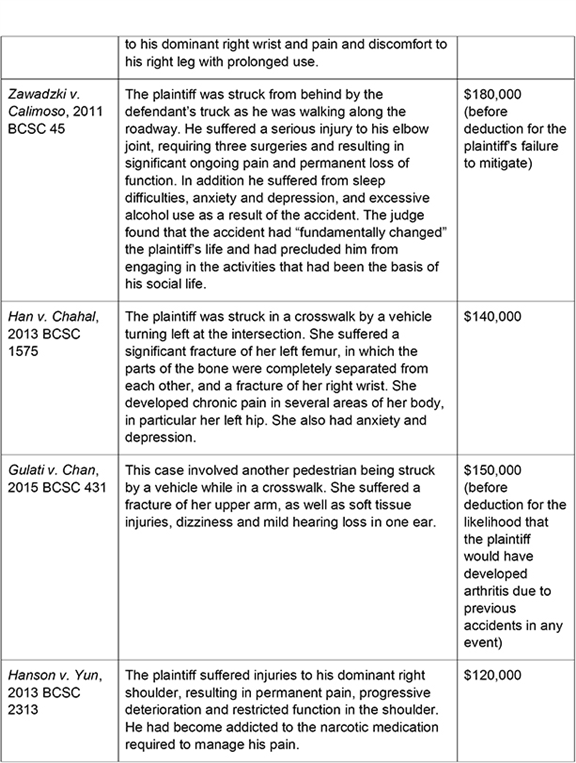
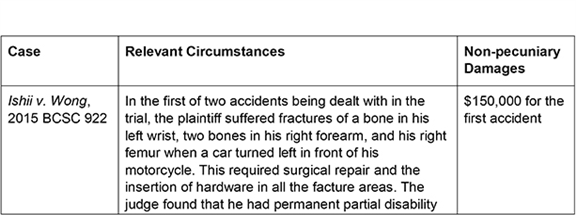
**124**  The principles that should guide an award under this heading are not controversial.

**125**  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.

**126**  Among the factors that can influence the amount of the award are the age of the plaintiff, the nature of the injury, the severity and duration of the pain, and the degree of disability, emotional suffering and impairment of life experienced by the plaintiff, including impairment of their important relationships and lifestyle pursuits: *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.

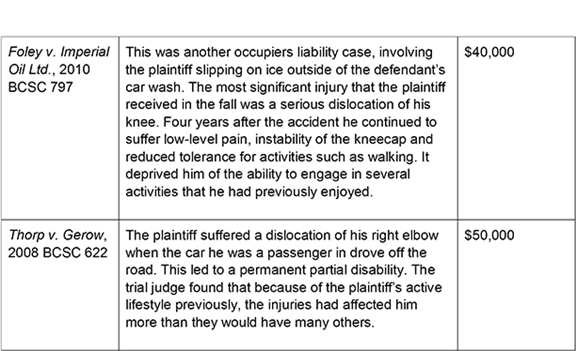
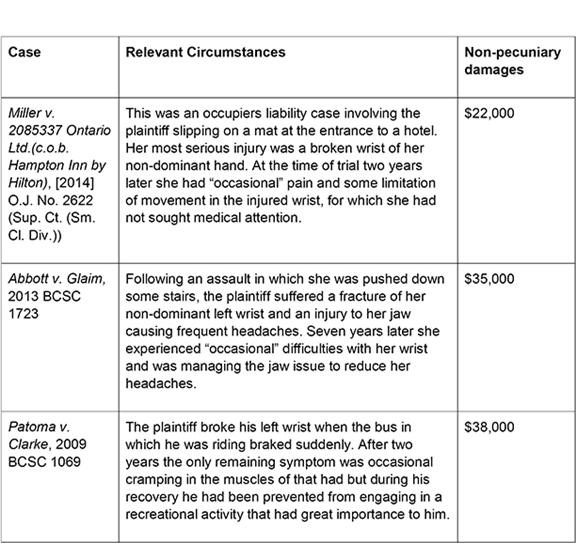
**127**  The amount of the award is driven by what is required to ameliorate the condition of plaintiff in their particular situation, and their need for solace may not necessarily correlate with the seriousness of their injury. Because of this need to recognize the specific circumstances, there can be no general "tariff" of awards: *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. Nevertheless, other decisions dealing with similar circumstances can serve as a guide in arriving at an award that is just and fair to both parties: *Kuskis v. Hon Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) at paras. 135-136.

**128**  Mr. Ackermann's counsel characterizes him as having "a lifelong severe injury with resulting disability". This has led to the loss of his sense of self-worth, as a result of his inability to do a job in which he took pride or to engage in many of the home-related tasks and family activities that used to give him pleasure. As a result, his counsel seeks an award of $150,000 under this heading, relying on the following recent decisions to justify that figure:



**129**  The defendants' submission is that while Mr. Ackermann's injury has certainly affected his life, it has not done so to a degree that justifies a "significant" award of general damages. As their counsel put it, Mr. Ackermann "still has significant use of his wrist, and while there are limitations, he is still able to work around the house, spend time with family and visit friends." Therefore he submits that an appropriate award should not exceed $50,000.

**130**  The decisions offered by the defendants' counsel in support of this position are:



**131**  As can be seen, these two ranges of cases are quite polarized. In general the cases offered on Mr. Ackermann's behalf involve more numerous or serious injuries, or more serious after-effects and impact on the plaintiffs' functioning. Conversely, most of the defendants' cases do not feature as significant a duration or extent of impairment as he has suffered, although the circumstances in *Foley* and *Thorp* do reflect fairly substantial interference with those plaintiffs' previous lifestyles.

**132**  I think that in this case Mr. Ackermann's circumstances demonstrate a meaningful requirement for solace, one that is greater than his physical injury might otherwise suggest. It was not contested that he was previously a person for whom the ability to interact physically with the world, and his identity as a "worker" in both his actual employment and his home life, were extremely important. The pain that is brought on by the use of his wrist is serious enough, but in my view a critical aggravating factor has been the comprehensive undermining of his sense of capability in the parts of his life that he otherwise found the most fulfilling. Even though he was rather stoic when giving his evidence, the overall sense he projected of someone who has been cut adrift from the previous fundamentals of his life was still palpable.

**133**  Taking care to distinguish these effects from the harm that has been caused to his earning capacity, which is of course to be dealt with separately, I conclude that an award of $90,000 under this heading is appropriate.

**c. Past Wage Loss**

**134**  Mr. Ackermann's counsel submits that an appropriate award for past wage loss should be calculated based on a figure that falls between his actual annual earnings before the accident (once one adds back some of the deductions that he was able to claim through the business) and the somewhat higher average wage for a tile setter identified by Mr. Benning. It is argued that his earnings in the absence of the accident would likely have been higher than they were before it occurred, as the business grew and he was no longer spending time on his home renovation. This calculation would lead to an award of $205,000.

**135**  The defendants' counsel challenges the income analysis that produced Mr. Ackermann's supposed actual income. First of all he says that the higher actual income that Andreas described during the pre-accident years failed to deduct their expenses for vehicles, capital cost allowance and home business expenses, which according to Andreas' evidence were actually incurred by the business during those years. Second, the departure of Peter and Matthias from part-time work to pursue their studies, which occurred before the accident, would have to have been replaced, at hourly wages of $20-$25 per hour for Peter and $10 per hour for Matthias. Thus, the level of subcontractor deductions shown in the pre-accident years would have continued, but would now actually have to have been paid to workers outside the family, thereby reducing the business' income. And to the extent that the average wage of a tile setter is a relevant consideration in identifying the amount of lost income, there is a conflict in the expert evidence called by Mr. Ackermann. Mr. Trainor gave an average annual income of $34,668 and Mr. Benning said that it exceeded $50,000.

**136**  In addition, the defendants' counsel questions whether there was actually any additional income-producing capacity in the business that would have been utilized if the accident had not occurred. The Ackermanns described themselves as being very busy before the accident and had already established their reputation for excellent work.

**137**  A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *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.

**138**  When assessing loss under this heading, past hypothetical events (that is, what a plaintiff would have earned but for the accident) are to be treated the same way as future hypothetical events -- they are to be given weight in accordance with their relative likelihood. They do not have to be proven on a balance of probabilities: *Gill v. Probert*, [*2001 BCCA 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63B0-00000-00&context=) at para. 9.

**139**  The generally accepted approach to assessment of claims for a loss of earning capacity is first to set the parameters of the claim by referring to statistical evidence with respect to the class of individuals to which the plaintiff belongs, and then to adjust the resulting preliminary measure of damages to take into account contingencies that are particular to the plaintiff: *Smith v. Fremlin*, [*2014 BCCA 253*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B12B-00000-00&context=) at para. 23.

**140**  The importance of an accurate understanding of Mr. Ackermann's actual pre-accident earnings is obvious. If they are as low as his reported income, as the defendants contend, then there is a good reason to adjust the average earnings of a person in his position significantly downward in order to avoid over-compensating him.

**141**  In resolving this issue it is important to note first that the credibility of Andreas' core assertion -- that the business deducted significant amounts as subcontractor expenses for Peter and Matthias that he and his father actually received themselves -- was not challenged. Nor were the specific yearly amounts that Andreas said they had attributed to his brothers.

**142**  The argument that other expenses, which Andreas agreed they incurred, would have reduced their claimed earnings stumbles on the fact that in the statements of business income for Ackermann Installations, those expenses were all deducted before reaching the figure that Mr. Ackermann claimed as his business income.

**143**  As to the effect in future years of the departure of Peter and Matthias from the business, no link was established in the evidence between their participation and the ability of the business to take on a particular number of jobs or earn a particular amount of income. For example, as Mr. Ackermann's counsel pointed out in his reply submissions, there was no increase in income during the year that Peter was working full-time. Andreas was clear that he needed to hire the subcontractor following the accident to replace his father's skill and labour. There was no suggestion that the operation of the business depended on replacing Peter and Matthias' contributions once they completed their schooling. The evidence suggests instead that this was seen by all concerned as a collective family endeavour, which they were expected to contribute to while they were available but which did not depend on their involvement for its ongoing capacity.

**144**  As a result, I think it is reasonable to add half of the amounts that Andreas said were deducted for Peter and Matthias each year to Mr. Ackermann's share of the business income to arrive at his actual income.

**145**  As to the earnings of the business in the absence of the accident, I am prepared to accept that Mr. Ackermann would also have reaped the benefits of the higher rates per square foot of tile laid and the higher hourly rates for labour that Andreas now receives. However, it is difficult to assign a very high probability to the business growing in the manner that Andreas envisioned in his evidence, which seems largely to reflect his own ambitions. The fact that he now mainly works alone tends to suggest that the business is actually highly dependent on the skill of the individual tile setter, and not readily expandable through the use of crews. Without knowing what his solo business now earns it is difficult to identify with any confidence what the true additive effect of his father's participation was to the capacity and profitability of their former business, other than the efficiency gained from his ability to go and set up the next job while his father was completing the current one, and his general comments that he could not do as much work without his father and had to give up some jobs. The division of labour in Ackermann Installations made sense, because his father would not have been able to interact with English-speaking customers sufficiently, but there is a realistic possibility that Andreas has now largely combined their two roles and not much additional earning capacity has been lost because of his father's injury.

**146**  All in all, I think that the figure proposed by Mr. Ackermann's counsel -- the mid-point between average tile setter earnings and the actual earnings as I have found them - - fairly reflects the rate increases that the business would certainly have commanded in the years since the accident (and which Andreas now enjoys in his own business) without indulging in speculation about business growth. Accordingly I will award $205,000 under this heading. The deductions required by the *Insurance (Vehicle) Act* were already included in the average and actual earnings that Mr. Benning calculated, so no further deduction from this award needs to be made.

**d. Future Earning Capacity**

**147**  As in the case of past income loss, Mr. Ackermann's counsel submits that an award for impairment of future income capacity should fall between the projections based on his actual income in the pre-accident years and those based on the average income of tile setters, on the basis that he would have worked full-time until 75. This would lead to an award of $560,000. His evidence clearly indicates that he would have worked "well into his 70s" like his father, so in his counsel's view that projection of earnings into his later years is appropriate.

**148**  His counsel also submits that it is doubtful that Mr. Ackermann has any residual capacity to earn income that would reduce the award. His current English skills are insufficient for any jobs involving customer service and it could be two to four more years before he reaches that level, according to Ms. Turigan. In addition to the significant barrier to his employment raised by his language ability, other barriers identified by the vocational witnesses who testified are his time out of the workforce, his age, his lack of education and computer skills, and the injury to his dominant hand.

**149**  Even Dr. Powers, whose more optimistic opinion I am urged to treat with caution, conceded that these barriers to employment exists and that in particular Mr. Ackermann's time off from working by the time his language skills reach an acceptable level will make his return difficult.

**150**  The defendants' counsel takes serious issue with these propositions.

**151**  On the length of Mr. Ackermann's remaining career as a tile setter if he had not been injured, the submission is that it is unrealistic to project that he will work to any extent as a tile setter until age 75, in view of the physically demanding nature of the work and the medical issues that exist independently of the wrist injury, such as his diabetes and high blood pressure. The only evidence in support of such a degree of longevity came from Mr. Ackermann and his sons' subjective impressions of his continuing health and strength. It is also noteworthy that there are no statistics showing anyone working as a tile setter at that advanced age.

**152**  On the question of what other employment Mr. Ackermann is capable of doing, the defendants' counsel sought first to emphasize the meaningful degree of right wrist function that he retains and the fact that the medical experts and the occupational therapists who evaluated his capacity concluded that he is capable of returning to positions that are sedentary or require only "light strength". He can use his left wrist for greater strength and could improve his functioning with his right hand with a wrist brace.

**153**  The defendants also stress the prospect of continuing improvement in Mr. Ackermann's language skills, which will increase the range of his job opportunities. They point to Dr. Powers' opinion that with employer accommodations and vocational rehabilitation he could earn $13-15 per hour. Such a job would completely replace the lost income from tile setting at Mr. Ackermann's declared income, and even a minimum wage job would contribute about $11,000 per year. Dr. Powers has previously found work for people with a similar range of challenges.

**154**  Their counsel pointed out that even Mr. Trainor, the expert in vocational rehabilitation called by Mr. Ackermann, conceded that if his English improved sufficiently he could, with a sympathetic employer, work as a security guard or driver (bus, truck or delivery).

**155**  The governing principles in this area are well known. They were concisely summarized 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=) (I have omitted the points that do not relate to our circumstances):

[24] As this Court noted 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...where a plaintiff ...claims a loss of earning capacity, the onus is on the plaintiff to prove that there is a substantial possibility of an event occurring, which will result in a loss of earnings:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward* [*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=)], by Bauman J. in *Chang* [*Chang v. Feng*, [*2008 BCSC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=)], and by Tysoe J.A. in *Romanchych* [*Romanchych v. Vallianatos*, [*2010 BCCA 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=)], that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok* [*Steenblok v. Fung* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (C.A.)], or a capital asset approach, as in *Brown* [*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.)]. 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* [*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=) (C.A.)] and *Romanchych*...

[Emphasis in original.]

**156**  There is no dispute that to the extent that Mr. Ackermann's earning capacity is dependent on his ability to work as a tile setter in the future it has effectively been extinguished by his injury. The evidence is clear that he cannot do that job. The important question is whether he retains the capacity to work in other fields and whether he can earn sufficient amounts that it can either be said that there is not a real and substantial possibility of a future event leading to an income loss, or that any such loss is much less serious than the level at which he seeks to quantify it.

**157**  I am satisfied that Mr. Ackermann's age, the pace at which he is mastering English, his level of education, his previous dependence on his physical capabilities and his time out of the workforce all combine to make placing him in any job a daunting task. In this regard I found Dr. Powers' opinions quite unrealistic. When his assumptions about how well Mr. Ackermann could speak English after being in Canada since 2004 proved unwarranted, he sought to shift his ground and maintain that Mr. Ackermann's current language proficiency level would allow him to have productive customer interactions in the jobs that were being proposed for him. I found Ms. Turigan's view that Mr. Ackermann's language skills would not currently permit him to engage in that kind of activity much more persuasive.

**158**  And even if Dr. Powers found Mr. Waldie's vocational rehabilitation efforts lacking, he was not in a position to address Ms. Wright's actual job searches on Mr. Ackermann's behalf, which failed to secure even a volunteer opportunity in any business setting. That struck me as the best evidence of the enormity of challenge that Mr. Ackermann actually faces. I find it hard to believe that she somehow overlooked the numerous promising local employers that Dr. Powers said he was able to identify.

**159**  I accept that Mr. Ackermann's prospects may improve if he is able to progress higher in the language levels. But that improvement in his attractiveness as an employee will be offset by the resulting increase in his time out of the workforce and his age, which were generally conceded to be detrimental factors.

**160**  I conclude that the possibility of Mr. Ackermann obtaining paid employment in the future is so low that his remaining earning capacity must be considered minor at best. If he does become employed I predict that at best he is looking at entry-level service-type jobs, with virtually no possibility of replacing his pre-accident income.

**161**  In this case we have reliable enough information about his past earnings to use that as the basis for quantifying his loss of capacity under this heading. Average tile setter wages decline to $24,000 per year for workers between 60 and 65 and as I have said there are no income statistics at all after that, so the average wages are no longer useful for setting a reasonable mid-point for any award, as they were for past income loss.

**162**  The question then becomes: how long a working life if that accident had not occurred should the award reflect? The length of Mr. Ackermann's father's working life obviously does not help me determine what his own physical capacity to continue as a tile setter likely would have been, since that is dependent on such a variety of factors, but it does shed light on his attitude towards work and its crucial role in his self-image, which are useful predictors of his intention to keep working. I accept his evidence that he had no retirement plan other than to keep working as a tile setter, and I am satisfied that he would have done so as long as he was physically capable of it. The evidence as a whole describes a person whose pre-accident life was really all about working. But even the strongest work ethic, which I am satisfied he has, cannot overcome the progressive effects of aging, and the defendants' counsel did a good job of establishing the physical demanding nature of tile setting, which I am satisfied that Mr. Ackermann would have had increasing difficulty carrying on at the same pace, even if he had kept at the job. In other words, I think that effective part-time work and earnings would have been forced on him eventually by diminishing capacity rather than by a wish to cut back. That may explain why Mr. Hildebrand's statistics did not include any tile setters in the higher age range. I foresee that this reduction would have occurred progressively, through a slowing in his productivity and a decline in the number of jobs he could take on, rather than by a conscious decision to work half-time at a fixed point.

**163**  I do not think that his current health problems, which are fairly common and appear to be well-managed, require any adjustment of this forecast. The evidence from his urologist was that his cancer was effectively dealt with. His elevated heart rate during functional testing was not linked to any medical evidence, so I cannot give it any weight as an indication of his health prospects. The usual statistical probability of disability or death in each year is already built into the economists' projections.

**164**  As is well-known, an award under this heading must be assessed rather than mathematically calculated (see *Uhrovic v. Masjhuri*, [*2008 BCCA 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2T7-00000-00&context=) at paras. 28-32), but it still needs to be realistically anchored in as much information about earnings as is available. To that end, I think it would be helpful to recall the future projections of each of the expert economists, on the earnings that they assumed:

Mr. Benning:

1. $48,000 per year in 2013 dollars, working full-time to age 65 and part-time from 65 to 75: $404,550;
2. $48,000 per year in 2013 dollars, working full-time to age 65: $559,388.

Mr. Hildebrand:

1. $26,175 per year, full-time to 65: $130,041;
2. $26,175 per year full-time to 70: $230,897;
3. $26,175 per year full-time to 65 and part-time from 65 to 70: $180,469.

**165**  I find that Mr. Benning's first scenario (working full-time to age 65 and part-time from 65 to 75) most closely matches the working life for Mr. Ackermann that would likely have occurred in the absence of the accident, except that I think that his earnings would have begun to decline at around age 65, rather than being reduced immediately by half, and then decreased gradually to zero, or close to it, by age 75. I think Mr. Benning's figure remains accurate however, since in the years between 65 and 75 he probably would have spent roughly equal amounts of time earning above and below the half-time figure as those earnings declined.

**166**  His minor remaining earning capacity justifies only a correspondingly minor reduction of Mr. Benning's figures. I conclude that a 5% reduction roughly captures what remains.

**167**  As a result, the award under this heading will be $385,000.

**e. Failure to Mitigate**

**168**  A plaintiff in a personal injury action has a positive duty to mitigate their loss, but if a defendant's position is that a plaintiff could reasonably have avoided some part of it, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, [*2001 BCCA 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63NT-00000-00&context=) at para. 35.

**169**  The defendants' counsel submits that Mr. Ackermann failed to act reasonably to mitigate his loss in several respects. He took two years to start English classes and did not attempt to accelerate his progress once he began them by practising with any of the English-speakers in his family. He has not attempted to upgrade his computer skills, which are close to non-existent, he has not called on his network within the German community of Kelowna for job prospects and he did not follow up on any of the information and support that he received from Mr. Waldie, until he started seeing Ms. Wright just before trial.

**170**  The position on behalf of Mr. Ackermann is that he took a reasonable amount of time to try to recover sufficiently to try to return to tile setting. Since it became apparent that this was no longer a realistic goal he has taken extensive English instruction and worked with two vocational specialists, to no avail.

**171**  In my opinion, no failure to mitigate has been shown. In this case the defendants caused injury to a man in late middle age, with little formal education and virtually no English, who was entirely dependent on his physical capacity to earn a living. What would have been reasonable for him to do to improve his situation after receiving the injury must be determined in light of those factors.

**172**  I am unable to find that the time between the accident and the beginning of Mr. Ackermann's efforts to prepare himself for other forms of employment was unreasonable. That period contained his failed efforts to return to tile setting, the dates of which were not defined precisely in the evidence, and I am satisfied that it would have taken some additional time following that failure to come to the realization that he was not going to be able to do any physical jobs that involved the repeated use of his right hand -- that is, everything he had done in his working life until then -- and would need to embark on a completely different career path.

**173**  If Mr. Waldie's assistance did not follow the best practices of vocational rehabilitation, as Dr. Powers suggested, I am not sure how Mr. Ackermann could have known that, and it is unrealistic to suggest that he should have sought out alternative advice. He was certainly fully cooperative with both Mr. Waldie and Ms. Wright's suggestions.

**174**  I also cannot put much weight on Mr. Ackermann's failure to access job prospects within his language communities. It must be kept in mind that such prospective employers would have had to (1) speak his language, (2) have a suitable vacancy or be willing to employ him despite being surplus to requirements, and (3) be sympathetic to his lack of immediately-applicable skills and experience. Mr. Waldie certainly had no success with that approach. I have already found that Ms. Wright's efforts, which were directed to the very modest goal of helping Mr. Ackermann obtain a community-based volunteer position, are the best measure of what is actually out there for him, and I am not satisfied that calling on linguistic or ethnic connections would have made any appreciable difference to that situation.

**175**  Nor were his computer skills shown to be one of the main barriers to gaining new employment, so I can see no particular significance in his failure to upgrade them.

**176**  Finally, the evidence is clear that he has been diligent in pursuing his English training. If speaking English at home would have helped him with his progress, which common sense suggests it might have, it has not been shown to what degree or, more importantly, that he would now be at a different LINC/CLB level or would be better able to perform a customer service job than he currently is.

**f. Cost of Future Care**

**177**  This was a fairly lightly-documented aspect of the case. I think that Dr. Powers' recommendation of further vocational counselling (25-30 hours at $100 per hour) is reasonable, to take maximum possible advantage of Mr. Ackermann's very limited remaining future earning capacity.

**178**  The orthopedic surgeon, the plastic surgeon and Ms. Morris, the defendants' occupational therapist, all say that a wrist brace would be beneficial and Ms. Morris has identified a more suitable one than the one that Mr. Ackermann has struggled with. As I have said, this may be the same brace that he said he was contemplating purchasing for $700. The use of such a brace makes perfect sense and the expense should be allowed.

**179**  Anti-inflammatory medication was recommended by the orthopedic surgeon in his report. Mr. Ackermann's counsel also submits that an allowance for household tasks at home that he can no longer do himself would also be reasonable. However, in the absence of evidence of the amounts of these supports that will be required over his life expectancy and their costs, I do not feel comfortable speculating about them to the defendants' detriment.

**180**  I will therefore award $3,700 under this heading.

**g. Special Damages**

**181**  These were admitted by the defendants, in the modest amount of $109.60.

**4. CONCLUSION**

**a. Summary**

**182**  In summary, I award the following:

1. Non-pecuniary Damages: $90,000.00
2. Past Income Loss: $205,000.00
3. Impairment of Future Earning Capacity: $385,000.00
4. Future Care $3,700.00
5. Special Damages: $109.60

**TOTAL: $683,810.00**

**b. Costs**

**183**  In the absence of any other considerations, I would say that Mr. Ackermann has had substantial success in this trial and should receive his costs at the ordinary scale of difficulty. However, if there are matters affecting costs that need to be raised, the parties should arrange a hearing date or a schedule for making written submissions, as they prefer.

T.A. SCHULTES J.

[**1**](#Backward_fnref_fnr-1) Report of Dr. Steinruck, family doctor, April 27, 2012

[**2**](#Backward_fnref_fnr-2) Report of Dr. Miller, plastic surgeon, May 7,2012

[**3**](#Backward_fnref_fnr-3) Ibid

[**4**](#Backward_fnref_fnr-4) Report of Dr. Steinruck, May 4, 2015

[**5**](#Backward_fnref_fnr-5) Ibid

[**6**](#Backward_fnref_fnr-6) Report of Dr. Perey, orthopedic surgeon, August 25, 2015

[**7**](#Backward_fnref_fnr-7) Report of Dr. Miler

[**8**](#Backward_fnref_fnr-8) Report of Dr. Perey

[**9**](#Backward_fnref_fnr-9) Ibid

[**10**](#Backward_fnref_fnr-10) Mr. Ackermann told her that he finds it difficult to do tasks that require any dexterity with his current brace, so she suggested obtaining one that supports his wrist while allowing free movement of his fingers. This may be the $700 brace that he described having investigated on his own.

[**11**](#Backward_fnref_fnr-11) Matthias was living in Germany at the time of the trial and was not called as a witness.

[**12**](#Backward_fnref_fnr-12) The actual income that he testified to for each year was not always the precise sum of his father's declared income and half of the amount allocated to Peter and Matthias, but was still quite close to it.

[**13**](#Backward_fnref_fnr-13) There was some guesswork in Andreas' evidence about this year. He believed that the gross business profit of $70,563 would have been reduced by other expenses, so that his and his father's shares would have been $30,000 each. He also described the $15,000 for Peter's work (in addition to the same amount for Matthias') would have been the minimum amount that they had allocated and that it could have been higher.

[**14**](#Backward_fnref_fnr-14) For both past wage loss and impairment of future earning capacity Mr. Benning also made projections based on an income of $80,000 per year. However, that figure was not relied on in submissions.

[**15**](#Backward_fnref_fnr-15) Although it was not explained in submissions, I took the relevance of this fact, if it is established, to be that Mr. Ackermann was advancing this justification before any accident or litigation gave him a motivation to do so, thus rebutting the implicit defence suggestion that it is a more recent contrivance to avoid contributory ***negligence***.

**End of Document**

[***Eissfeldt (Litigation guardian of) v. Eissfeldt, [2012] B.C.J. No. 1671***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2B5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.M. McEwan J.

Heard: June 29, 2012.

Judgment: August 8, 2012.

Docket: M095112

Registry: Vancouver

**[2012] B.C.J. No. 1671** | 2012 BCSC 1199 | 37 M.V.R. (6th) 297 | 2012 CarswellBC 2376

Between Amy Elizabeth Eissfeldt, an infant, by her Litigation Guardian, Theodore Eissfeldt, Plaintiff, and Elaine Evelyn Eissfeldt, Mark Delare Lewis, Jebel Ali Enterprises Ltd., Donald Trevor Brown and Vital Aviation Ltd., Defendants

(23 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — To dismiss action — Application by Brown and Vital Aviation Ltd to dismiss action against them allowed — While stopped at intersection awaiting turn signal, Vital's vehicle, which was driven by Brown, was struck by defendant Eissfeldt's vehicle, which had been struck by another vehicle — Brown's vehicle was stopped on painted stop line, but before marked crosswalk — No basis to find Brown failed in his statutory duty to avoid the crosswalk and intersection — Duty did not extend to anticipating that another vehicle might suddenly lose control because of a collision and veer into his path.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — Breach of rules of the road — *Negligence* — Application by Brown and Vital Aviation Ltd to dismiss action against them allowed — While stopped at intersection awaiting turn signal, Vital's vehicle, which was driven by Brown, was struck by defendant Eissfeldt's vehicle, which had been struck by another vehicle — Brown's vehicle was stopped on painted stop line, but before marked crosswalk — No basis to find Brown failed in his statutory duty to avoid the crosswalk and intersection — Duty did not extend to anticipating that another vehicle might suddenly lose control because of a collision and veer into his path.**

**Transportation law — Proceedings — Practice and procedure — Application by Brown and Vital Aviation Ltd to dismiss action against them allowed — While stopped at intersection awaiting turn signal, Vital's vehicle, which was driven by Brown, was struck by defendant Eissfeldt's vehicle, which had been struck by another vehicle — Brown's vehicle was stopped on painted stop line, but before marked crosswalk — No basis to find Brown failed in his statutory duty to avoid the crosswalk and intersection — Duty did not extend to anticipating that another vehicle might suddenly lose control because of a collision and veer into his path.**

|  |
| --- |
| Application by the defendants Brown and Vital Aviation Ltd. to dismiss the action against them. Brown was operating a pick-up truck owned by his company, Vital. While Brown was waiting at an intersection in the left-hand turn lane for an advance green arrow, a collision occurred. The collision pushed the vehicle driven by the defendant Eissfledt out of its lane of travel, causing it to strike Brown's truck. On discovery, Brown admitted that he stopped his vehicle on, rather than behind, the painted stop line. However, the vehicle was stopped before the marked crosswalk. The plaintiff took the position that by placing his vehicle where he did, Brown was in breach of s. 186 of the Motor Vehicle Act and that expert evidence might show that the difference between stopping where Brown did and stopping behind the stop line might have been the difference between Brown's vehicle being involved in the collision, and potentially contributing to the plaintiff's injuries, or not being involved at all. He further submitted that the issue of Brown's degree of fault could not be determined at this stage of the proceeding.  HELD: Application allowed.  There was no basis to find that Brown failed in his statutory duty, which was to avoid the crosswalk and the intersection at the red light. That duty did not extend to anticipating the possibility that another vehicle might suddenly lose control as a result of a collision and veer into his path, obliging him to guess where to place his vehicle in order to avoid such a contingency. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 129*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F6-00000-00&context=), s. 129(1), s. 186

Supreme Court Civil Rule, Rule 9-7(15)

**Counsel**

Counsel for the Plaintiff: S.F. Robertson.

Counsel for the Defendant, Elaine Evelyn Eissfeldt: G. Somers, Q.C.

Counsel for the Defendants, Donald Trevor Brown and Vital Aviation Ltd.: S. Katalinic.

**Reasons for Judgment**

|  |
| --- |
| **T.M. McEWAN J.** |

**I**

**1**  The defendants Donald Trevor Brown and Vital Aviation Ltd. seek dismissal of this action against them and costs.

**II**

**2**  On July 3, 2005, Mr. Brown was the operator of a 2002 Chevrolet Silverado pick-up truck that was owned by Vital Aviation Ltd., a company he and his wife operate. The vehicle was the first one stopped in a designated left-turn lane at the intersection of Dogwood Street and Island Highway in Campbell River, British Columbia. The intersection is controlled by a signal light. Mr. Brown was waiting for an advance green arrow which would permit his intended left turn onto Island Highway.

**3**  While Mr. Brown was in that position awaiting the signal change, a collision occurred within the intersection which pushed a small red vehicle driven by the defendant, Elaine Eissfeldt, out of its own lane of travel. It struck the right front bumper of Mr. Brown's truck and came to rest some distance away, off to the right side of his vehicle and somewhat behind it.

**4**  Responsibility for the collision in the intersection obviously rests primarily with the operators of the vehicles involved. The collision with Mr. Brown's vehicle occurred largely because his vehicle happened to be where it was when Ms. Eissfeldt's vehicle spun out of control and crossed into his turning lane.

**5**  The plaintiff submits that in placing his vehicle where he did, Mr. Brown was in breach of s. 186 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*. It provides:

**Stopping at intersections**

**186** Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

1. at the marked stop line, if any,
2. before entering the marked crosswalk on the near side of the intersection, or
3. when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

**6**  It is agreed that photographs taken immediately after the collision accurately depict the position of the Brown vehicle at that time. Mr. Brown says he did not move the truck after the collision. He and his passengers all described the impact as slight with minimal damage amounting to a scuff and a small dent on the bumper. In Discovery Mr. Brown was asked whether the vehicle moved at impact:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | When you came up to the stoplight you obviously applied the brake. This was a standard vehicle or automatic? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Automatic. |  |
|  | Q | Your foot was pressed on the brake the whole time? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Obviously the vehicle would have moved a little bit because there was some impact. Do you recall how much your vehicle moved? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would say none at all. |  |
|  | Q | But it wouldn't have moved forward after impact. |  |

You would have kept your foot on the brake the whole time?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. If anything backwards, but no. The impact was very slight. |  |

**7**  The significance of this evidence, from the plaintiff's point of view, is that the photographs show the Brown vehicle at rest *on* rather than *behind* the painted stop line on the pavement. In this position Mr. Brown's truck was fully clear of, that is, behind, the north-south crosswalk, which was also a feature of the intersection. Mr. Brown had the following to say on Discovery:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Tell me why you came to stop on that while line? |  |
|  | A | Right on the white line? |  |
|  | Q | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, my visibility over the hood of the vehicle is somewhat limited. I thought I was about a foot short of the while line, but I guess I was a little further than that. |  |
|  | Q |  | You understand that the while line is a line that indicates where you are suppose to stop behind? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, I understand that. |  |
|  | Q | You intended to stop behind it? |  |
|  | A | Yes. |  |
|  | Q | Or at it? |  |
|  | A | At it, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You will agree with me that the pictures indicate that you are actually on the white line? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I will agree with you. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | The nose of your vehicle actually extends beyond the white line? |  |

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

**III**

**8**  The plaintiff's allegation is that Mr. Brown's admission and the photographs establish a statutory breach which defines his duty of care in the circumstances. The plaintiff cites *Cook v. Teh*, [*68 D.L.R. (4th) 602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M47G-00000-00&context=); [*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=), and *Wang-Lai v. Ong*, [*2011 BCSC 1260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6270-00000-00&context=), as authority for these propositions. In *Cook v. Teh*, Wallace J.A. described the interrelationships of statutory and common law rules of the road:

Sections 181(1), (2) and (3) do not constitute "an exclusive code" relating to the right of way between pedestrians and vehicles. As noted by Mr. Justice Anderson, they must be construed in the light of the duties imposed by s. 183(a) and the common law duty of care owed by pedestrians and drivers to exercise due care for their own safety and the safety of others. Because of these concurrent duties the statutory right of way cannot be considered "absolute".

The statutory obligation and privileges delineated by the provisions of the Motor Vehicle Act do not entitle an individual to disregard any apparent danger which confronts him or her but it does require that the respective duties and obligations of the parties be analyzed on a different basis than would be the case had there been no such statutory provision. Conceding that there are common law duties existent in addition to the statutory obligations imposed upon the respective parties, the question which remains to be answered is: in light of the provisions of the Motor Vehicle Act and the common law duties of driver and pedestrian what is the appropriate approach to assessing the responsibility of the respective parties where the pedestrian has been found to be in breach of s. 181(2) of the Motor Vehicle Act?

The trial judge was required to analyze the evidence to ascertain -- in view of the plaintiff's breach of s. 1.81(2) and the driver's breach of s. 181(3) and in the light of the duties imposed upon the parties by s. 183(a) as well as the common law -- to what degree did the conduct of each of the parties contribute to the accident?

A driver or pedestrian is not obliged to anticipate a breach of the law by other users of the highway nor are they obliged to take anticipatory precautions against the possible happening of an unlawful act by other adults. However, this does not suggest any person can proceed without the exercise of due care, even one who has the right of way. The limitation on the assumption that others will observe the provisions of the Motor Vehicle Act regulating traffic continues only until such time as the person, be he driver or pedestrian, becomes aware, or ought to have become aware, that the other party is not going to obey the law whereupon that person's obligation to avoid an accident supersedes his right to rely upon the assumption that others will comply with the traffic regulations.

In a somewhat similar analysis Cartwright, J. stated (at p. 613) in Johnston National Storage Ltd. v. Mathieson, [*[1953] S.C.J. No. 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05X-00000-00&context=), supra:

It was accurately stated in the following words by Aylesworth J.A. in Woodward v. Harris, [*[1951] O.W.N. 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JN14-G258-00000-00&context=) at p. 223 (revd (new trial ordered) [*[1952] 1 D.L.R. 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05N-00000-00&context=): "Authority is not required in support of the principle that a driver entering an intersection, even though he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided."

This approach, which refrains from eroding the obligation imposed by ss. 181(1), (2) and (3) of the statute, still recognizes the statutory obligation imposed by s. 183(a) of the Motor Vehicle Act and the overall common-law duty on the parties to take all reasonable steps to avoid an accident at a time when either of them should properly appreciate their failure to act with reasonable care may jeopardize the safety of the other.

[Emphasis added]

**9**  In *Wong-Lai*, Sewell J. said:

[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=).

[Emphasis added]

**10**  The plaintiff's position is that expert evidence may eventually show that the difference between stopping where Mr. Brown did and stopping with his vehicle wholly short of the stop line may have been the difference between his vehicle being involved in the collision, and potentially contributing to the plaintiff's injuries, or not being involved at all. The plaintiff further submits that the issue of Mr. Brown's degree of fault in the collision cannot be determined at this stage of the proceeding, and that Mr. Brown's application is premature.

**11**  The plaintiff further submits that to allow the application would be to permit litigating in slices and to risk making findings of fact that may prove embarrassing when the whole case is heard. The plaintiff cites *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, [*[2002] B.C.J. No. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=) (C.A.). In that case the Court per Southin J.A., after citing the rule, which I also quote, made a pertinent observation:

**5** By Rule 18A:

18A (1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:

1. an action in which a defence has been filed, ...

\* \* \*

1. On or before the hearing of an application under this rule, the court may
2. adjourn the application, or
3. dismiss the application on the ground that
4. the issues raised by the notice of motion are not suitable for disposition under this rule, or
5. the application will not assist the efficient resolution of the proceeding.

\* \* \*

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

**6** This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.

**7** When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

**12**  The plaintiff lastly submits that this court can make a positive finding of fact that Mr. Brown was in breach of the standard of care by failing to stop behind the white line, but that any further determination should await the trial.

**IV**

**13**  Mr. Brown submits that Rule 9-7(15), the new name for the old rule 18A, reproduced in *Bacchus*, permits the court to grant judgment in favour of any party either on an issue or generally. He submits that the onus rests on the plaintiff to prove the allegations she has made. In *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=) (S.C.) at para. 67, Cohen J., observed:

**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.).

**14**  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=) (S.C.) at para. 4, N. Smith J., observed.

**4** A summary trial application pursuant to Rule 18A, such as this one, is a form of trial. The plaintiff has the burden of proving his or her case, even when the application is brought by a defendant seeking dismissal of an action.

**15**  While I accept these statements of law, I note that there are circumstances where the proof in the possession of the plaintiff is not fully developed and where it would be unfair to decide an issue at an early stage.

**16**  Mr. Brown acknowledges that as a user of the highway he owed the plaintiff a duty of care. A breach of the standard of care occurs when a person creates an objectively unreasonable risk of harm, falling below the conduct that would be expected of an ordinary reasonable and prudent person in the same circumstances. The test was set out 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=), per Major J. at para. 27:

**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.

**17**  Mr. Brown submits that, in any event, s. 186 is not the applicable section, but that s. 129(1) is:

129(1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.

**18**  I think this is correct. Section 186 applies to intersections controlled by *stop signs*, not traffic control signals. The duty outlined in s. 129 is to stop before the marked crosswalk. There is no question that Mr. Brown did so, as can be seen in the photographs. There is no suggestion in the *Act*, and none of the case law supports the notion that where stop lines are painted in the left turn lane ahead of a crosswalk, there is a duty to stop *before* rather than *on* them, as long as the vehicle does not enter the marked crosswalk. In this regard Mr. Brown's acknowledgment that he intended to stop before the line may mark a slight deviation from the standard he meant to achieve, but it is not evidence that obliges the court to impose a higher standard on Mr. Brown than that set out in the section. It is not at all clear that the stop lines are anything more than guides to ensure that vehicles do not encroach the crosswalk and the intersection, which are the duties imposed by the section.

**19**  As the cases show, statutory duties have been superimposed on the common law duty of care and may create a modified standard in the circumstances to which they pertain. The context remains important, however. The concern of a motor vehicle operator at an intersection controlled by a traffic signal is for pedestrians and traffic lawfully crossing or turning in the intersection. The assessment of risk begins with the premise that one may rely on other drivers to obey the rules of the road, subject to the qualifications set out in the cases. (See paras. 8 and 9 herein).

**20**  The occurrence of a random event precipitated by the failure of others to obey the rules of the road (I do not know which of the other defendants this may be or to what degree they may share liability), is not the sort of harm that could be described as foreseeable by Mr. Brown. In the circumstances it is obvious that he was in no position to react as the collision transpired.

**V**

**21**  There is simply no basis, in my view, for a finding that Mr. Brown failed in his statutory duty, which was to avoid the crosswalk and the intersection at the red light. That duty did not extend to anticipating the possibility that a vehicle might suddenly lose control as a result of a collision and veer into his path, obliging him to guess where to place his vehicle in order to avoid such a contingency.

**22**  Giving full consideration to the fact that the court must be very careful not to permit litigating in slices and the risk of embarrassing consequences as a result of ruling on an incomplete view of the case, I consider this to be an example of a circumstance where it is appropriate to apply Rule 9-7(15). Mr. Brown was not in breach of the relevant statutory duty found in s. 129. Section 186 of the *Motor Vehicle Act* does not apply. Whether or not the impact with his vehicle contributed in any respect to the plaintiff's claims, Mr. Brown's vehicle was not where it was as a result of any ***negligence*** on his part.

**23**  The application is therefore allowed and the action as against Mr. Brown and Vital Aviation Ltd. is dismissed with costs.

T.M. McEWAN J.

**End of Document**

[***Fleming v. McAllister, [2017] B.C.J. No. 625***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N8X-PSB1-JCRC-B3MM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

D.A. Betton J.

Heard: December 5-8, 12, 13, 2016.

Judgment: March 30, 2017.

Docket: M103761

Registry: Kelowna

**[2017] B.C.J. No. 625** | 2017 BCSC 521 | 2017 CarswellBC 836 | 277 A.C.W.S. (3d) 539 | 97 B.C.L.R. (5th) 405

Between Terrance Allen Fleming, Plaintiff, And Rory Patrick McAllister, Patrick Terrence McAllister, Danielle Lee Wentland, Minister of Justice, Defendants

(130 paras.)

[Editor's note: Supplementary reasons for judgment were released May 10, 2017. See [*[2017] B.C.J. No. 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NJH-4X81-F5KY-B3SS-00000-00&context=).]

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Leg injuries — Knee — Action by Fleming for an assessment of damages for injuries suffered in three motor vehicle incidents allowed in part — Liability was admitted in all three incidents — Fleming's neck and mid back injuries were caused by the first and second incidents — His knee injury was caused by the third incident — There was an indication that Fleming would continue to have symptoms but there was no medical support for his claim of loss of housekeeping capacity — Fleming was awarded $70,000 in non-pecuniary damages, $150,000 for past loss of income, and $40,000 for loss of future earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Retroactive loss of income — Special damages — Non-pecuniary loss — Action by Fleming for an assessment of damages for injuries suffered in three motor vehicle incidents allowed in part — Liability was admitted in all three incidents — Fleming's neck and mid back injuries were caused by the first and second incidents — His knee injury was caused by the third incident — There was an indication that Fleming would continue to have symptoms but there was no medical support for his claim of loss of housekeeping capacity — Fleming was awarded $70,000 in non-pecuniary damages, $150,000 for past loss of income, and $40,000 for loss of future earning capacity.**

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| Action by Fleming for an assessment and apportionment of damages for injuries suffered in three motor vehicle incidents. Liability was admitted in all three incidents. Fleming was born in 1956 and since 1986 had owned a business that sold roofing and siding materials. Prior to the first motor vehicle accident in December 2012, Fleming enjoyed good general health, he was active in coaching baseball, and he attended the gym regularly. His principal lasting complaint from the first accident was of low back pain. The second incident occurred in September 2013 and the principal lasting complaint continued to be his low back symptoms. The third incident occurred in September 2015 when Fleming was riding his bicycle. He injured his knee in that incident. The parties reached an agreement for special damages of $4000. Fleming took the position that he was also entitled to awards for non-pecuniary damages, past and future loss of income, and loss of housekeeping capacity. He sought $115,000 in non-pecuniary damages, $600,000 for past loss of income, $300,000 for future loss of income, and $20,000 for loss of housekeeping capacity.  HELD: Action allowed in part.  Fleming's neck and mid back injuries were caused by the first and second incidents. His low back and knee injuries were caused by the first and third incidents, respectively. There was an indication that Fleming would continue to have symptoms and would be restricted from doing the physical aspects of his job that he had done in the past. However, there were many factors that might have affected his business, including economic and industry factors, and his health. There was no medical support for Fleming's claim of loss of housekeeping capacity. Fleming was awarded $70,000 in non-pecuniary damages, $150,000 for past loss of income, and $40,000 for loss of future earning capacity. The Court rejected both parties' arguments on apportionment. |

**Cases cited:**

**Counsel**

Counsel for the Plaintiff: D. Graves, C. Wojnarowicz.

Counsel for the Defendants, Rory Patrick McAllister, Patrick Terrence McAllister and Danielle Lee Wentland: D. Shea.

Counsel for the Defendant, Minister of Justice: S. Kelly.

**Plaintiff's Authorities Relied On**

*Preston v. Kontzamanis*, [*2015 BCSC 2219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HK3-JGT1-JPGX-S3V4-00000-00&context=).

*Hutchinson v. Dyck*, [*2015 BCSC 1039*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB3-MY31-JX3N-B2D1-00000-00&context=).

*Dzumhur v. Davoody*, [*2015 BCSC 2316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HX-00000-00&context=).

*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=).

*Everett v. King* [*(1981), 34 B.C.L.R. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X220-00000-00&context=) (S.C.).

*Boaler v. Brar*, [*[1995] B.C.J. No. 2341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B24T-00000-00&context=).

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*Savoie v. Williams*, [*2013 BCSC 2060*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S41C-00000-00&context=).

**Defendant's Authorities Relied On**

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*Bilanik v. Ferman*, [*2014 BCSC 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2D3-00000-00&context=).

*Sandhu v. Gabri*, [*2014 BCSC 2283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4VS-00000-00&context=).

*De Vries v. Poltorak*, [*2013 BCSC 2527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16D-00000-00&context=).

*Munoz v. Singh*, [*2014 BCSC 567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-620F-00000-00&context=).

*Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=).

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*Reynolds v. M. Sanghera & Sons Trucking Ltd.*, [*2015 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G4B-CVF1-JPGX-S2TN-00000-00&context=).

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*Ridge Tool Company v. A & L Plumbing & Heating Ltd.*, [*2010 SKCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-F22N-X1P9-00000-00&context=).

*Hutchings v. Dow*, [*2006 BCSC 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1YM-00000-00&context=), aff'd [*2007 BCCA 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46D-00000-00&context=).

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*Blenkarn v. Mills*, [*2016 BCSC 1976*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M43-BH51-DXHD-G241-00000-00&context=).

**Reasons for Judgment**

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| **D.A. BETTON J.** |

**Introduction**

**1**  The plaintiff seeks an assessment and apportionment of damages for injuries suffered in three separate motor vehicle incidents. Liability is admitted in all three incidents.

**Background**

**2**  The first and second incidents are referenced in one notice of civil claim, the third in a separate notice of civil claim. There was an order dated August 16, 2016, that the two claims be heard together. The plaintiff has settled his claim with the defendant, the Minister of Justice, in respect of the second incident. The terms of that settlement are not known to this Court. The defendants in the first and third incidents have common representation.

**The Plaintiff**

**3**  The plaintiff is 60 years of age, born May 1, 1956.

**4**  He is divorced after a marriage of approximately 32 years and has two successful adult children. He separated from his ex-spouse Arlene Fleming in May 2009, and they were divorced in 2011.

**5**  He has a grade 12 education (1974) and a diploma/degree in forestry from Selkirk College (1976).

**6**  His work history has, however, been in the construction industry. Since 1986, he has been an owner of a roofing and siding business currently operating as Best-Way Siding (Kelowna) Ltd. ("BWS"). The plaintiff and Arlene Fleming have always been and continue to be the only and equal shareholders in BWS. Both have been and remain active in the business despite their divorce.

**7**  The business sells roofing and siding materials, with roofing materials accounting for the bulk of sales. The company has traditionally focussed on the sale of higher-end and new or innovative products. This has been a deliberate strategy of the business to distinguish itself from large retailers and because of the prospect of larger profit margins on such products.

**8**  There has always been and continues to be a loose and informal distribution of responsibilities between the plaintiff and Arlene Fleming. The plaintiff focuses on sales and marketing. In that respect, he endeavors to work closely with his contractor customers. One of his goals is to educate them about the benefits of the products BWS sells, so they can in turn market those products to their clients. He also assists those contractors with preparing quotes and estimating jobs. His business strategy is to try to help his contractors succeed so they can in turn contribute to the success of BWS.

**9**  The business includes general retail sales of products out of its business premises.

**10**  Arlene Fleming likens herself to an office manager. As part of her assumed responsibilities she assists the business' bookkeeper, looks after in-store retail sales from walk-in customers, and deals with billing and accounts receivable.

**11**  The plaintiff and Arlene Fleming have historically drawn equal salaries from the company. In the years leading up to the motor vehicle incidents, that salary was approximately $70,000 annually.

**12**  Prior to the first motor vehicle incident on December 17, 2012, the plaintiff enjoyed good general health, although he had undergone bilateral hip replacements (to his left hip in January 2009 and to his right hip in 2011). The second hip replacement was complicated by the development of a deep vein thrombosis. The procedures were, however, generally successful, leaving the plaintiff with only some minor left hip symptoms that were not limiting his overall function. He was active in coaching baseball, achieving some significant recognition for that. He also attended the gym regularly.

**The First Motor Vehicle Incident / MVI1**

**13**  The first motor vehicle incident ("MVI1") occurred when the plaintiff stopped at a red light at a Kelowna intersection. The defendant failed to stop and struck the vehicle immediately behind the plaintiff. That vehicle was in turn pushed into the rear of the plaintiff's Ford F150 pickup, causing minor damage.

**14**  The evidence from the plaintiff and that of the medical experts as to what injuries were caused by each incident and how each incident affected existing injuries will be referred to in greater detail later in this decision. I will only provide a cursory overview of the injuries in this section, for context.

**15**  The plaintiff described feeling an immediate but momentary sharp pain in his neck. Emergency personnel attended and the plaintiff declined going to the hospital. He ultimately left the scene and carried on with his work. As the day progressed, he developed a headache, and pain in his neck and back.

**16**  His principal lasting complaint from MVI1 is of low back pain.

**17**  The injuries limited the plaintiff's ability to work, but he was gradually increasing his work hours leading up to the time of the second motor vehicle incident. He was able to do some of his work remotely from his home and he had flexibility to come and go from work as needed, but he struggled to attend to all of the tasks that he normally did efficiently and effectively. He was not fully recovered by the time of the second motor vehicle incident.

**18**  As stated, liability for the first motor vehicle incident has been admitted by the defendant.

**The Second Motor Vehicle Incident / MVI2**

**19**  The second motor vehicle incident ("MVI2") occurred on September 12, 2013. The plaintiff was again in his F150 pickup. The defendant was a police officer travelling in the same direction as the plaintiff. The defendant made a U-turn in front of the plaintiff and the plaintiff hit the defendant's vehicle broadside, roughly in the area of its rear axle. The plaintiff had been travelling at a speed of approximately 50 km/hr immediately before that incident.

**20**  Immediately after the incident, the plaintiff experienced increased pain in his low back, as well as pain in his hips and waist. He also developed pain in his shoulder in the area where his seatbelt had been positioned. Following MVI2 he again reduced his work hours and responsibilities. His symptoms persisted and various treatment modalities were undertaken. He was, as before, able to increase his work load over time. After an initial spike in his symptoms following MVI2 the principal lasting complaint continued to be his low back symptoms.

**21**  The plaintiff's claim in respect of MVI2 was settled prior to the commencement of this trial.

**The Third Motor Vehicle Incident / MVI3**

**22**  The third motor vehicle incident ("MVI3") occurred on September 16, 2015, while the plaintiff was riding his bicycle. The unidentified defendant pulled out in front of the plaintiff. The plaintiff took evasive action and avoided an actual collision, but fell to the ground while doing so. He injured his left knee.

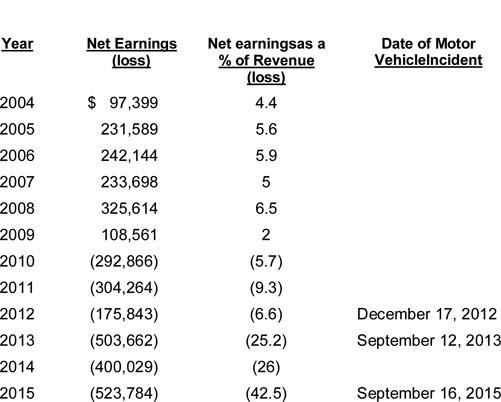
**The Medical Evidence**

**23**  Each party introduced expert medical opinion evidence. The plaintiff relies on reports of a physical and rehabilitative medicine specialist, Dr. Laidlow, dated November 24, 2014 and June 28, 2016. The defendants rely on the report of an orthopedic surgeon, Dr. Pisesky, dated May 27, 2015. That report predates MVI3.

**BWS Finances**

**24**  The financial success of BWS had declined significantly in the years leading up to the motor vehicle incidents, and that general pattern continued after MVI1. The financial reports of BWS have been reviewed by experts for both parties, who provided opinions on losses in the plaintiff's income attributable to his injuries.

**25**  Net earnings and net earnings as a percentage of revenue since 2004, according to the company's statement of earnings and retained earnings, are as follows:



**Issues and Positions of the Parties**

**Issues**

**26**  There are three broad issues raised by the parties that are at the root of these proceedings:

1. First, what are the nature and severity of injuries and symptoms resulting from the global effect of the three motor vehicle incidents?
2. Second, what has the impact of the plaintiff's injuries been on his work and how has that affected the success of BWS?
3. Third, how are the various injuries and the resulting symptoms connected generally, and, more specifically, how are they connected to each of the motor vehicle incidents?

**27**  The answers to the three broad questions set out above will provide the foundation for the conclusions regarding each of the specific issues and claims.

**The Plaintiff's Position on Liability**

**28**  The plaintiff says that he is entitled to an award of nonpecuniary damages, past and prospective loss of income, and loss of housekeeping capacity. He does not advance any claim for costs of future care. In addition, the parties have reached an agreement for special damages to be paid by the defendants in this trial. The plaintiff seeks a global assessment of damages but with an apportionment of a percentage of that assessment to each of the three motor vehicle incidents. He argues that the apportionment should be 80%, 10%, and 10%, respectively, to each of the first, second, and third motor vehicle incidents. In light of his settlement in respect of MVI2, the plaintiff argues that his global award here should be reduced by 10%.

**29**  The plaintiff says his health was good before MVI1 and that he was active in and a key figure of BWS. Specifically, he says he was the driving force behind the business' marketing and sales in addition to providing physical labour.

**30**  He says he had a long and successful history as a pitching coach, including in 2011 and 2012, and went to the gym four to five days per week. He was in a healthy romantic relationship prior to MVI1.

**31**  He says MVI1 left him with chronic and serious low back pain and spasm as well as some reduced range of motion in his neck. Despite a substantial amount of physiotherapy, the injuries significantly affected his effectiveness and engagement in his work. He also says that he was not able to carry on with many of his personal activities with the same enthusiasm and vigour. All of this, he says, contributed to the failure of two personal relationships.

**32**  The plaintiff says MVI2 caused some new pain in his hips and shoulder, but generally this incident was not a significant factor in his ongoing symptomatology.

**33**  The plaintiff argues that MVI3 resulted in a brief aggravation of his low back pain and neck issues and caused a new knee injury.

**The Defendants' Position on Liability**

**34**  The defendants do not challenge that the plaintiff was injured or generally what the nature of his injuries was in each of the incidents. The defendants say, however, that MVI2 contributed significantly to the plaintiff's injuries. The defendants point to the nature of the incidents and the damage to the plaintiff's pickup as support for the proposition that MVI2 involved much greater impact and forces. In addition, the defendants argue that the plaintiff's treatment history also points to a more substantial contribution by MVI2.

**35**  The defendants say the plaintiff suffered mild soft tissue injuries to his neck and back in MVI1 and that those were aggravated in MVI2. The defendants argue that these injuries are indivisible. The defendants say that the knee injury from MVI3 is divisible and can be assessed separately. The defendants point to medical evidence suggesting that the knee injury consisted of a cartilage injury or an aggravation of an underlying degenerative change within the knee.

**36**  The defendants argue that because the injuries from MVI1 and MVI2 are indivisible, the plaintiff should only be able to recover the damage award assessed for those two incidents less the settlement amount that the plaintiff negotiated in respect of MVI2.

**37**  Alternatively, the defendants say that the apportionment of damages should be 45% to each of MVI1 and MVI2 and 10% to MVI3.

**The Plaintiff's Position on Damages**

**38**  In addressing the assessment of damages, the plaintiff says that the symptoms should be viewed as moderate to severe and chronic in nature. He argues that an appropriate award for nonpecuniary damages is $115,000.

**39**  The plaintiff also argues that he has suffered significant past loss of capacity to earn income. While acknowledging that market and economic factors independent of the motor vehicle incidents have impacted BWS, he says his past loss of earnings as a result of the incidents is $600,000. The plaintiff characterizes this as a loss of capacity to earn income. He asserts that BWS' business losses were increased as a result of his injuries. He says that with his continued symptoms, a future loss of a further $300,000 should be assessed. The plaintiff relies on the expert report of the business valuator Mr. Spence in support of this position.

**40**  The plaintiff also argues that he should be awarded $20,000 for loss of housekeeping capacity based on his physical limitations.

**The Defendants' Position on Damages**

**41**  The defendants say that the lasting effects of the injuries are limited. They point to the evidence that the plaintiff continues to be physically active. The defendants argue that an overall assessment of nonpecuniary damages should be $45,000 - $70,000.

**42**  In respect of the plaintiff's claims for loss of earning capacity, the defendants say that there are many unrelated factors affecting the performance of BWS. The defendants say that when those are taken into account, an appropriate award for past losses would be $18,000 and that there is no established future loss of capacity.

**43**  In addition, the defendants say that there should only be a "modest" award, if any, for loss of housekeeping capacity.

**44**  The parties reached an agreement with respect to special damages. That agreement is that an award of $4,000 should be made with no apportionment as between the incidents.

**Analysis**

**45**  In order to assess the effect of the injuries arising from the motor vehicle incidents, it is necessary to make findings as to the plaintiff's pre- motor vehicle incident health.

**The Plaintiff's Pre-Incident Health**

**46**  Both medical experts agreed that prior to the motor vehicle incidents the plaintiff was not experiencing any significant related problems and had no real health-related limitations. He did have some left hip pain, but there is no evidence it was impacting his activities or employment.

**47**  Post-motor vehicle incident investigations revealed a pre-motor vehicle incident degenerative condition in his lumbar spine that was, in fact, asymptomatic. Dr. Pisesky for the defence stated the plaintiff's "... past history surgically and medically were essentially non-contributory." The plaintiff's expert Dr. Laidlow indicated in his June 28, 2016 report:

In my previous report, I indicated that there was evidence that he had appeared prior history of lower back pain and a history of some pain in the anterior aspect of the right hip, as well as altered sensation over the lateral aspect of the right thigh.

**48**  This comment and the one referenced in it from the previous report regarding a history of low back pain are based on Dr. Laidlow's interpretation of a 2011 physiotherapy pain diagram that was in error. The physiotherapist, Mr. Walsh, testified and confirmed that the markings Dr. Laidlow took to be locations of pre-existing pain were in fact indicating areas *without* pre-existing pain. As a result, and despite the references in Dr. Laidlow's reports to pre-existing low back pain, it is my conclusion that there was none of any relevance to this decision. There is no indication that this misinterpretation of the physiotherapy record from 2011 had any undue impact on Dr. Laidlow's opinions such that I should give them any reduced weight.

**49**  As noted, the plaintiff had both hips replaced prior to MVI1 but there is no indication of significant lasting limitations from those surgeries. The reference in Dr. Laidlow's report to pain in the anterior aspect of the right hip and an altered sensation over the lateral aspect of the right thigh are, as I understand the evidence, the only consequences of those surgeries and they are of no functional consequence. The plaintiff was active with BWS full-time and was also active outside of work with coaching baseball and attending the gym. He was generally unrestricted in carrying on the activities he wished to pursue.

**The Plaintiff's Post-Incident Health**

***Treatments***

**50**  The plaintiff has undergone a variety of treatments and assessments since MVI1.

**51**  He has attended a substantial amount of physiotherapy.

**52**  The plaintiff was prescribed Gabapentin, a neuropathy pain medication, in 2013. During the period of time he was using that medication, he experienced significant weight gain and became very deconditioned. Once off the Gabapentin, he was able to lose weight, and by July 2015 had lost approximately 48 pounds.

**53**  The plaintiff underwent Xylocaine injections (an anaesthetic or nerve block) in July and September 2014, to try to identify the specific source of pain in his back and to determine if he was a candidate for rhizotomy. Those procedures did not produce any lasting relief and it was determined that a rhizotomy was not a treatment option for him.

**54**  In March 2015, the plaintiff was given epidural steroid injections which provided approximately two months' relief.

**55**  There are no specific treatment recommendations at present except that the plaintiff maintain his own exercise program and take low-level analgesics as required.

***Low Back***

**56**  The medical opinions are not dramatically different especially in relation to the low back injury.

**57**  Dr. Laidlow says the plaintiff had a "long-standing degenerative disc disease of the lumbar spine with facet joint osteoarthritis prior to the accident". Dr. Laidlow opines that "it did not seem as though the second accident made any change to it" and, "I feel that [MVI1] did result in a musculoligamentous injury to the lumbar spine and that this resulted in further myofascial tightness and a worsening of his mechanical lower back pain over what had been previously present." I note that the reference to "worsening" is based on the aforementioned erroneous interpretation of pre-MVI1 physiotherapy records.

**58**  Dr. Pisesky says in respect of the plaintiff's low back:

It is my opinion there were no pre-existing problems contributing to the ongoing symptomatology and that the injuries sustained in the motor vehicle accident of December 12 [*sic*], 2012 [MVI1] are, in my opinion, the sole cause of his ongoing symptomatology that he is experiencing.

***Mid Back***

**59**  In respect of the plaintiff's complaints of mid back pain, Dr. Laidlow, in his 2014 report, says:

I feel that Terry did likely suffer the injury to the left T8 and T10 ribs, in a form, from an undisplaced fracture with one of the accidents, but it is impossible to know which one it was. ...I attribute the mid back pain equally to the motor vehicle accidents of December 17, 2012 [MVI1] and September 12, 2013 [MVI2].

**60**  In his 2016 report, he said:

I am of the opinion that he had a muscular strain to the thoracic spine with both accidents and was still having some mechanical pain related to it. At the moment, he feels that his symptoms have remained the same. I do not find any restriction the movement of the mid back or tenderness to palpation.

**61**  Dr. Pisesky made no reference to complaints of mid back pain and observed no mid back pain issues on examination.

***Neck***

**62**  Dr. Laidlow noted in 2014:

I feel that Terry did suffer a mild musculoligamentous strain to the neck with both [of the first two] motor vehicle accidents and some mild mechanical neck pain since that time, which seems to be resolving. I attribute the neck pain to both motor vehicle accidents.

**63**  In 2016, Dr. Laidlow said of the plaintiff's neck, "[o]n my examination of his neck now, he had full movement and no evidence of tenderness. I feel that the strain has resolved."

**64**  Again, Dr. Pisesky noted no neck issues on examination and made no comment on any neck issues in his report.

***Shoulder***

**65**  Dr. Laidlow addressed the complaints of shoulder pain in 2014, saying:

He did demonstrate muscular tightness in the posterior shoulder girdle.

I feel that Terry suffered a muscular strain to the anterior chest with the second motor vehicle accident as a result of a seatbelt injury. He does get rare myofascial pain related to this that seems to be resolving. I attribute it to the second motor vehicle accident.

**66**  In 2016, Dr. Laidlow said:

It was my previous opinion that he had suffered a muscular strain to the anterior chest with the second motor vehicle accident as a result of the seatbelt injury. At this time, I do not find any evidence of abnormality in the shoulder and I feel that this injury has resolved.

**67**  Again Dr. Pisesky noted no issues with the plaintiff's shoulder on examination and made no comment on any shoulder issues in his diagnosis.

***Thighs***

**68**  Both Dr. Laidlow and Dr. Pisesky concluded that changes in sensation over the thighs were unrelated to any of the motor vehicle incidents.

***Summary***

**69**  In Dr. Laidlow's summary in his most recent report (2016), he said this:

I think it is likely that Terrance will continue to have symptoms as he is now. I do not feel that he has any treatment options that would make a difference beyond general conditioning and the exercises suggested. He is not a candidate for rhizotomy based on lack of success of the injections. He has improved with respect to his neck, mid back and shoulder and they are unlikely to bother him in the future. The altered sensation over the lateral aspect of the right thigh will be permanent but will not result in any weakness or extension of numbness to other areas. The left thigh numbness has settled and will not come back.

The left knee pain still needs further evaluation to determine whether Terrance is a candidate for arthroscopy and if so, has a good result from it. I do feel that he is at greater risk of developing osteoarthritis in the left knee due to the September 2015 [MVI3] injury but the full evaluation of the risk would need the additional evaluation suggested.

**70**  Dr. Pisesky says:

His current status is in my opinion, quite good and my prognosis over time is that he should have a gradual improvement overall in the symptomatology.

The treatments that he should probably continue are that of ongoing physiotherapy and daily exercise. Physiotherapy may have to be continued for a further three to six months, once to twice a week. He may actually have to have a further epidural block if he deteriorates overall in his neurological status.

It is my opinion that as a result of these injuries, there is a low probability that this will advance to the point of needing surgical management in the future.

It is my opinion that in the long term he should not have permanent symptomatology overall except for some mild aching in his low back as well as the numbness in his right thigh from the Meralgia Paresthetica.

It is my opinion, in terms of his employment likely to continue to be restricted in terms of heavy physical work of lifting and climbing resulting from his job as a sider. He may have to continue indefinitely or permanently as an administrator in his job.

It is my opinion that the claimant's medical problems and physical problems prior to the accident have not been impacted in any way and are not contributing to his ongoing symptomatology in any way at this time.

**71**  The plaintiff describes his post-injury symptoms as also having had a significant impact on his personal life and employment. It is noteworthy that in his testimony the plaintiff frequently referred to his mental state, that he simply was not motivated, that he was easily frustrated. He tearfully referred to his two failed relationships that had begun after the divorce from his wife. The only related comments in the medical opinions are as follows:

1. In Dr. Pisesky's 2015 report:

It is my opinion there may be some psychological issues behind all this as commented on by Dr. Nowak in his report of September 4, 2013, and by Mr. Fleming's response in my office. This is not my area of expertise and I will not further comment on this. It may be worthwhile looking into this however;

1. In Dr. Laidlow's 2014 report:

On September 4, 2013, Dr. Nowak, a Specialist in Physical Medicine and Rehabilitation, reviewed Terry. He indicated that Terry was having pain in the neck, lower mid back and lumbar region. Dr. Nowak indicated that the previous hip surgery had been complicated by bilateral deep venous thrombosis. Dr. Nowak felt that there may be a fair amount of somatization, anxiety and symptom magnification behavior.

**72**  No report of Dr. Nowak is in evidence and the issue is not addressed anywhere else in the evidence or submissions. While I accept that dealing with longstanding pain is frustrating and can affect a person's mood and efficiency, it is very difficult on the evidence before me to identify the extent to which these complaints might be attributable to the plaintiff's physical injuries.

**73**  The notice of civil claim relating to MVI1 and MVI2 refers to "trauma induced anxiety" and "sleep disturbance and fatigue". The notice of civil claim for MVI3 includes in its list of alleged injuries "sleep disturbance and disruption", and "exacerbation of depression and anxiety". There is no evidentiary basis to find any trauma-based anxiety and it was not argued. In addition there is no evidence that MVI3 exacerbated any depression or anxiety.

**74**  In the days following MVI1, pain in his low back was the plaintiff's most significant problem and he says that it has remained so ever since. He started physiotherapy in January 2013, and attended two to three times per week for treatment, and another two times per week for traction. He experienced what he described as spasms in his low back.

**75**  The plaintiff was in a relationship and living with his girlfriend. They were engaged in March 2014, but that relationship ended in April 2015. The plaintiff blames the symptoms and the medications for changes in himself that prompted his fiancée to end that relationship. His fiancée did not testify.

**76**  He testified that he was unable to coach baseball in 2014, and that he struggled with home cleaning and maintenance. He did return to cycling in 2014, an activity that he had pursued in the past, and found that that did not aggravate his symptoms and was helpful in his conditioning, including weight loss.

**77**  Unfortunately his return to cycling led to MVI3, but since that incident the plaintiff has once again returned to cycling. He also regularly goes to the gym. He works four to five hours per day, five days per week. He has been in another relationship that ended in October 2016, after approximately one year.

**78**  The combined effect of the injuries limited the plaintiff's time at work and his activities while at work. He had the freedom to come and go from work and his hours of work and his absences were not tracked or recorded. In addition to his physical absence and reduced abilities, he found as time wore on without sustained or meaningful improvement, his optimism and enthusiasm for his work suffered. He described himself as becoming short tempered. It is in respect of this evidence from the plaintiff that some challenges arise. While the plaintiff clearly blames the motor vehicle incidents for his emotional state, the evidence as a whole is lacking in making that connection.

**79**  The plaintiff said that there was some improvement in his condition before MVI2 and that that incident set him back for a brief period.

**80**  There are issues in respect of the plaintiff's testimony regarding the impact of MVI2 on his activities. With multiple vehicle incidents and injuries, the developments in his relationships, and the events affecting his business, it was apparent during his evidence that he had difficulties articulating the impact of each event and keeping those clear in his mind. During his cross examination on inconsistencies in his evidence, he observed with considerable frustration that, in hindsight, he should have kept records. Given all that was occurring in the plaintiff's life, it is understandable that he had difficulty giving evidence in a detailed chronology and articulating the impact at various times of various events and circumstances. In the end, however, I was not left with confidence in the reliability of his recall of specific periods of time and the impact of specific events. I conclude that these details had in fact blurred in the plaintiff's memory and that his efforts to bring clarity were influenced, at least subconsciously, by what would improve the results of this trial for him.

**81**  Those challenges are, however, resolved by the consensus of the two medical experts regarding the impact of MVI2. Dr. Pisesky said in his report that MVI2 "... did not result in any significant new injuries but primarily did result in an aggravation of his initial injuries from the first accident." Dr. Laidlow opined that MVI2 did not result in any change.

**82**  I rely on those expert opinions generally to understand the impact of each of the motor vehicle incidents on the plaintiff's symptoms and his past and future prognosis. Certainly, the plaintiff's evidence assists in understanding the global impact on him, but it is not helpful in respect of the task of attribution.

**83**  The knee injury resulted in some clicking when the plaintiff is climbing stairs but it is not a significant issue for him.

**84**  Overall, the plaintiff describes his current symptoms as fluctuating with pain at 2 to 4 out of 10 on a daily basis, with spasms in his low back resulting in pain at 8 to 10 out of 10. The latter episodes occur intermittently. He is able to remain physically active, including being able to cycle 50 km routinely during the cycling season and going to the gym five to six days per week. He does this for his own enjoyment and in part because physical activation is necessary to manage his symptoms. This activity does provide some context for understanding the ongoing impact and severity of his condition.

**Nonpecuniary Damages**

**85**  Each party provided a number of authorities in support of their respective positions and they are not substantially at odds. The plaintiff's authorities suggest a range of $80,000 - $90,000 in nonpecuniary damages, and, with the addition of the knee injury, the plaintiff argues $115,000 is an appropriate award. The defendants' cases suggest a range of $60,000 - $70,000. I will not refer to all of the authorities but attach as an appendix to this decision an index of the decisions from each of the parties' books of authorities.

**86**  It is noteworthy the plaintiff makes no mention in his submissions of any psychological injury or condition. The plaintiff's evidence left the impression that he attributed much of his difficulty at work and in his personal relationships to lack of drive and interest; to a change in his personality. There is no expert evidence to explain specifically the nature of his emotional problems or their connection to the motor vehicle incidents. Anecdotally, one might say such responses would logically flow from chronic pain. But, in the circumstances of this case and the evidence before me, that is not sufficient to prove such an injury.

**87**  This is of note since Dr. Laidlow says the plaintiff is only limited by his injuries in the physical aspects of his work. Dr. Laidlow does not specifically refer to any other limitation including any psychological condition. Dr. Pisesky's conclusion referenced above makes no mention of psychological issues.

**88**  In the decision of *Dzumhur v. Davoody*, [*2015 BCSC 2316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HX-00000-00&context=), an award of $85,000 was made for nonpecuniary damages. There, the Court had medical opinion diagnosing sleep disruption, an emotional illness, and psychological symptoms, and recommending antidepressants. In this case, the plaintiff has been faced with the losses of relationships, as well as serious business losses contributed to by economic, and environmental circumstances, which certainly impact his mental health.

**89**  In *Preston v. Kontzamanis*, [*2015 BCSC 2219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HK3-JGT1-JPGX-S3V4-00000-00&context=), Parrett J. awarded $100,000 for nonpecuniary damages, describing the plaintiff as having his life reduced from a very busy and active individual to a more sedentary observer, noting that his lifestyle, both in his profession and his choice of recreational activities, had been significantly curtailed. While that may be a description that the plaintiff would endorse for himself in this case, it is not one that is supported by the medical reports. That, together with the uncertain connection between his emotional issues and his injuries, causes me to conclude that the plaintiff is not in the same category.

**90**  Having considered all of the evidence and the authorities provided to me, it is my conclusion that an appropriate global award for nonpecuniary damages is $70,000.

**Loss of Earning Capacity**

**91**  This is the most contentious aspect of the plaintiff's claim. The dispute between the parties focuses on the question of whether - or, perhaps more accurately, how much - of the poor performance of BWS is a product of the plaintiff's injuries. There is no doubt that industry and economic factors have played a significant role in the company's performance. It is obvious from a review of the earnings and earnings compared to revenue that there has been dramatic decline and that that trend began before MVI1. The decline in earnings as a percentage of revenue did fall steeply in the first full year after MVI1.

**92**  The plaintiff attributes the decline in the fortunes of BWS primarily to his absence from work and his reduced efficiency and engagement while at work as a result of his injuries. While acknowledging economic forces took a toll on BWS, he stresses that this downturn was not the first in the business' long existence. He says the difference in his ability both physically and emotionally to respond to a downturn with the same vigour, enthusiasm and interest as he would otherwise have shown has had a significant negative impact and resulted in a much greater decline than otherwise would have occurred.

**93**  Based on his injuries and my conclusions as to their severity, I have no difficulty accepting that they would have had a negative impact on BWS. In particular, in an economic downturn it makes sense that a small business would rely heavily on its key personnel. Indeed, the defendant's expert readily acknowledged that proposition in cross-examination. The difficulty is, however, determining the amount of that decline attributable to the injuries.

**94**  *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=) [*Hardychuk*], contains a useful summary of the law regarding the assessment of past loss of earning capacity at paragraphs 175 to 178:

[175] An award of damages for loss of earning capacity, whether in the past or the future, represents compensation for a pecuniary loss. The goal is to restore the plaintiff to the position he or she would have occupied but for the defendant's ***negligence***. Accordingly, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=); *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=); *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=).

...

[177] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity, however, involves consideration of hypothetical, not actual, events. The plaintiff is not required to prove hypothetical events on a balance of probabilities. Rather, 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; 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=); aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=).

[178] As with the loss of future earning capacity, the court's task is to assess damages for past loss of capacity rather than to calculate them mathematically. Allowances for contingencies should be made and the award must be fair and reasonable taking into account all of the circumstances: *Falati*.

**95**  The British Columbia Court of Appeal's decision in *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=) [*Rowe*], referenced in *Hardychuk*, considered a claim for loss of earnings where the plaintiff was neither a shareholder nor an "official employee". The Court of Appeal made these comments:

[22] In *D'Amato v. Badger*, [*[1996] 2 S.C.R. 1071*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3RK-00000-00&context=), an appeal from the decision of this Court on which the appellant relies, the company of which Mr. D'Amato was a 50% shareholder appealed from the conclusion that its loss was too remote. The Supreme Court of Canada dismissed the appeal. As a result, the Court said,

52 ... the issue arose whether the award of $36,650 by the Court of Appeal under the *alter ego* principle should stand. The rationale for the *alter ego* doctrine is not as strong as it once was, in light of recent developments in tort law. However, the respondents did not cross-appeal on this issue, so the Court of Appeal's award of $35,650 [*sic*] remains as is.

[23] Clearly, the court called into question the continuing utility of the "alter ego" doctrine, a point that is significant on this appeal. The rationale for the "alter ego" doctrine is that injured plaintiffs who earn their income through a closely-held corporation should not be denied damages for their loss simply because, strictly speaking, the loss of income was suffered by the corporation. This rationale focuses on the loss of income *per se* as the relevant compensable loss. However, the relevant loss is not the income itself; rather, it is the value of the loss of earning capacity, a capital asset, for which the tortfeasor must pay compensation.

...

[27] The Chief Justice said,

47 There is considerable case law establishing that an award for loss of earning capacity is intended to compensate for the loss of an asset, the capacity to earn. 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 p. 251, Dickson J. (as he then was), following *Jennings v. Cronsberry*, [*[1966] S.C.R. 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=), stated that:

It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings, supra*. A capital asset has been lost: what was its value?

Subsequent decisions have followed this approach: see *Earnshaw v. Despins* [*(1990), 45 B.C.L.R. (2d) 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4DT-00000-00&context=) (C.A.), at p. 399; *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.), at p. 59; *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.), at para. 27. As Finch J.A. noted in *Pallos*, these cases "all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury".

[Emphasis in original]

[28] On the question of the appropriate valuation of the lost asset, the Chief Justice turned to academic commentary:

49 As Cooper-Stephenson notes, *supra*, [Kenneth D. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996)] at p. 138, damages under this head are universally quantified on the basis of what the plaintiff would have earned, had the injury not occurred.

As far as concerns lost income, the courts fluctuate between the notion of "loss of earnings" and "loss of earning capacity", not for the most part intending any aspect of the substance of an assessment to depend on the particular wording, since damages are universally quantified on the basis of what the plaintiff *would have*, not what he or she *could have*, earned absent the injury.

[Emphasis in originals]

[29] She concluded,

50 These damages are not, then, based on a fixed value that has been assigned to an abstract capacity to earn. Rather, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time, had the tort not been committed. It follows that the loss of this value - the loss that the plaintiff has sustained, and that the damage award is intended to compensate for - should be treated as a loss sustained over time, rather than as a loss incurred entirely at the time that the tort was committed.

[Emphasis of Smith J.A. in *Rowe*]

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

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

[Smith J. underscoring; other emphasis in original]

[32] I see no need to enter into the esoteric debate as to whether a claim for past loss of earnings is a claim for general or special damages: see *Trache v. C.N.R.*, [*[1929] 2 D.L.R. 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-F361-M0VM-00000-00&context=) (Sask. C.A.); *Heltman et ux v. Western Canadian Greyhound Lines Ltd*. (1966), 57 W.W.R. 449 (B.C.C.A.); *Baart v. Kumar* [*(1985), 66 B.C.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-212G-00000-00&context=) (C.A.); *Wersch v. Wersch*, [*[1945] 2 D.L.R. 572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X29C-00000-00&context=) (Man. C.A.); *Alexander Enterprises Ltd. v. Dobbin* [*(1987), 63 NFLD & PEIR 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8T1-JFKM-64FV-00000-00&context=) (Nfld. C.A.). The term "special damages" may have different meanings in different contexts and, in most cases, the distinction between general and special damages will not matter. However, the distinction is important in cases, such as this one, where the evidence of pre-trial loss of earning capacity does not come from a conventional income stream. I would adopt the apt remarks of Barwick C.J. in *Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649 at 658, [1968] H.C.A. 9:

The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[Emphasis of Smith J.A. in *Rowe*]

**96**  More recently in *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=), after referencing its earlier decision in *Rowe*, the Court of Appeal said this at para. 19:

[19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held 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. 11, [*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=), the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

(See also *Catling v. Poteryko*, [*2017 BCSC 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N1F-TXX1-DXPM-S49W-00000-00&context=) at paras. 26-32 and *Worobetz v. Fooks*, [*2015 BCSC 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0N1-00000-00&context=) at paras. 105-107.)

**97**  The plaintiff relies on the report of Donald Spence, an accountant and business valuator. Key to his report are his "primary assumptions" described as follows:

1. You have asked us to prepare calculations utilizing the following alternative assumptions:
2. *Assumption One*. The increase in the Company's wages expense, if any, during the fiscal years following the First MVA was the result of the First MVA, the Second MVA and/or the Third MVA (collectively the 'MVAs'); and,
3. *Assumption Two*. Absent the MVAs, the Company would have generated similar pre-tax income (loss) during each of the fiscal years 2013, 2014 and 2015 (i.e., fiscal years ended March 31) as it had on average during the fiscal 2011 and 2012 years (i.e. the two fiscal years prior to the first MVA).

**98**  In his conclusion, Mr. Spence identified losses in 2013 to 2015, and nothing in 2016. Relying on the assumptions set out above, losses are calculated as follows:



**99**  Each assumption facilitates a relatively straightforward calculation. Applying Assumption One, Mr. Spence simply identified the arm's-length wages as a percentage of revenue for 2011 to 2016. Any percentage increase in the years after the first motor vehicle incident was identified to be the loss.

**100**  In applying Assumption Two, Mr. Spence looked at the same five-year period. He roughly averaged the pre-tax loss for 2011 ($326,000) and 2012 ($210,000) at $270,000. He then attributed any loss in years following MVI1 above $270,000 to be a product of the injuries.

**101**  There are numerous issues and problems with these assumptions and Mr. Spence's report. I note that nowhere in the report or in his testimony did Mr. Spence actually express the opinion that the method would produce reliable loss calculations. The plaintiff's counsel suggested that this would be a logical inference and should be implied, but I am unable to accept that proposition. It is my observation that Mr. Spence provided a very simplistic way of trying to identify a loss from the complex circumstances affecting the company's fortunes, and it is not, in my view, a reliable one. His failure to endorse the utility of the assumptions as creating a reliable estimation of loss is conspicuous and of consequence.

**102**  It is of note that the two assumptions are presented as alternative methods of identifying a specific loss and yet they produce dramatically different results. Logic would suggest that if they were each reliable methodologies the results would at least be similar. There can in fact be only one actual loss value. The task is to determine what it is. The fact that these efforts provided dramatically different results is an indication that one or both assumptions is/are flawed.

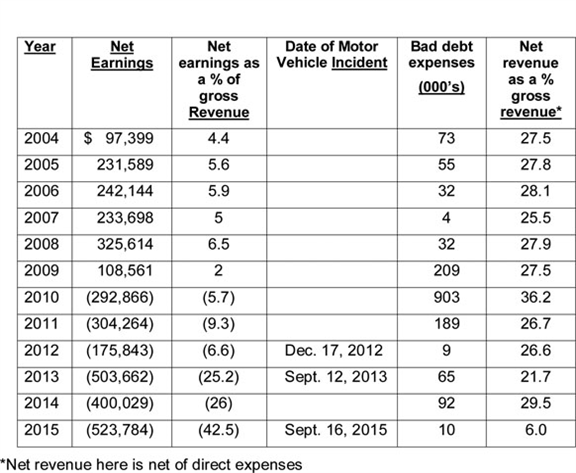
**103**  Nowhere does Mr. Spence comment on this discrepancy by indicating that one or the other of the assumptions is a better indicator or, in fact, that either of them are reliable indicators of losses attributable to the plaintiff's injuries. Indeed, as can be seen by his paragraph 7, quoted above, he does not even take ownership of the assumptions. He states only that he was asked to apply them. In the end, his report is primarily made up of some arithmetic based on assumptions put to him.

**104**  Assumption Two uses two very different results from 2011 and 2012 to produce an average. There is no earlier history considered and I am unclear on why an average of two years with very different results would provide a reliable measure or standard against which to measure the results in subsequent years.

**105**  The evidence from the plaintiff and Arlene Fleming, as well as the evidence generally, does provide some indication about staffing decisions given the business environment in which BWS was operating and given the plaintiff's limitations, but it falls short of supporting Assumption Two. There may in fact be a correlation between the plaintiff's injuries and the wages, but there is not an evidentiary basis to say the connection is as direct as the assumption in the report presumes.

**106**  There were many things occurring that may have affected the business, including the economic and industry factors, and the plaintiff's health.

**107**  The assumptions in Mr. Spence's report are, in my view, superficial. To illustrate the difficulties with such a superficial approach to the losses, I refer to the table in paragraph 25 above. Here, however, I have added some additional columns to highlight some significant aspects of the financial statements which are not explained and, in my view, not readily explainable by the plaintiff's injuries.



**108**  As can be seen, bad debt expenses jumped dramatically in 2009 to 2011, inclusive. The plaintiff was unable to explain this, indicating that he left such accounting issues to his accountants. He did say that BWS changed accountants during this period and different accounting practices may account for some of this, but this is not clear. It may be that performance in prior years was skewed by questionable sales that were causing increases in accounts receivable.

**109**  Further, revenues after deducting direct expenses, which I infer are costs of goods sold, follow a pattern starting in 2013 (the full first year after MVI1) that is difficult to understand unless factors other than the plaintiff's motor vehicle incident injuries were contributing. These percentages are ultimately a reflection of mark-up. The average up to 2011 was 28.4% and including 2012 was 28.2%. The three years that follow are 21.7%, 29.5% and 6% respectively. Based on the plaintiff's recovery and return to more regular and substantial work hours, one would expect the effect of his injuries on the business to be declining generally into 2015. There is certainly no evidence that explains this pattern and, particularly, that demonstrates that the pattern is attributable to the plaintiff's injuries. Obviously the profit margin on sales is the key to the company's success.

**110**  The defendants introduced a report of Mr. Harder. That report did not undertake an independent assessment but rather critiqued the approach of Mr. Spence and then made adjustments to the calculations. For example, Mr. Harder challenged Mr. Spence's determinations that income tax should not be considered and that the whole of the loss would be the plaintiff's as opposed to one half of it because of the 50% shareholding. I will not address those issues here because it is my conclusion that I cannot rely on the fundamental calculations in Mr. Spence's report themselves. In the result, I am unable to rely on either report as a foundation for determining the losses.

**111**  The real loss to BWS would be in the effectiveness and efficiency of the plaintiff. This is a product of his reduced presence and his reduced efficiency due to his ongoing pain and limitations in his work. There is no question on the evidence that his role at BWS involved some physical labour, but, in large measure, his inability to continue that work could be compensated for through other employees.

**112**  In relation to his marketing and communication with contractors and suppliers, he was able to offset the effects of his injuries on this work, to some extent, by doing work from home. It is, however, a very different scenario, especially in challenging market conditions, having a healthy and enthusiastic supplier dealing with contractor clients, versus one who is somewhat detached and less responsive due to physical absence and pain. There is no evidence of specific contracts lost, rather just a general decline in the overall fortunes of the business. Identifying how much of that is specifically attributable to the accidents is impossible. The financial data serves only to provide an outer limit of the total decline and the task for assessment is to identify how much of that should properly be attributed to the decline in the plaintiff's function.

**113**  In carrying out this task, some of the observations made by Mr. Harder in his report need to be considered. Among them is the fact that the plaintiff is a 50% shareholder with Arlene Fleming. Each continues to draw their salaries but the company has suffered losses.

**114**  The losses are the company's and this award is not intended to replace those losses but rather to compensate the plaintiff for his loss of earnings capacity. In my view, the appropriate reward is $150,000 for the period ending at the trial date.

**115**  The medical reports each say that the plaintiff is not now restricted by his injuries in terms of carrying out any of the administrative tasks associated with his job. There is indication that he will continue to have symptoms and will be restricted from doing the physical aspects of his job that he has done in the past. In my view that does support a finding of a loss of capacity to earn income that extends beyond the time before trial. I fix the future loss of capacity to earn income at $40,000.

**Loss of Housekeeping Capacity**

**116**  The Court of Appeal in *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=), said as follows at paragraphs 64-67:

[64] *Kroeker v. Jansen* [*(1995), 123 D.L.R. (4th) 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=), [*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.), and *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=), [*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=), both concerned the loss of housekeeping capacity which, prior to *Kroeker*, had not been accepted in this Province as a separate head of damage.

[65] As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for future cost of care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered *by the plaintiff*, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered *to the plaintiff*. It is true that the two claims may overlap--just as the normal claim for loss of earnings and cost of care may do so--because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care, particularly if the plaintiff is hospitalized. The loss is a "negative" loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses--the addition of an extra expense--and they clearly fall under cost of care.

[66] Indeed, in *McTavish*, the Court distinguished between loss of housekeeping capacity and future care costs, at para. 43:

[43] As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely. [Emphasis of Kirkpatrick J. in *O'Connell*]

[67] As noted by Madam Justice Huddart in *McTavish*, at para. 16, the case was concerned with the development of principled restraints on claims for loss of housekeeping capacity. One of the principles approved in *Kroeker* came from *Fobel v. Dean* [*(1991), 83 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JS5Y-B294-00000-00&context=) at 407, [*[1991] 6 W.W.R. 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JS5Y-B294-00000-00&context=) (Sask. C.A.), in which it was said that it is not necessary for a plaintiff to prove that someone will be employed to do the work in the future to be entitled to an award for loss of housekeeping capacity. As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* [*[2002] 1 SCR 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=) at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:

It is clear that both the *need* and the *opportunity* for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature--such as institutional care --then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff.

**117**  In this case, Dr. Laidlow indicated in 2014 that the plaintiff did not need assistance in doing his housework but that he may have to do it in "more of a piecemeal fashion than before". There is no medical support for the plaintiff's claim of loss of housekeeping capacity. The plaintiff did testify that his back pain makes heavier tasks around the home more difficult. However, that is not, in my view, a sufficient basis upon which to make an award.

**Apportionment**

**118**  In dealing with this issue, the distinction between the concepts of divisible/indivisible injuries, apportionment, and causation must be considered.

**119**  *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=), is a frequently referenced authority in this area. Within the decision are comments on apportionment between tortious causes and the difference in analysis where injuries result from tortious and non-tortious causes. The Supreme Court of Canada said this at para. 22:

[22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial ***negligence*** statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the ***negligence*** of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

**120**  In respect of divisible/indivisible injuries, the Court made these comments at paragraphs 24 and 25:

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

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

**121**  In *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=), the Court of Appeal confirmed that the effect of the Supreme Court of Canada decision in *Athey* was to change the law of apportionment in respect of indivisible injuries. The Court said this:

[32] There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory ***negligence***, the plaintiff can claim the entire amount from any of them.

[33] The approach to apportionment in *Long v. Thiessen* [*[1968] B.C.J. No. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F06F-223R-00000-00&context=), is therefore no longer applicable to indivisible injuries. The reason is that *Long v. Thiessen* pre-supposes divisibility: *Long* requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.

[34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the ***Negligence*** *Act*, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.

[35] This is not a case of this Court overturning itself, because aspects of *Long v. Thiessen* were necessarily overruled by the Supreme Court of Canada's decisions in *Athey, E.D.G.*, and *Blackwater*. Other courts have also come to this same conclusion: see *Misko v. Doe*, [*2007 ONCA 660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64DY-00000-00&context=), [*286 D.L.R. (4th) 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64DY-00000-00&context=) at para. 17.

[36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.

[37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), [*[2005] 3 SCR 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of ***negligence***" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

**122**  As noted above in paragraphs 57-82, the medical opinions here say that the plaintiff's low back injury arose in MVI1, that MVI2 caused a temporary aggravation of the symptoms related to this injury, and that the remaining symptoms are entirely attributable to MVI1.

**123**  Dr. Pisesky, for the defence, does reference the plaintiff's complaints in respect of his mid back and neck but does not address the cause or consequence of those complaints. Dr. Laidlow, for the plaintiff, says the mid back and neck injuries were caused by MVI1 and MVI2. I conclude that each of these areas of injury are indivisible.

**124**  Dr. Laidlow confirms that the knee injury is entirely attributable to MVI3.

**125**  There is no evidence that contradicts these medical opinions.

**126**  The defendants argue that the nature and intensity of treatment suggests that MVI2 had a more significant effect than either the plaintiff or the medical experts indicate. The defence also points to the severity of MVI2 to say that the forces involved would have been significant and therefore likely to have caused significant injury. Its arguments are summarized in part at paragraphs 35 and 36 of the defence written argument as follows:

1. The plaintiff's back injury has persisted from the first accident to the present. It is submitted that notwithstanding the opinions of Drs. Laidlow and Pisesky, this court can find that the second accident contributed to his back injury including to his lower back. He commenced taking Gabapentin after the second accident; he and his physician requested an MRI after the second accident. He was able to continue cycling after the first accident but his cycling was impeded substantially by the second accident; and the evidence of Ms. Fleming is that the plaintiff was back to work on close to a full-time basis prior to the second accident, but was disabled for working full-time again for a period afterwards. Opinions attributing his lower back injury solely to the first accident are suspect for that reason. The plaintiff also suffered mid-back injury and neck injury which were attributable to both accidents.
2. In analogous cases, courts have held that injuries from a second accident were indivisible from first-accident injuries where the plaintiff had not yet recovered from the first accident and where the first accident injuries were exacerbated and aggravated.

**127**  I accept the medical opinions. The treatment regime that the plaintiff undertook was an evolution and it is my conclusion that the persistence of the symptoms from MVI1, together with the aggravation resulting from MVI2, drove the treatment decisions. The severity of an impact is relevant but there is no evidence here, nor is it something I am prepared to accept as a general proposition, that there is a direct correlation between force of impact or speed of impact and resulting injuries. Any inferences that could be drawn certainly do not displace the unanimous expert medical opinions before me.

**128**  Each of the neck and mid back injuries are indivisible and were caused by MVI1 and MVI2. The low back and knee injuries are divisible and caused by MVI1 and MVI3, respectively. I find that MVI2 caused a temporary aggravation of the low back symptoms which is irrelevant to divisibility.

**Conclusion**

**129**  In the result, I reject both parties' arguments on apportionment. In the circumstances, including the plaintiff's settlement in respect of MVI2, I require further submissions from counsel as to the application of these findings to the global award that I have made. Counsel should contact trial scheduling to arrange a time for those submissions including their estimate of time needed.

D.A. BETTON J.

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**Appendix "A"**

**130**

**Plaintiff's Authorities Relied On**

1. *Preston v. Kontzamanis*, [*2015 BCSC 2219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HK3-JGT1-JPGX-S3V4-00000-00&context=)
2. *Hutchinson v. Dyck*, [*2015 BCSC 1039*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB3-MY31-JX3N-B2D1-00000-00&context=)
3. *Dzumhur v. Davoody*, [*2015 BCSC 2316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HX-00000-00&context=)
4. *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=)
5. *Everett v. King* [*(1981), 34 B.C.L.R. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X220-00000-00&context=) (S.C.)
6. *Boaler v. Brar*, [*[1995] B.C.J. No. 2341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B24T-00000-00&context=)
7. *Wagner v. Narang*, [*2003 BCSC 1750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60RD-00000-00&context=)
8. *Gillespie v. Yellow Cab Company Ltd.*, [*2015 BCCA 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBG-0YF1-F4W2-6310-00000-00&context=)
9. *Savoie v. Williams*, [*2013 BCSC 2060*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S41C-00000-00&context=)

**Defendant's Authorities Relied On**

1. *Amini v. Mondragaon*, [*2014 BCSC 1590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G3H-VVF1-JSRM-62MX-00000-00&context=)
2. *Bilanik v. Ferman*, [*2014 BCSC 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2D3-00000-00&context=)
3. *Sandhu v. Gabri*, [*2014 BCSC 2283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4VS-00000-00&context=)
4. *De Vries v. Poltorak*, [*2013 BCSC 2527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16D-00000-00&context=)
5. *Munoz v. Singh*, [*2014 BCSC 567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-620F-00000-00&context=)
6. *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=)
7. *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=)
8. *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, [*2015 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G4B-CVF1-JPGX-S2TN-00000-00&context=)
9. *Engel v. Salyn*, *[1993] 1 S.C.R. 306*
10. *Ridge Tool Company v. A & L Plumbing & Heating Ltd.*, [*2010 SKCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-F22N-X1P9-00000-00&context=)
11. *Hutchings v. Dow*, [*2006 BCSC 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1YM-00000-00&context=), aff'd [*2007 BCCA 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46D-00000-00&context=)
12. *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=)
13. *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=)
14. *Blenkarn v. Mills*, [*2016 BCSC 1976*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M43-BH51-DXHD-G241-00000-00&context=)

**End of Document**

[***Cue v. Breitkreuz, [2010] B.C.J. No. 792***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6307-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: December 18, 2009; April 9, 2010.

Judgment: April 30, 2010.

Docket: M064862

Registry: Vancouver

**[2010] B.C.J. No. 792** | 2010 BCSC 617 | 188 A.C.W.S. (3d) 917 | 2010 CarswellBC 1065

Between Miquel Mendoza Cue, Plaintiff, and Roy Breitkreuz and Gary's Delivery Service Ltd., Defendants

(17 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Causal connection — Motor vehicles — Rules of the road — Signals and warnings — Evidence and proof — Action arising from motor vehicle accident dismissed — Plaintiff's vehicle was struck from behind by defendant's truck while in left lane — Plaintiff testified he turned right onto street, signalled, moved to left lane and had been waiting at least five seconds to turn left when struck — Defendant testified plaintiff turned onto street and then cut in front of his vehicle and stopped without warning — Defendant's version accepted as entirely consistent with independent witness's evidence and corroborated by short distance between where plaintiff turned onto street and stopped to turn left — Plaintiff caused accident.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Lane changing — While signal changes — *Negligence* — Liability — Civil actions — Causation — Action arising from motor vehicle accident dismissed — Plaintiff's vehicle was struck from behind by defendant's truck while in left lane — Plaintiff testified he turned right onto street, signalled, moved to left lane and had been waiting at least five seconds to turn left when struck — Defendant testified plaintiff turned onto street and then cut in front of his vehicle and stopped without warning — Defendant's version accepted as entirely consistent with independent witness's evidence and corroborated by short distance between where plaintiff turned onto street and stopped to turn left — Plaintiff caused accident.**

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| Action arising from a motor vehicle accident. The plaintiff's vehicle was struck from behind by the defendant's truck in the left lane of the southbound road. The plaintiff testified that he turned right onto the southbound road from a stop sign, signalled and moved to the left lane and then waited for an opportunity to turn left. The plaintiff testified that he had been waiting five or more seconds to turn left when the defendant hit him. The plaintiff's wife was in the vehicle and testified that she had time to unbuckle her seatbelt and reach back to pick up her dog before they were struck. The plaintiff's daughter saw the accident scene on her way home from school and testified that the plaintiff's left turn indicator was on and the defendant was making racial slurs about him. The defendant testified that he was travelling southbound and saw the plaintiff turn right onto the street, so moved over to the left lane. The defendant testified that the plaintiff accelerated, cut in front of him and abruptly stopped, leaving him no time to avoid the collision. An independent witness testified that he was waiting to turn into the northbound lanes when he saw the plaintiff cut in front of the defendant and slam on his brakes, causing the accident. The plaintiff argued that the independent witness's evidence was not credible because he was hostile and testified it was daytime when all other witnesses testified it was dark.  HELD: Action dismissed.  The independent witness did have obvious hostility towards the plaintiff, who he believed was faking injuries and driving up insurance premiums. However, the witness's evidence was entirely consistent with the defendant's, despite having no connection to him. The confusion over the time of day was not fatal, given that the accident occurred six years ago. The defendant's version of events was preferred since it was corroborated by an independent witness and by the short distance between where the plaintiff turned onto the southbound street and where the collision occurred. The plaintiff caused the accident. |

**Counsel**

Counsel for the Plaintiff: T.J. Vondette.

Counsel for the Defendants: D.N. Robinson.

**Reasons for Judgment**

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

**1**   This action arises out of a motor vehicle collision in which the plaintiff's car was struck from the rear by the defendants' truck. The plaintiff said the collision occurred while he was stopped, waiting to make a left turn. The defendant said the plaintiff suddenly changed lanes, then stopped in front of him, leaving no opportunity to avoid the collision. By agreement of counsel, this trial dealt only with the issue of liability.

**2**  The collision occurred shortly after 5:00 p.m. on November 30, 2004, at the intersection of Main Street and 44th Avenue in Vancouver. The plaintiff, Miquel Cue, was driving a Toyota Corolla, with his wife in the front passenger seat. They had left their house on 43rd Avenue, just west of Main Street, and were driving to a drugstore on Fraser Street, which is parallel to Main Street and a few blocks further to the east. Main Street, in that area, has three lanes in each direction, but the curb lanes were occupied by parked vehicles. The collision occurred in the southbound traffic lane adjacent to the centre line, which I will refer to as the left lane. I will refer to the southbound traffic lane next to the parked vehicles as the right lane.

**3**  The plaintiff testified that at the intersection of 43rd Avenue and Main Street, he stopped at a stop sign, checked for oncoming traffic, then made a right turn to head south on Main Street, intending to then turn left at 44th Avenue. He said he turned into the right lane, put on his left-turn signal, then moved into the left lane and slowed down. The plaintiff said that before changing lanes, he checked his rear view and side mirrors, and looked over his shoulder to determine that it was safe to do so. At that point, he said, he was in about the middle of the block between 43rd and 44th Avenues and other southbound traffic was still north of 43rd Avenue.

**4**  The plaintiff testified that as he was slowing down in the left lane, a car behind him moved into the right lane and passed him. At the intersection of 44th Avenue and Main Street, he stopped to wait for oncoming traffic to pass before making his left turn. He estimated that he had been waiting for five seconds or more before his car was struck from behind.

**5**  On cross-examination, the plaintiff agreed that he was travelling between 40 and 50 kilometres per hour (kph) and began to slow down when he was about two car lengths from the intersection. He rejected the suggestion that this was an abrupt stop.

**6**  The defendant, Roy Breitkreuz, was driving south on Main Street in a five-ton truck. He testified that he was travelling at about 50 kph when he crossed 41st Avenue and saw the plaintiff's vehicle ahead, trying to make a right turn at 43rd Avenue onto Main Street. The defendant said he moved from the right to the left lane. He said that he saw the plaintiff's car make the right turn and accelerate in the right lane, although his truck was catching up to it quickly. Suddenly, the defendant said, the plaintiff's car moved to the left lane, then braked. He said the plaintiff was only two or three car lengths from the intersection of 44th Avenue when he completed the lane change. The defendant said he first took his foot off the accelerator, but applied his brakes in a "panic stop", when he saw the plaintiff's brake lights come on. He said he saw no turn signal before the collision, only brake lights.

**7**  The plaintiff and the defendant agree that the block of Main Street between 43rd and 44th Avenues is a short one. Photographs show that on the west side of Main Street there are only five lots, occupied by four houses and a small commercial building. The defendant said he has subsequently paced off the distance and believes the block to be approximately 65 metres or 65 yards long.

**8**  The plaintiff's wife, Almica Cue, who was in the front passenger seat of the plaintiff's vehicle, testified that her husband's lane change was not abrupt, the stop was gradual, and she saw and heard the left turn signal indicator inside the vehicle. Mrs. Cue said they were stopped at the intersection long enough for her to undo her seatbelt, turn around, and pick up her dog from the back seat.

**9**  The plaintiff's daughter, Mandy Cue, came upon the scene after the accident, when she was on her way home from high school. She said she saw the left turn signal flashing on her parents' car. She also said she heard the defendant, while speaking to another person at the scene, make a derogatory racial remark about her father. The defendant denies that.

**10**  The only independent witness called at trial was Hardial Singh Poonia. Mr. Poonia testified that he was stopped in his vehicle on 44th Avenue on the west side of Main Street waiting to make a left turn to head north on Main Street, when he saw both the plaintiff's and the defendant's vehicles approaching. He said the plaintiff's car accelerated, moved in front of the truck, then "slammed on the brakes". From his observation, Mr. Poonia did not think the truck had any chance to stop before sliding into the plaintiff's car.

**11**  There are reasons to approach Mr. Poonia's evidence with some caution. He showed an obvious hostility to the plaintiff, stating that he thought the plaintiff was faking injuries after a minor accident, and expressing a concern that such claims could affect insurance premiums. Mr. Poonia admits that, at the scene of the accident, he was angry about what he had seen and clearly expressed that anger.

**12**  Counsel for the plaintiff also points out that Mr. Poonia stated with some certainty that the accident had occurred during daylight, while all others say it was dark. Given the time of day and time of year, Mr. Poonia was clearly wrong on that point and counsel for the plaintiff suggests that a witness who is wrong about such a basic and obvious matter must be unreliable.

**13**  However, Mr. Poonia's description of the accident is entirely consistent with the defendant's version of events. Notwithstanding his attitude toward the plaintiff, there is no evidence that he has any connection to the defendant. I do not agree that his evidence can or should be discounted merely because he was wrong about the lighting conditions. The important point, and the one most likely to be accurately recalled six years later, was the description of the collision itself.

**14**  Faced with a plaintiff and a defendant whose recollections and descriptions of the accident are irreconcilable, I prefer the evidence that is consistent with that of the only independent witness. The evidence of the defendant and Mr. Poonia is also more consistent with the shortness of the block between 43rd and 44th Avenues. Given the short distance within which the plaintiff had to change lanes and stop, I find those manoeuvres must have been more abrupt than the plaintiff now recalls and believes them to have been.

**15**  Where there has been a rear-end collision, the onus shifts to the following driver to show that he or she was not at fault: *Robbie v. King*, [*2003 BCSC 1553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B081-00000-00&context=) at para. 13. It is also the case that the driver of a following vehicle must allow a sufficient distance to stop safely in the event of a sudden or unanticipated stop by the vehicles ahead: *Pryndik v. Manju*, [*2001 BCSC 502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2V6-00000-00&context=) at para. 21, aff'd [*2002 BCCA 639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YG-00000-00&context=); and *Rai v. Fowler*, [*2007 BCSC 1678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21NY-00000-00&context=) at para. 30.

**16**  On the evidence before me in this case, I find that the defendant has discharged the onus upon him. I find that the plaintiff, by changing lanes in the manner that he did, created the situation in which the defendant did not have a safe stopping distance behind the plaintiff's vehicle. Had the plaintiff not stopped, the defendant would have had the opportunity to slow down and allow the distance between them to increase. But when the plaintiff stopped immediately following the lane change, the defendant had no chance to avoid the collision. The defendant had no reason, in the moments leading up to the accident, to anticipate the plaintiff's lane change and stop.

**17**  The plaintiff's claim must therefore be dismissed. Counsel may make written submissions as to any costs issues that may arise from these reasons.

N.H. SMITH J.

**End of Document**

[***Demarzo v. Michaud, [2010] B.C.J. No. 336***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X10N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

N. Brown J.

Heard: December 7-11, 2009.

Judgment: February 26, 2010.

Docket: M48978

Registry: Nanaimo

**[2010] B.C.J. No. 336** | [*2010 BCSC 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VF-00000-00&context=) | [*2010 CarswellBC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VF-00000-00&context=) | [*186 A.C.W.S. (3d) 999*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VF-00000-00&context=)

Between Deidrea Demarzo and Daniel Saliken, Plaintiffs, and Paul Michaud, Defendant

(117 paras.)

**Case Summary**

**Damages — For torts — Direct causal connection or link — Action by plaintiffs for damages for injuries suffered when their car was struck from behind by defendant's car allowed — Plaintiff suffered significant lower back injury because of accident — Plaintiff awarded damages of $356,500 — $85,000 in non-pecuniary damages for pain and suffering and loss of enjoyment of life — $44,000 for diminished homemaking capacity — $2,500 to plaintiff's husband as in-trust award for work he did — $75,000 for past loss of income — $150,000 for loss of earning capacity — Plaintiff had started her own landscaping business which she had to give up due to her injuries.**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Action by plaintiffs for damages for injuries suffered when their car was struck from behind by defendant's car allowed — Plaintiff suffered significant lower back injury because of accident — Plaintiff awarded damages of $356,500 — $85,000 in non-pecuniary damages for pain and suffering and loss of enjoyment of life — $44,000 for diminished homemaking capacity — $2,500 to plaintiff's husband as in-trust award for work he did — $75,000 for past loss of income — $150,000 for loss of earning capacity — Plaintiff had started her own landscaping business which she had to give up due to her injuries.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Non-pecuniary loss — Pain and suffering — Action by plaintiffs for damages for injuries suffered when their car was struck from behind by defendant's car allowed — Plaintiff suffered significant lower back injury because of accident — Plaintiff awarded damages of $356,500 — $85,000 in non-pecuniary damages for pain and suffering and loss of enjoyment of life — $44,000 for diminished homemaking capacity — $2,500 to plaintiff's husband as in-trust award for work he did — $75,000 for past loss of income — $150,000 for loss of earning capacity — Plaintiff had started her own landscaping business which she had to give up due to her injuries.**

**Tort law — *Negligence* — Causation — Action by plaintiffs for damages for injuries suffered when their car was struck from behind by defendant's car allowed — Plaintiff suffered significant lower back injury because of accident — Plaintiff awarded damages of $356,500 — $85,000 in non-pecuniary damages for pain and suffering and loss of enjoyment of life — $44,000 for diminished homemaking capacity — $2,500 to plaintiff's husband as in-trust award for work he did — $75,000 for past loss of income — $150,000 for loss of earning capacity — Plaintiff had started her own landscaping business which she had to give up due to her injuries.**

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| Action by Demarzo and her husband Saliken for damages for injuries suffered when their car was struck by Michaud's car. On March 19, 2005, Demarzo, the driver, had stopped at a red light and was struck from behind by Michaud's car. Demarzo suffered injuries to her neck, shoulder, upper and lower back. The main issue was what bore legal responsibility for Demarzo's injuries. Demarzo suffered from a degenerative spine condition and had two post-accident occurrences that cause back pain. Demarzo attempted to lift two 20-pound dumbbells in May 2005, which she claimed exacerbated her injuries. Demarzo was a very active individual who had started her own landscaping business. She was forced to give up the business because of her injuries.  HELD: Action allowed.  Demarzo was awarded damages of $356,500. Demarzo sustained a significant lower back injury because of the motor vehicle accident. Had it not been for the accident, most likely Demarzo would not have sustained any injury to her lower back when she lifted the two dumbbells. Demarzo was awarded $85,000 in non-pecuniary damages for pain and suffering and loss of the enjoyment of life. Demarzo was awarded $44,000 for diminished homemaking capacity and for re-landscaping the grounds of her home. Saliken was awarded an in-trust award of $2,500 for work done for Demarzo. Demarzo was awarded $75,000 for past loss of income. Demarzo had a good opportunity to be successful in her landscaping business. She was awarded $150,000 for loss of earning capacity. |

**Counsel**

Counsel for the Plaintiff: R.F. Johnston.

Counsel for the Defendant: A.J. Winstanley.

**Reasons for Judgment**

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| **N. BROWN J.** |

**1**   On March 19, 2005, the defendant drove his Pontiac Sunbird into the back of a Jeep Cherokee driven by the plaintiff Deidra Demarzo, who had stopped for a red light at a Vancouver Island Highway intersection. The plaintiff had turned to her right to say something to her passenger, Daniel Saliken. The light turned from red to green just before impact, the force of which propelled the Jeep about a car's length into the intersection.

**2**  Of the injuries the plaintiff sustained in her neck, shoulder, upper and lower back, the most serious, and the focus of the trial, was the lower back. The plaintiff testified that she still experiences lower back pain worsened by bending, lifting, or standing or sitting too long. The plaintiff and her husband testified about the substantial effect her injury has had on her work and recreational activities, leading her eventually to decide to give up the landscaping business she had been developing.

**I. POSITIONS**

**3**  The main medical legal question is what is legally responsible for the plaintiff's ongoing problems: the plaintiff's degenerative spine condition; the accident; or two post accident occurrences on May 29, 2005 and in early November 2005.

**4**  The plaintiff says that the March 21, 2005 accident caused her all of her injuries, including her continuing lower back symptoms, and that her accident injuries were exacerbated on May 29, 2005, when she tried to lift two 20lb dumbbells out of the way when tidying up the basement at home.

**5**  What the plaintiff describes as a second flare-up occurred in early November 2005, after the plaintiff had been out walking with friends and experienced increased pain and neurological symptoms that included numbness in her foot.

**6**  She submits that the degenerative condition of her lower back, whether it existed before the accident or resulted from it, produced no symptoms until then; and she argues that there is no basis for supposing that without the accident the plaintiff would have injured her back on May 29, 2005 or suffered the November 2005 flare-up and her ongoing symptoms. The plaintiff submits that the March 21, 2005 accident likely caused a tear of the annular ring at L4-5, which lifting the dumbbells exacerbated on May 29, 2005 and which flared up again with neurological symptoms in November 2005; and that whatever the mechanics of the accident injuries, they precipitated her lower back problems.

**7**  The defendant's position is that if the plaintiff suffered any lower back injuries from the accident, they were minor. He submits that the plaintiff's attempt to lift "two heavy dumbbells" caused a more serious injury to her back than the defendant's ***negligence***. He submits that the disc protrusion seen on MRI imaging on April 2008 likely occurred in early November 2005, after the plaintiff had gone on a walk with her friends or, alternatively, when she tried to lift the two dumbbells in May 2005. For either case, the defendant argues that the plaintiff's pre-existing degenerative spine and May 29, 2005 injuries are the cause of her ongoing symptoms, not the defendant's ***negligence***. The defendant also submits that the plaintiff's degenerative spine condition resulted from years of gym workouts, sports activities and landscaping, which pre-disposed her to the lower back symptoms she has been experiencing; this condition, combined with the plaintiff's dumbbell lifting injury bears the blame for the plaintiff's continuing symptoms.

**8**  The plaintiff claims compensation for pain and suffering and loss of enjoyment of life, loss of income, loss of earning capacity and loss of homemaking capacity, special damages and costs. The defendant argues that the plaintiff is entitled only to a modest award for her soft tissue injuries and her limited ability to work for about a month. The defendant has paid the plaintiff's special damages.

**II. PRE-ACCIDENT HISTORY**

**9**  During her Prince George teenage years, the plaintiff actively participated in high school sports and recreation, including rugby, beach volleyball, skiing, hiking, cycling, and bicycling. Starting in Grade 8 and throughout high school, her favourite pastime was working out in a gym. Her sports activities during high school and after her 1997 graduation resulted in a high level of fitness that served her well when, about three years later, she started working as a landscaper and had to meet that job's strenuous physical demands.

**10**  Before starting to work as a landscaper, she had completed two years of university transfer courses at New Caledonia College, with good standing, and after that ran a small marketing and advertising company for a few months. She then moved to the Lower Mainland and started working as a landscaping labourer. In 2002, she took some landscaping courses offered by her employer, following these up with a more formal four-month certified course she attended after work. In 2003, she moved to *Mascone Landscaping* ("*Mascone*"), attracted to the company's focus on installations on new building sites and the chance to learn more about that facet of the landscaping business. When *Mascone* laid her off after about four months, the plaintiff decided to start up her own landscaping business.

**11**  Since she had become self-employed, she needed to buy a truck and all the necessary tools, borrowing over $10,000 from her parents to buy them. Her immediate marketing strategy was to target homeowners with large landscapes; her next target was strata complex clients; and her ultimate goal was obtaining landscaping contracts for new building sites. Throughout all of 2004, the plaintiff progressively built up her business in the Vancouver area. On some contracts, she did all the work herself; on larger ones she hired "young guys with strong backs" to help.

**12**  The evidence satisfies me that before her March 2005 move to Nanaimo to live with Mr. Saliken, the plaintiff was making progress in building her lower mainland landscaping business with a growing network of clientele. Her growing clientele, coupled with her personality, energy, and dedication, was laying a foundation for potential success.

**13**  I accept the plaintiff's evidence that before the accident her physical and emotional health were excellent, that she loved her work and her sports. She suffered no pre-accident physical problems of note, with the exception of some discomfort she felt in her shoulders and neck related to power trimmer work on some high hedges, especially challenging for a 5'3" frame. That discomfort was relieved by a fall 2002 chiropractic treatment and her employer's willingness at the time to excuse her from further trimming of high hedges. She suffered no recurrence. The plaintiff acknowledges that she sometimes felt sore muscles after work, but felt this was what anyone would expect after working hard all day; and sore muscles never stopped her from working.

**14**  In September 2004, she met Daniel Saliken, now her husband, at a beach volleyball game. Over the following six months that preceded the accident, they then saw one another every weekend, splitting their time between Vancouver and Nanaimo. Mr. Saliken's work as a land officer with the provincial government allowed him to set up his work schedule so he could be off eight weeks per year. On his days off, he and the plaintiff played beach volleyball or ran with a mountain running group. The plaintiff introduced him to the "Grouse Grind", a very challenging fitness hike up Grouse Mountain. When winter rains forced the end of the volleyball season and limited outdoor activities, they went to the gym and worked out.

**15**  Mr. Saliken felt attracted to what he described as the plaintiff's energetic, "almost obsessive" attraction to sports, which he said matched his own, explaining that it was "hard for an active guy to find a woman who is as active as that, and that this was the woman that he was looking for."

**16**  Mr. Saliken sometimes went on the plaintiff's Vancouver area job sites to help or just "hang out." He recalled a "big job" in North Vancouver where he saw the plaintiff install 25 yards of soil and then plant big trees, clean up the debris and lay the turf. He had worked on the job himself over two days, and was impressed with the plaintiff's strength and stamina. He described work on other job sites as well, and observed that she works "harder than guys do, back and forth, back and forth, not even taking breaks, just five minutes for a burger, then back to work, non-stop." He said that the plaintiff worked out hard at the gym "like a guy", using all the machines.

**17**  Mr. Saliken denied awareness of any back complaints by the plaintiff.

**18**  By March 2005, Mr. Saliken said that he and the plaintiff had become serious about their relationship, but found the long distance aspect difficult. He tried to convince the plaintiff to move to Vancouver Island, and take her landscaping business with her, but she resisted his suggestion at first, pointing out to him that she had been building an "upscale client list", and said she was reluctant to give it up. Even so, by February 2005 they came to a compromise, with the plaintiff travelling back and forth between Nanaimo and Vancouver so she could continue to service her more lucrative Vancouver clients. In March 2005, the plaintiff moved to Nanaimo, began living with the plaintiff, and started marketing her business on Vancouver Island while maintaining her existing Vancouver clients. Then in the third week of March, the accident occurred.

**III. ACCIDENT AND POST ACCIDENT HISTORY**

**19**  The plaintiff said that she felt shaken at the scene. Afterwards, she went to the home of Mr. Saliken's mother, noticing her stiff neck and headaches were getting worse. She also began to notice some stiffness on the left side of her back.

**20**  Counsel for the defendant submits that the plaintiff exaggerated the forces of the collision in statements she gave to the examining physicians, which he suggests led them astray when they prepared their opinions. I reject this. It is true that the plaintiff indicated to some medical examiners that she thought the defendant's impact speed at impact was 60 kilometres per hour. This estimate might be high, but the fact remains that the impact generated a significant amount of abrupt force on the bodies of Mr. Saliken and the plaintiff, who was turned to her right at the time of impact. Mr. Saliken, a fit man, also sustained injuries, albeit less significant than the plaintiff's. He recalled that the collision thrust his body forward quite violently, then backward and then forward again; causing him to strike and bruise his head.

**21**  I accept the evidence of the plaintiff and Mr. Saliken that the impact propelled the Jeep forward about 14 to 15 feet, nearly resulting in a collision with a car in front that had been pulling out in response to the light change from red to green. Mr. Saliken described how the impact bent the trailer hitch and crushed the bike rack, both thrown away, as well as other damage to the vehicle.

**22**  On March 21, 2005, the plaintiff and Mr. Saliken saw Dr. Vaughn at the same time. Dr. Vaughn prescribed physiotherapy for the plaintiff. On March 29, 2005, she attended the *Departure Bay Physiotherapy Clinic* ("*Departure Bay*"). There, she received massage on her shoulder and lower back and the physiotherapist heat wrapped her left shoulder. The plaintiff recalls that she felt terrible after the massage, and that her back felt worse than before she went in for treatment.

**23**  Despite continuing lower back complaints, the plaintiff eventually stopped further physiotherapy treatments because she was not receiving any benefit from them; in fact, she says they seemed to aggravate her symptoms. She continued daily stretching on her own, and did not seek any other medical attention until after the aforementioned May 29, 2005 dumbbell lifting incident.

**24**  The plaintiff testified that she expected a full recovery so she continued marketing her business and tried to resume some of her normal activities. For example, she tried raking, but could not continue with that or other typical landscaping tasks. She promoted her business and supervised jobs where Mr. Saliken did the labour. She did experience some improvement in the next eight weeks, but continued experiencing lower back symptoms that worsened with attempts to become more active. She also testified that she had a brief episode of foot numbness a couple of weeks before May 29, 2005, the day she tried lifting the two 20lb dumbbells.

**25**  The defendant pointed to differences in the history the plaintiff gave to examiners about the weight and number of dumbbells involved in the May 29, 2005 incident. Nothing turns on these. I find any discrepancies relate as much to errant arithmetic by recording physicians as anything else, and that most likely there were two 20lb dumbbells involved.

**26**  Before turning next to the various medical-legal opinions, I should note that during argument the defendant raised an objection to the admissibility of a document styled as an "Interpretation of Clinical Records of Departure Bay Physiotherapy Clinic". This document contained a typed interpretation of notes made by treating physiotherapists in March and April 2005. The notes show that the physiotherapists treated the plaintiff for lower back pain. The opinions of Dr. Vaughan and Dr. Reems about the onset of lower back pain relied on this document to some degree. I dismissed this objection for reasons set out in an Appendix at the conclusion of these reasons.

**IV. MEDICAL-LEGAL OPINIONS**

General Practitioner Dr. Vaughan - February 14, 2006

**27**  Dr. Vaughan was the first physician to see the plaintiff after the collision, although his office colleague Dr. Reems eventually became her primary caregiver. In his February 14, 2006 medical report, Dr. Vaughn confirmed that he saw the plaintiff on March 21, 2005 and that he did not note any back complaints. This was also the case when she saw him on April 27, 2005 and told him she had been to physiotherapy and that the treatments seemed to make her neck pain and headaches worse. Since the plaintiff had been receiving physiotherapy treatment for lower back pain at the time, one would expect mention of this. Still, a clinical note does not necessarily contain all relevant information at a given time.

**28**  When Dr. Vaughan wrote his February 14, 2006 report, he had received a copy of the *Departure Bay* records that defendant's counsel objected to during trial. Dr. Vaughan partly relied on these records in coming to his conclusion that the Plaintiff had suffered a lower back injury as well as a whiplash injury of her neck in the accident. He noted that initially "she hurt everywhere and the neck discomfort and secondary headaches were the prominent symptoms immediately."

Medical Report of Dr. Reems - March 6, 2007

**29**  Dr. Reems assumed primary care of the plaintiff from Dr. Vaughn. He saw the plaintiff on December 27, 2006, which was her last visit before he wrote the March 6, 2007 report where he noted at p. 2:

... In hindsight of course, it is entirely probable that the low back difficulties did start out with the motor vehicle accident, unfortunately there is no mention of low back issues related to the motor vehicle accident in the previous visits with Dr. Vaughan. He does not mention any low back complaints until her visit of August 11, 2005. On review of Departure Bay Physiotherapy notes from Gulzar Hallman, she notes a motor vehicle [accident on] March 19, 2005, and began examination and treatment of Ms. Demarzo on March 29, 2005. This would therefore fit with her claim that her back pain began as a result of the motor vehicle accident, rather than first mention of same in our charts on May 30, 2005, with the back pain issues related to lifting at home.

**30**  When Dr. Reems saw the plaintiff on February 14, 2007 -- well after the May 29, 2005 lifting injury and November 2005 flare-up discussed separately below -- she told him that she was still attending chiropractic treatments on an as-needed basis, that she was still experiencing pain in her left shoulder and left lower back, and that she had been unable to carry out any landscaping work since November 2006. She continued to experience numbness along the left lateral foot margin. When he wrote the report in February 2007, Dr. Reems' prognosis was an optimistic one, but unfortunately, by the time of trial the plaintiff had still not recovered and the prognoses of some of the other specialists are considerably more pessimistic.

Dr. Leete, Orthopaedic Surgeon - June 3, 2009

**31**  Dr. Leete graduated from University of London, St. Mary's in 1961, came to Canada in 1967, practiced and qualified as an orthopaedic surgeon in Ontario and has practiced as an orthopaedic surgeon since 1979. When the plaintiff saw Dr. Leete on June 3, 2009, his clinical examination and testing revealed "segmental instability in the vertebrae" (i.e. it does not extend smoothly after bending) and also pain on bilateral resisted straight leg raising. He thought these were indicative of mechanical back pain with segmental instability.

**32**  He described the medical imaging as "quite revealing":

... These show that she has sacralisation of her fifth lumbar vertebrae and has only four mobile lumbar segments. The last mobile segment at the level of L4-5 is extremely degenerative for a person of her age with sclerosis on either side of the joint, indicative of abnormal movement.

**33**  Dr. Leete attributed the advanced degenerative change shown on imaging to the injury sustained in the motor vehicle accident:

For a person of her age to show such degenerative change, it is apparent on her plain films, she must have sustained significant injury and the only relevant history of injury is the motor vehicle accident of the 19th of March 2005.

It is my opinion, therefore, that her ongoing back discomfort is a direct result of the accident that has been described.

Her prognosis is, I think, extremely guarded. The degree of degenerative change that she has at the last mobile segment in her spine does, I think, render her to be a candidate for long term back discomfort.

**34**  Dr. Leete opined that he did not believe the plaintiff would be able to return to her previous work as a landscaper and that she would require a more sedentary job in the future. Dr. Leete also opined that should the plaintiff become pregnant, she could expect to experience an acute exasperation of discomfort. This expectation was borne out because when the plaintiff became pregnant, she experienced acute back problems.

**35**  When asked on cross-examination how soon he would expect the plaintiff to exhibit pain if she had suffered a tear of the annulus in the accident, he explained that pain might not be immediate; it can worsen gradually, as swelling and irritation in the tissues progresses.

**36**  He also explained that medical literature does not support a causative connection between the congenital fusion of the plaintiff's spine at the last vertebral segments at L5-S1 (as seen on x-ray) and backache; likewise, no support for a causative connection between such a congenital fusion and the onset of disc problems at the next higher level, L4-5, where imaging had revealed a "minor herniation" (or tear of the annular ring). In addition, he denied any support in the medical literature for a connection between physical activities such as football and occupations such as landscaping and the development of back pain. On cross-examination, Dr. Leete confirmed his opinion that the accident had injured the plaintiff's lower back, including the annulus, rendering the plaintiff more susceptible to further injury.

Dr. Filbey, Physiatrist - April 22, 2008

**37**  Dr. Filbey has practiced as a physician for 15 years and as a physiatrist for 10 of those. He is a Clinical Assistant Professor at the University of British Columbia. He saw the plaintiff in April 2008.

**38**  His opinion largely accords with Dr. Leete's opinion, although his analysis places little importance on the annular tear at L5. On examination of the plaintiff, he found no abnormality at S1 and no nerve root irritation. He states at pp. 4 and 5 of his April 22, 2008 report, prepared at the request of plaintiff's counsel:

Ms. Demarzo has not had a history of pain in the currently symptomatic areas prior to the MVA. The records, and Ms. Demarzo's own history, indicate that she developed low back pain following the MVA.

It is noted that she had an acute complaint of low back pain with the dumbbell lifting. There is no indication that she would have developed pain in the low back with lifting the dumbbells had it not been for the pre-existing low back pathology (related to the MVA). It is more likely than not that as a result of the MVA contributed to the development an acute exacerbation of pain with such an activity.

The disc protrusion on the MRI scan is reported to be "tiny" and did not displace the left L5 root. There is nothing on the MRI scan that accounts for her bilateral leg symptoms at this time. My conclusion is that the MRI scan has no acute impact or relevance to her current symptoms. I am of the opinion that the MRI scan findings are not relevant from a clinical perspective with respect to nerve root compression.

The degenerative changes are unlikely to be a result of the MVA although they may have been rendered symptomatic by the MVA.

**Prognosis:**

Ms. Demarzo has ongoing chronic low back pain. Her MRI scan identified lumbar spondylosis and an annular tear. She has had pain now for over 2 1/2 years. It is my opinion that she will remain symptomatic. The annular tear is unlikely to be of much relevance at this time. There is no risk of significant radicular pathology as a result of the MVA.

It is possible that Ms. Demarzo may experience ongoing degeneration of the discs identified as being abnormal in the MRI scan.

**Gainful Employment:**

Ms. Demarzo is advised to avoid heavy lifting or repetitive tasks with her low back in the future. She can continue with her employment.

**39**  On cross-examination, Dr. Filbey clarified and expanded on his opinion. Dr. Filbey said that physicians now get less "excited" about imaging that shows vertebrae changes or artefacts such as annular tears, explaining that he had ordered the MRI scan in order to see if it offered any confirmation of a nerve impingement, which could have necessitated surgery. The MRI ruled out a serious impingement requiring surgery, and he concluded that the annular tear in this case was not clinically significant. While the tear could have occurred at the time of the accident, it could also have developed gradually over time. He did not think it was possible to look back and say when it occurred. Like Dr. Leete, he did not agree with the defendant counsel's suggestion that the plaintiff's degenerative spine would lead to back pain and he opined that the accident trauma caused the plaintiff's symptoms. He explained that trauma renders asymptomatic degenerative spines symptomatic in many patients. In the plaintiff's case, he felt that the degeneration of the plaintiff's spine had accelerated because of the accident, but also that this process would plateau and not then not continue to worsen. However, now it would be unstable. He predicted that because of the accident the plaintiff will now be "symptomatic over the long term".

**40**  Dr. Filbey also opined that the degenerative changes had been present for a considerable period but that without pre-accident baseline imaging and no post-accident comparatives soon enough after the accident, it was impossible to give a reliable opinion on the extent of the changes pre-accident, although he felt that some degenerative changes would definitely have been present then. He clarified his written report further by confirming that it was his opinion that without the intervention of the car accident trauma, the plaintiff would have remained asymptomatic.

**41**  He did not agree that lifting two 20lb dumbbells was the cause of the plaintiff's ongoing symptoms because she had no history of previous back pain and her back was accommodated to lifting and strenuous activity, just as the bodies of athletes accommodate to the demands of the their sports activities. Like Dr. Leete, Dr. Filbey disagreed with the defendant's suggestion that the plaintiff's work as a landscaper predisposed her to degenerative changes or pain.

Dr. A. Moll, Neurologist

**42**  Dr. Moll saw the plaintiff in June 2006, at the request of Dr. Reems. Dr. Moll confirmed that his conclusion was that at some point the plaintiff suffered irritation of the S-1 nerve root level on the left side, and that this probably occurred in November 2005. Dr. Moll felt that the plaintiff likely suffered a probable disc protrusion with nerve root irritation in November 2005, with substantial resolution, but that the numbness and an impaired ankle reflex laterally reflected some residual scarring at the left S1 nerve root level.

**43**  On questioning, Dr. Moll felt that it did not really matter whether was just part of the progression of the initial injury or partly related to the degenerative spine condition; he felt that both were pertinent.

Dr. J. Reed, Chiropractor - Clinical Record Review

**44**  Dr. J. Reed saw the plaintiff on May 31, 2005 after she had injured her back lifting the dumbbells. The plaintiff told Dr. Reed she had experienced numbness in her right foot radiating from her lower back during the previous week, but that it had only lasted for one day. The plaintiff's last visit with Dr. Reed was on November 7, 2005, following her acute onset of pain and numbness.

Medical Reports of Dr. Schweigel, Orthopaedic Surgeon - April 21, 2008, January 21, 2009, and December 1, 2009

**45**  Dr. Schweigel conducted a medical examination of the plaintiff at the defendant's request on January 21, 2009. He agrees with the other physicians that the plaintiff sustained a soft tissue injury to her neck and back as a result of the motor vehicle accident. On p. 4 of his January 21, 2009 report, he opined:

**Opinion and Discussion:**  My opinion and discussion remain unchanged from the report given on April 21, 2008. I believe she did sustain a soft tissue injury to her neck and back as a result of her motor vehicle accident. I do not believe she sustained a disc protrusion as a result of the motor vehicle accident on March 19, 2005.

**46**  He also opined that the dumbbell lifting injury in May 2005 caused an injury to the lumbar spine, and that the plaintiff did not have a significant injury to the lumbar spine from the accident. He felt that the significant triggering event was the dumbbell-lifting incident:

... It sounds like she had a soft tissue injury whereby she had a couple of complaints to the physiotherapist, but no significant findings. There were no documented neurological findings and her range of motion of the lumbar spine prior to the lifting of the weight was normal.

... I believe the lifting of the weight is the triggering event which caused the pain. She was bedridden because of this pain after lifting the weight. She had very mild complaints to the physiotherapist only after the motor vehicle accident brought her to the lifting of the weight. I don't believe the motor vehicle accident caused the disc protrusion. It sounds like the motor vehicle accident caused a mild soft tissue injury to her lumbar spine... This ongoing low back pain sounds as if it is a mechanical type pain, ie. lifting, bending or twisting are more likely to bother the back. This mechanical back pain is not related to the motor vehicle accident.

**47**  On cross-examination, Dr. Schweigel confirmed that at the time he wrote all three of his reports, he believed the plaintiff had ongoing mechanical lower back pain brought on by activities such as lifting or twisting. He acknowledged that an acute phase follows an injury, but said that this usually settles over time. However, it was also his experience that although there might be improvement, there could be a waxing and waning pattern during the recovery period, and that strenuous activity during the recovery would more likely cause an aggravation. He did not rule out the possibility that the May 29, 2005 lifting injury was an exasperation of the lower back injury caused by the accident.

**V. DISCUSSION AND FINDINGS**

**48**  The medical opinions of Dr. Filbey and Dr. Leete, in conjunction with the plaintiff's accepted testimony, are more than adequate to show that the plaintiff sustained a significant lower back injury because of the motor vehicle accident. It is also clear that the plaintiff had not recovered from her accident injuries on May 29, 2005, when she lifted the two dumbbells. At that point, apart from some on site supervision and attempts to resume activities that worsened her symptoms, the plaintiff was still unable to work as a landscaper. She had not returned to any of her various recreational activities and was still not able to manage homemaking activities as before. While she had felt some improvement in her lower back pain since the accident, she was far from recovered by the time of her May 29, 2005 injury. Dr. Schweigel appears to have incorrectly assumed that the plaintiff's symptoms before May 29, 2005 had been insignificant. However, it is apparent that, two months later, the plaintiff, though improving, was still significantly symptomatic and incapacitated.

**49**  I accept the opinion of Dr. Filbey that had it not been for the accident, most likely the plaintiff would not have sustained any injury to her lower back when she lifted the two dumbbells. I accept the persuasive evidence I heard that before the accident the plaintiff was extremely hard working, and could lift, push, twist and pull with significant force and effort, participate in sports, and attend the gym without limitation and had been able to do so asymptomatically for a long period. Anyone capable of working in the landscaping business day after day as well as exercising in a gym as hard as the plaintiff did before the accident and without any indication of lower back complaints should have been able to lift two 20lb dumbbells without sustaining such a significant persisting injury, as Dr. Filbey noted. Of course, it is possible to sustain an acute temporary injury after moving or lifting something the wrong way, but the circumstances in the case at bar are quite different.

**50**  Further, while it is possible that at the time of the accident the plaintiff sustained an annular tear or other injury to one of the discs in her lower back, this tear was very small one. I accept Dr. Filbey's opinion that such a small tear has little clinical significance in this case; and that the focus should be on the overall history and clinical history of the plaintiff, not on individual artefacts.

**51**  I find that the plaintiff sustained a significant soft tissue injury to her lower back but it is not possible to unravel the plaintiff's clinical history in such a way that allows a conclusive evidentiary finding on the specific medical legal question of when the plaintiff sustained her annular tear.

**52**  The plaintiff's lower back symptoms have become chronic and I accept Dr. Leete, Dr. Filbey's medical opinions that she will continue to experience intermittent lower back complaints, especially related to certain activities. This is far from what she was able to do before the accident.

**53**  As for the defendant's contention that the plaintiff's landscaping activities produced her degenerated spine and that this is the ultimate cause of her symptoms, I prefer the opinions of Dr. Leete and Dr. Filbey that there is no sound medical basis for the proposition that because someone over the years has been active in sports and worked as a landscaper, they are necessarily predisposed to development of degenerative changes in the spine or that such changes are associated with back pain. I understood from the evidence of Dr. Leete and Dr. Filbey that one patient may present with images of a markedly degenerated spine and have no history of symptoms, while another patient may present with marked symptoms, and have images of a perfectly normal spine. I also find that there is no sound medical basis for concluding that the plaintiff would have suffered the symptoms and limitations that she has experienced or that her degenerative spine would have inevitably become symptomatic, absent inducement of symptoms by the trauma of the motor vehicle accident.

**54**  The plaintiff's position is that when she lifted the dumbbells, she experienced immediate onset of pain in the same area she injured in the accident; that this was an exacerbation of the plaintiff's unresolved injuries; and that there is no evidence to show that she would have experienced her continuing symptoms but for the injuries she sustained in the accident. On the balance of probabilities, I agree with the plaintiff's position. I find that but for the accident the plaintiff would not have suffered the pain and disability she experienced after accident, including the exacerbation of her injuries on May 29, 2005 and acute flare-up with neurological symptoms in November 2005.

**55**  The principles of causation as set out by the Supreme Court of Canada at paras. 16-17 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=) [*Athey*], govern in this case:

[16] In *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortuous conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision ...

[17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their ***negligence***.

**56**  As stated above, it is impossible to unravel the plaintiff's medical history in a way that that can lead to a precise determination of the respective contributions of the plaintiff's degenerative spine, the accident trauma and the May 29, 2005 lifting injury to her continuing symptoms, from which she will not fully recover. However, I find that the medical evidence exceeds the evidentiary standard laid down in *Athey.* Accepted medical evidence amply demonstrates that the trauma of the accident substantially caused or contributed to the plaintiff's ongoing symptoms, and as such, the defendant is liable for the resulting losses. Moreover, I accept the opinion of Dr. Filbey that there is no reason to conclude, absent the accident, that because of the plaintiff's degenerative spine condition or the May 29, 2005 exacerbation, the plaintiff would have experienced such pain and disability in future years.

**VI. LOSSES**

**A. Pain and Suffering and Loss of Enjoyment of Life**

**57**  The plaintiff has never returned to her former work as a landscaper or to any of her former recreational activities, at least not with any degree of intensity. She is still unable to play volleyball, cannot run long distances, although she did try running in the last month but at a far lower level than before. She no longer exercises at the gym. She does not enjoy movies in theatres because she finds sitting for long periods very uncomfortable. She explained that the last time she went out with friends, she felt very uncomfortable, but suffered through it as she was too embarrassed to leave. Given her enjoyment of sports and active lifestyle shared with her husband, as well as the loss of her former capacity to be active, this represents a substantial loss for the plaintiff as a person and a spouse. Although the plaintiff will likely improve somewhat in the future, I accept that she will not ever be able return to her former level of participation in recreational activities or regain her former physical capacities; and will continue to experience varying degrees of chronic back pain that will necessitate alteration of her lifestyle.

**58**  The accident depressed the plaintiff's mood, leading to a marriage separation in early spring 2007. Mr. Saliken testified that the plaintiff became depressed, unhappy about living with him in Nanaimo, impatient and angry. Making matters worse was the apparent mindset of Mr. Saliken's family, who were impatient with the pace of the plaintiff's recovery and kept asking why she could not work. The plaintiff's feelings of frustration, augmented by her feelings of diminishment in the eyes of her husband's family, who she did not yet know well and who had "never seen how hard she could work", and her feeling that she had become a drain on the household combined with other aggravating factors, ultimately led to arguments and her two months separation from her husband. Fortunately, their bond and commitment to one another were strong enough to allow the plaintiff and Mr. Saliken to weather these adverse emotional affects of the accident and they reconciled. Nonetheless, the plaintiff's separation from her husband and her emotional distress are emblematic of the degree of suffering and loss of enjoyment of life the plaintiff has experienced. She is entitled to a substantial award for pain and suffering and loss of the enjoyment of life. Bearing in mind that while she will receive compensation for her loss of earning capacity, she has still lost the enjoyment and satisfaction she experienced in her chosen career. I award the plaintiff $85,000 for non pecuniary damages.

**B. Impairment of Homemaking Capacity and Grounds Maintenance**

**59**  The plaintiff claims compensation for impairment of her homemaking capacity, a claim that encompasses her inability to maintain the grounds around their ocean side home and the cost of future maintenance. The defendant submits that $40,000 would be a suitable award for these losses.

**60**  When Mr. Saliken lived alone in what now is the family home, he left the grounds untended because he had no interest in gardening and chose to leave the grounds in their natural ocean side state. Before the plaintiff moved in with Mr. Saliken, he agreed that she should landscape the grounds around the house. The plaintiff testified that she went all out, installing lawns, beds and a wide variety of plants, producing the finished look you "might expect from a landscaper", as she described it. The plaintiff had purchased wholesale plants and materials that would retail for over $5,000. She had planned to maintain the grounds because she knew Mr. Saliken wasn't "into" gardening. After the accident, the plaintiff's diminished capacity joined with the fact that Mr. Saliken had to assume most of the housekeeping, as well as labour on the plaintiff's commercial landscaping projects, resulted in circumstances where the grounds were not maintained and became overgrown. Mr. Saliken's elderly father came the odd time to cut the lawn, but for all intents and purposes, I understand that the grounds ended up looking worse than when the plaintiff had landscaped them. As matters now stand, the plaintiff will not be able to look after them as she had planned and her husband has neither the time nor personal interest to motivate him to take on the responsibility for grounds maintenance.

**61**  The plaintiff asks that the cost of restoring and maintaining the grounds be considered, pointing out that she will have to hire someone to restore and then to maintain them. However, asked what the hourly cost would be, she said that she billed out her own time on projects at $50 per hour per person, and workers' time at $20 per hour.

**62**  The plaintiff and Mr. Saliken are credible witnesses, but they cannot supply all that a trier of fact requires to award substantial damages on this aspect of the claim for loss of homemaking capacity. Although I accept that the grounds are in a sorry state, I have no photographic evidence showing the state of the grounds before the accident that allows me to gauge the scope of work done and required, nor do I have any invoices for the purchased plants and or independent estimate of the costs for restoring and maintaining the grounds.

**63**  Furthermore, the plaintiff is obligated to mitigate her damages. While I accept the plaintiff's evidence that she charged for her own time at $50 per hour, an independent estimate and evidence about market rates for landscape maintenance should have been introduced. The plaintiff paid her own workers $20 per hour per person, not the $50 hourly rate that counsel proposed as a basis for calculating the future cost for restoring and maintaining the landscape. An independent estimate could have included a calculation of the cost of replacing the current landscaping with low maintenance landscaping, taking into account salvageable plants, together with the annual cost for future maintenance. This would have been a starting point for an assessment.

**64**  Overall, the evidence justifies an award that encompasses an amount to restore the grounds to an attractive but lower maintenance state and the cost of maintaining them. The plaintiff can mitigate costs by overseeing the work and hiring less experienced lower cost labour, as she did for her former business. As for the long term, an award for lost homemaking capacity should be an assessment that weighs all factors, including the real possibility that in the future the plaintiff will improve sufficiently to allow her to garden for pleasure to some extent and avoid some of the costs of maintenance in the process. I find that with the plaintiff's expertise and ability to oversee the work and salvage some plants, she can mitigate costs to some extent. Based on the accepted description of the work the plaintiff had done, but assessing the costs conservatively given the lack of an independent estimate, I allow $4,000 for the cost of re-landscaping the grounds and changing them to a layout that will require a reduced level of maintenance. The cost of future grounds maintenance is encompassed with the general award for loss of homemaking capacity. With respect to the plaintiff's loss of the enjoyment she would have experienced in maintaining the grounds of the family home is encompassed within the general award for non-pecuniary damages.

**65**  The plaintiff also claims compensation for diminished housekeeping capacity on the basis that Mr. Saliken has had to take on various household duties that she can no longer do herself, such as cleaning the floors and bathtub and unloading the dishwasher. She continues to do other chores, but at a slower pace and with discomfort. The evidence confirms that she must now be careful using her lower back and it follows that she should avoid any heavy or repetitive lifting.

**66**  Neither party called evidence to show how many hours weekly would be reasonable, or the range of hourly rates in the Nanaimo area. Photographs of the interior of the house or other objective evidence would have assisted in assessing the need and scope of work required. Nevertheless, the accepted evidence about the plaintiff's limitations justifies an award for the cost of hiring cleaners to clean the floors and bathrooms, and to carry out other housekeeping that aggravates the plaintiff's lower back. She is also entitled to some assistance with heavy seasonal cleaning, as the evidence confirms her post-accident vulnerability in that regard.

**67**  The plaintiff has a young child to care for now as well as the pending responsibilities of full time work or further education, and she has lost a considerable amount of her former capacity to juggle the demands of work, child rearing and homemaking. She is entitled to receive a significant award for diminished homemaking capacity. In my view, the figure submitted by defendant's counsel is fair when measured against the plaintiff's limitations and assuming reasonable amounts of assistance at a reasonable cost. Accordingly, I award $40,000 for diminished homemaking capacity that encompasses both indoor and outdoor activities and an additional $4,000 for the initial cost of cleaning up and re-landscaping the grounds, to a total of $44,000.

**C. In Trust Claim for Substitute Labour Provided by Daniel Saliken**

**68**  The plaintiff advances an in trust claim based on the fact that in order to keep the plaintiff's landscaping business viable, Mr. Saliken had to take time off work to carry out work the plaintiff was unable to perform. There was no evidence that he suffered any personal pecuniary loss however. Plaintiff's counsel submits that 400 hours is a rough approximation of the total hours Mr. Saliken expended which, calculated at $14.34 per hour, yields a total loss of $5,736.00. However, the plaintiff and Mr. Saliken indirectly benefitted from the income earned on the projects and, in that sense, Mr. Saliken's labour did not go uncompensated. However, he used his personal time off from his work to perform the work the plaintiff would have done otherwise. Had Mr. Saliken not performed the work he did for the plaintiff, she plaintiff would have had to hire labour. In my view, this claim logically should form part of the plaintiff's loss of income claim, analyzed on the basis that the plaintiff should not benefit from Mr. Saliken's labour that the plaintiff would have otherwise had to purchase from strangers. In any event, it is compensable. As noted above, the documentation is sparse and the plaintiff derived some benefit from his labours, making this difficult to quantify. I award $2,500 in compensation for Mr. Saliken's labour substituted for that of the plaintiff.

**D. Past Wage Loss**

Business after the Accident, Work Done and Lost Opportunities

**69**  When the plaintiff moved to Vancouver Island, she handed out business cards and promoted her business through realtors, contractors and, as a result, secured a number of contracts. She tried to perform some landscaping tasks on these contracts post-accident but did not do well afterwards. As a result, she supervised the work performed by Mr. Saliken or hired hands on site. The plaintiff expected a full recovery that would eventually see her assume all her former duties so she wanted to keep her business as active as possible; however, she never was able adequately to resume her former activities and eventually quit the business altogether.

**70**  The plaintiff continued receiving calls from Vancouver clients and referees so she sometimes travelled there with Mr. Saliken who did the work while she supervised. However, she found that even travelling in a car was difficult.

**71**  The documentary record of the work completed was very thin. The plaintiff explained that she was not good at record keeping records and that some of these were lost when she moved to Nanaimo. Apart from the income tax returns, the only documentary evidence that the plaintiff was able to find is a May 25, 2007 quote for 2430 Recreation Road totalling $71,559; a bill for a decorative retaining wall for $10,248.69, and an invoice dated September 2005 for a lawn and cedar installation for $3,546.81. The plaintiff fell behind in filing her income tax returns. The only ones available are for fiscal years 2004 and 2005. For the period April 1, 2004 to December 31, 2004 the plaintiff reported business revenue of $18,133. But start-up expenses and other deductions resulted in an $11,300 loss. In 2005, she reported business revenue of only $2,750, but this represented only one project at Buntzen Lake and does not include some other jobs totalling about $6,000.

**72**  As for the invoices, these were not produced to the defendant until shortly before trial, leaving counsel no opportunity to depose the plaintiff on these documents or investigate them further. Such documentary shortcomings call for caution and conservative calculations when it comes to assessing the plaintiff's past loss of income. Nevertheless, the plaintiff's claim has substance. The descriptions of landscaping projects the plaintiff and Mr. Saliken gave were concrete and logical, and I have enough evidence to make an assessment that is reasonable and fair to both sides.

**73**  First, I will summarize the evidence about completed or lost projects based on the evidence of the plaintiff and Mr. Saliken, who between them had good recall of most of the projects, including the approximate amount of the billings on them. I will attribute gross revenue to these projects. I will take these attributed amounts into account when estimating the plaintiff's post-accident (i.e. the plaintiff's 'with accident') income. These must remain approximations. As for the lost projects, I will consider them to a limited extent in assessing the plaintiff's future prospects in the landscaping business, but will not award any loss of income in relation to them (because of the plaintiff's inability to complete the work). I will then set out all the factors in the table I have assembled below.

North Vancouver - 2005

**74**  This was a client that the plaintiff had completed a lot of work for in the past and had received a continuing flow of referral work from him. Mr. Saliken recalls spending four 8 to 10 hour days, about 40 hours in all, staying at his sister's place overnight. The intention was to try to keep the continuity of the plaintiff's business going. Attributed income: $2,000.

Absentee Landlord - April 2005

**75**  Another project was in April 2005 that involved cutting down some trees for an absentee landlord. I heard no details about the amount of time spent on that project. Attributed income: $500.

Southlands ("Ralph's Place") - Vancouver April 2005

**76**  Mr. Saliken travelled from Vancouver to Southlands, where the plaintiff had several clients encompassed within a few blocks. He was working with some lawn equipment but had started to "destroy" the lawn because he was not familiar with the equipment. The plaintiff could not operate the equipment and ended up calling in another landscaping colleague to finish the work. Attributed income: $0.

Buntzen Lake Coquitlam Hydro Project - April 2005

**77**  Mr. Saliken simply off-loaded plants there. The plaintiff says that this was included in the Plaintiff's 2005 return. Attributed income: $2,700.

Qualicum Beach - April to July 2005

**78**  This was a job given the plaintiff by the realtor Brenda Nicholls that paid $40 per week. Attributed income: $800.

Removing Debris - May 2005

**79**  This paid $150. Attributed income: $150.

September 2005 Lawn and Cedar Installation Invoiced

**80**  Attributed Income: $3,546.81

North Vancouver Backyard - September 2006

**81**  In September 2006, a neighbour of one of the plaintiff's clients called and asked if she would carry out a backyard makeover on his property. This would have required about 13 hours of work, not including travel time on the ferry, as recalled by Mr. Saliken. The plaintiff was paid $1,700. Attributed income: $1,700.

Esso Contract - October 2006

**82**  This customer owned a large gas station in Nanoose, and was referred to the plaintiff by the owner of another project at Qualicum Beach. This was a large project involving over 200 feet of driveway, with water features, fifteen large coniferous trees to be removed, among other tasks. The plaintiff hired a number of young men to do the work, and had the plants brought over from Vancouver. Mr. Saliken took two and a half weeks off work, and worked seven days a week, 12 hours a day in order to complete the job; thereafter, he had to leave his regular job at 4:30pm and work after hours in order to complete the project which was lit up with lights to allow night time work. He estimates that he worked about 300 hours on the project. Attributed income: $20,000.

Vancouver - April 2007 (Lost project)

**83**  The evidence on this work was unclear. The plaintiff testified that she was offered an opportunity at another job in April 2007 through a "police friend"; but she had to see a chiropractor because she was in so much pain. She gave the quote to the police officer. This evidence is too vague to give any weight in assessing loss of past income. Attributed income: $0.

Shawnigan Lake - May 2007 (Completed and Lost part of the project)

**84**  This Shawnigan Lake project was actually two projects, only one of which was completed. The first project was described by the plaintiff as a fairly large project which required building a retaining wall that was billed at $13,000. The plaintiff hired help to complete the project within four days. The second and larger project involved renovating the whole grounds of the lakefront property in preparation for a Canada Day celebration at a cost of about $70,000. The landowner said he wanted the work done soon, but since Mr. Saliken could not take any more time off work, the hired hands did not have enough available time either, and the plaintiff could not do it herself, she had to turn the project down. This project was the plaintiff's last job. Attributed income for completed portion: $10,249.

Manufactured Turf Installation (Lost project)

**85**  The plaintiff testified that one last opportunity for her landscaping business became available. A dealer who distributed installed manufactured turf for people who did not want to be burdened with garden maintenance offered the plaintiff a licence on the island. The plaintiff described the turf as a high quality, realistic looking turf. The dealer offered the plaintiff an opportunity to learn how to install the product. She went to the job site to learn the installation techniques, but found herself in pain, realized she couldn't do the work necessary and had to leave the site, leaving behind an angry dealer and what she saw as serious damage to her business reputation for letting the dealer down.

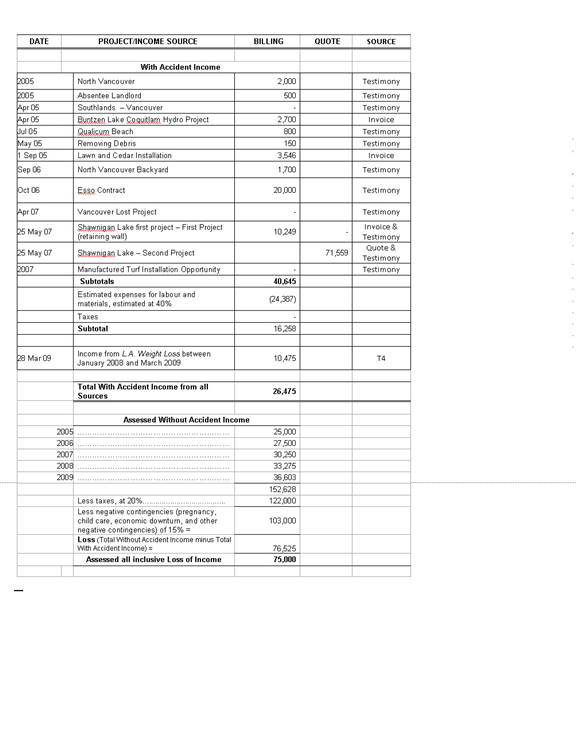
**86**  It was at that point that the plaintiff came to a realization that she could no longer work as a landscaper. Until then she had "kept thinking that she would turn the corner at some point, so kept putting in a huge effort in order to keep the company viable." She explained that she had tried hiring "help, but had learned that "no one works like the owner": at that stage of her business she had to provide her own labour to keep it viable and develop it further.

*L.A. Weight Loss*

**87**  The plaintiff's only other source of income post-accident was at *LA Weight Loss*. According to the plaintiff's T4, she earned $10,475.70 there for the period between January 22, 2008 and March 28, 2009 when the business closed and she was laid off. She explained that she was able to carry out her clerical duties at *LA Weight Loss* because there was a good balance between standing and sitting.

Calculating Past Loss of Income

**88**  I am satisfied that because of the accident the plaintiff suffered a past loss of income. The plaintiff's poor record keeping makes it very difficult to assess its extent. The plaintiff suggested a "conservative formula" for calculating the income based on the statistically reported annual income of landscapers in the province, which is about $28,000 per annum, using that as a basis for assessing the plaintiff's 'with accident income', and then deducting from that the amount that the plaintiff received on various landscaping projects and her *L.A. Weight Loss* wages. Those projects that do not have revenue amounts must remain approximations, in most instances relying on acceptance of estimates by Mr. Saliken and the plaintiff. The table below sets out basic accepted available evidence for estimating the plaintiff's 'with accident income'. Other assumptions are also included in the table. I did not deduct taxes because the plaintiff most likely has enough deductions, carry forwards and write-offs to the end of December 2009 to minimize taxes and this assumption favours the defendant, in any event. The plaintiff's 'with accident' income is based on the average annual earnings of people working as landscapers, reduced slightly to reflect the initial start-up costs and then increased by 10% per annum reflect likely expansion of the plaintiff's business and income growth. In my view, this is a reasonable basis for assessing the income the plaintiff would have earned had the accident not occurred ('without accident income'). The 40% marginal rate for expenses is an estimate.



**89**  I estimate and assess past loss of income at $75,000 and award damages in that amount. If the parties have any significant concerns about arithmetic, taxes or deductions they are at liberty to apply with brief written submissions.

**90**  I note that the plaintiff could achieve her with accident earnings only because her husband was able to do the physical work for her, assisted by hired labour. In my view, she took reasonable steps to mitigate her loss of income.

**E. Loss of Earning Capacity**

**91**  The client aspires to earn an income higher than minimum wage. She is looking for fulltime work that will allow her to alternate standing and sitting but which will also provide her with future opportunities and enable her to raise a family.

**92**  In my view, as mentioned earlier, the plaintiff had a good opportunity to develop a profitable landscaping business. She possessed the energy, the personality, the training, and the necessary understanding of marketing to succeed in that endeavour. Growth and expansion in the Nanaimo area should have afforded opportunities to develop her business.

**93**  The plaintiff may not have been able to continue working as physically hard on a long term basis as she had been; to be sure, with the prospective demands of raising children she would have faced practical limits on the time available to her to run and grow her business. Still, the accident happened at a critical time for her business. Like most entrepreneurs, 'sweat equity' was her most important capital contribution. The more she could do herself, the more she could keep for herself and use any surplus to capitalize the expansion of her business by hiring workers for larger projects. It is common knowledge that this is how many young enterprises grow. In due course, she could have withdrawn from the physical side of the business and diverted more time to marketing, managing, and maturing the business. I am satisfied that that the plaintiff has lost a significant business opportunity that should be taken into account in a proportionate and balanced way when assessing her loss of earning capacity.

**94**  The plaintiff satisfies the test in *Pallos v. ICBC,* [*[1995] 3 W.W.R. 728*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), [*53 B.C.A.C. 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=). Given her youth and the fact that she does not have an established career or settled employment, damages for diminished earning capacity must be assessed at large: *Sinnot v. Boggs*, [*2007 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=), [*241 B.C.A.C. 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=) at para. 16. At the same time, her loss of opportunity must receive fair consideration.

**95**  My assessment is premised on the fact that the plaintiff will not be able to return to work as a landscaper and will have to find more sedentary employment in the future, and thereby faces limitations in her employment. She now has to explore other options, with her physical limitations closing off employment opportunities that require repetitive lifting, bending, long periods of sitting or any moderately heavy labour that were open to her before the accident.

**96**  Having focused her mind and energy so resolutely on landscaping soon after she graduated from high school, the plaintiff has never put her mind to an alternative career. No vocational assessment was filed, which is not to suggest one was necessary.

**97**  Plaintiff's counsel presented various scenarios that calculated future losses based on having to work reduced hours as a landscaper or in other kinds of employment. I considered these but did not find them that useful.

**98**  The plaintiff is a young woman, intelligent and capable of further education that could earn her an income that is quite conceivably more secure, more remunerative and more conducive to family life than a career in landscaping, even one that encompasses a profitable landscaping business, as discussed. She has already demonstrated a capacity for higher education with her high post-secondary grades and, with that, career advancement. Even so, preparing herself for a new career will require both time and money. The defendant is not obligated to put the plaintiff in a better position than she was in before the accident, but the defendant's ***negligence*** has not only closed the plaintiff's chosen career, but any others like it. Conversely, if the award for loss of earning capacity does recognize the plaintiff's loss of opportunity and provisions some compensation for higher education and retraining, the defendant should benefit from this.

**99**  After assessing and weighing all of the above, I find an award of $150,000 for loss of earning capacity to be fair and reasonable. This award properly encompasses the plaintiff's lost opportunity; the time and cost for retraining; the plaintiff's diminished physical capacity; her competitive value as an employee to herself and to potential employers; and the more limited range of employment opportunities open to her.

**VII. SUMMARY OF DAMAGES**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non pecuniary damages: | $ 85,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past loss of income: | $ 75,000 |  |
|  | Mr. Saliken's Labour | $ 2,500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of earning capacity |  |  |
|  | and opportunity | $150,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future Care | $ 44,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages (paid) |  |  |

**Total $356,500**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**VIII. APPENDIX EVIDENTIARY RULING ON DEPARTURE BAY CLINICAL RECORDS**

**100**  During argument, counsel for the defendant advised he had not realized until trial that the document styled "Interpretation of Clinical Records of Departure Bay Physiotherapy Clinic" was prepared by a physiotherapist who had not treated the plaintiff, and was an interpretation, not a verbatim transcription, of the original record. The document contains a typed version of visits by the plaintiff to the Clinic on March 29, April 4 and 6 and August 24, 2005. Jennifer Schultz, a "locum physiotherapist", signed the document. It is common ground that Ms. Schultz did not complete the original records. The physiotherapist who first treated the plaintiff was a visiting physiotherapist from Australia, who has long since returned home and was not called as a witness.

**101**  The document was provided, along with a copy of the original handwritten records, to Dr. Vaughn, Dr. Reems, Dr. Leete, and Dr. J. Filbey.

**102**  In September 2009, the plaintiff sent the defendant a Notice to Admit in as follows:

**TAKE NOTICE** that the plaintiff requests that the defendant admit for the purpose of this proceeding only, the facts set out below and the authenticity of the documents referred to below, copies of which are attached.

**AND TAKE NOTICE** that, unless the Court otherwise orders, if the party to whom this notice is directed does not deliver a written statement, as provided in Rule 31(2) within 14 days after delivery of a copy of this notice to him or her, then the truth of the facts and the authenticity of the documents shall be deemed to be admitted.

**DATED** at the City of Nanaimo, in the Province of British Columbia, this 14th day of September, 2009.

**103**  Item #8 in the documents to the notice is the *Departure Bay Physiotherapy Clinic* records. They state:

8. Departure Bay Physiotherapy Clinic

1. The

(i) clinical records of Departure Bay Physiotherapy

Clinic dated March 29, 2005 to August 24, 2005; and

1. interpretation of clinical records of Departure Bay Physiotherapy dated December 8, 2005

(the "DBPC Records")

Were made or kept in the usual and ordinary course of business.

1. It was in the usual and ordinary course of business of the authors of the DBPC Records to record therein the statements of fact recorded at the time they occurred or within a reasonable time after that; and
2. The notes recorded in the DBPC Records were made by their authors at the time they occurred or within a reasonable time after that.

**104**  I understand that the defendant received a copy of the impugned 'transcription' several months earlier.

**105**  In support of his submission that the impugned document is not admissible, the defendant refers to s. 42(2) of the *Evidence Act*, *R.S.B.C. 1996, c. 124*, *Ares v. Venner*, [*[1970] S.C.R. 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=), [*14 D.L.R. (3d) 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=), *Olynyk v. Yeo*, [*[1989] 3 W.W.R. 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1SM-00000-00&context=), [*55 D.L.R. (4th) 294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1SM-00000-00&context=) (B.C.C.A.) [*Olynyk*], *McTavish v. MacGillivray* [*(1997), 38 B.C.L.R. (3d) 306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0WN-00000-00&context=), [*28 M.V.R. (3d) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0WN-00000-00&context=) (S.C.) [*McTavish*], and *Seaman v. Crook*, [*2003 BCSC 464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2DJ-00000-00&context=), [*14 B.C.L.R. (4th) 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2DJ-00000-00&context=).

**106**  Counsel said that he did not realize that Jennifer Schultz did not create the original record or make the observations herself, or give the treatments noted in the record until trial. Counsel argues that the letter is not admissible under s. 42(2) of the *Evidence Act* or at common law. He submits that the December 2005 letter is an "interpretation masquerading as a transcription", and that only the original author would be in a position to give an explanation of her shorthand symbols or decipher her handwriting. He further submits that absent any evidence about the original physiotherapist, we cannot know whether the statements made in the clinical notes were within her area of expertise: *Olynyk*.

**107**  Further, he says that the interpretation does not meet the test for admission because the clinical notes were made at the time when an ICBC claim was pending; they are the result of a referral to the clinic by the family physician in the immediate aftermath of the motor vehicle accident; and the interpretation was completed eight months later and was commissioned by plaintiff's counsel. They are therefore tainted by litigation and inherently unreliable. He refers to the words of Burnyeat J. in *McTavish* at para. 13:

[13] ... great caution should be taken before allowing any observations or diagnosis to be brought within the exception provided by Section 42 of the Evidence Act if those observations and diagnoses are recorded at a time when litigation is uppermost in the mind of the person making the declaration.

**108**  Counsel submits that "the interpreter of the clinical notes would have had the litigation uppermost in her mind as she would have been ever mindful of which side was to pay her translation fees".

**109**  Further, with respect to the necessity of the document in the case at bar, he says that any necessity which exists has been created artificially, flowing from the fact that the original maker of the documents is no longer available, a fact that should have been disclosed earlier, not four years later, and thereby artificially creating a necessity the plaintiff uses to pull up the socks of his argument for the admissibility of hearsay records. He submits that the plaintiff should have given timely notice and that any reliability concerns could have been dealt properly at the time. He submits that the prejudicial result of the lack of notice is that the defendant has been precluded from challenging the accuracy of records or entries that stand revealed as inherently unreliable, by what amounts to a stratagem.

**110**  First, in my view, the plaintiff's notice does not refer to the letter as a transcription of the records, but as an interpretation of them; the letter preceding it stated that the author had explained the physiotherapy records in layman's terms. Therefore, the defendant had early notice that the letter was not necessarily a literal transcription.

**111**  It would have been preferable if the plaintiff had given the defendant more precise notice by expressly seeking its admission, and the facts contained in it, as an accurate interpretation of the records originally made by the treating physiotherapist. It would also have been preferable if plaintiff's counsel had raised the problem of the availability of the original treating physiotherapist. However, the notice is self-explanatory and counsel for the defendant could have made any inquiries he deemed necessary at that time.

**112**  The letter is signed by Jennifer Schultz, who clearly identifies herself as a "locum physiotherapist", which in and of itself raises a question as to whether she was the original treating physiotherapist. Moreover, the handwriting varies across the records, with possibly two or even three different styles of handwriting, and it is not unusual to see different treating physiotherapists in a physiotherapy clinic, based on their individual availability for appointments.

**113**  Further, it is logical to assume that physiotherapists would employ similar notation methods so that other following physiotherapists who need to read them could readily understand them. It is not necessarily correct that only the original authors would be qualified to explain the shorthand symbols or decipher their handwriting. In any event, without any assistance, and despite poor photocopies, I can easily decipher the fact that the plaintiff complained that she was involved in a motor vehicle accident on March 19, 2005; that she was the driver; that her head was turned to the right at the time of impact; that she had symptoms on the left side of her neck and into the scapula, with headaches; that she had been taking Robaxacet with Advil and ice for therapy; that her symptoms were aggravated by walking and running, exercising and bending; that in the morning and at the end of the day, she complained of stiffness; that she was a landscaper; that she was off work at the present time; and that she had a very tight lumbar spine. There is a reference to symptoms in the evening that I could not decipher.

**114**  As for the defendant's argument regarding necessity, I note that the defendant raised this objection for the first time during argument. At that point, the only alternative would be to adjourn the trial, which is an important practical consideration.

**115**  The circumstances here are different from those found in the authorities cited by the defendant's counsel, given that the defendant had already admitted them pursuant to the notice, which, while flawed, did give sufficient notice to the defendant that the plaintiff was asking the defendant to admit the accuracy of the interpretation of the original clinical notes.

**116**  One can understand how counsel could have overlooked the significance of the characterization of the December 8, 2005 letter as an interpretation, the signatory identifying herself as a locum physiotherapist, and the varying handwriting found in the records; but the defendant's objections are now too late in the day. I see little prejudice to the defendant, especially in light of the fact that I have accepted the evidence of the plaintiff and Mr. Saliken that she felt lower back discomfort soon after the accident, that this became her predominant symptom and that she saw the physiotherapist with these complaints and received treatment for them.

**117**  Therefore, the interpretation dated December 8, 2005 remains in evidence.

N. BROWN J.

**End of Document**

[***Frers v. De Moulin, [2002] B.C.J. No. 576***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0T1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C. Lynn Smith J.

Heard: August 7 - 10, 13 - 17, 20 - 24, 27 - 31

and September 20, 2001.

Judgment: March 19, 2002.

Vancouver Registry No. B984953

**[2002] B.C.J. No. 576** | 2002 BCSC 408 | 1 B.C.L.R. (4th) 131 | 112 A.C.W.S. (3d) 600

Between Ernie Frers, plaintiff, and Siegfried Ingram De Moulin, Helmut De Moulin and the Insurance Corporation of British Columbia, defendants

(232 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, standard of care of driver — Keeping a proper lookout — Motor vehicle, rules of the road — Emergency vehicles — Defences — Contributory *negligence* — Damage awards — Injury and death — Head injuries — Brain damage.**

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| Action by Frers for personal injuries arising out of a motor vehicle accident. Frers was a police officer operating a motorcycle when he was struck by the defendant De Moulin. Frers had turned on his lights and siren and was proceeding northbound against the light across an intersection. De Moulin was driving westbound. He failed to see or hear Frers and continued through the intersection at 50 km per hour. Cars in the other three lanes of traffic had stopped for Frers. De Moulin had been listening to the radio and talking with his brother. Frers suffered a severe traumatic brain injury. He was unable to work. He had difficulty remembering things. He tired easily and could not drive unaccompanied. He had difficulty controlling his temper and had difficulty speaking. His relationship with his family suffered.  HELD: Action allowed.  De Moulin was negligent as he was not paying sufficient attention to the driving conditions. The presence of stopped cars in the other lanes should have alerted him to a hazard in the intersection. Frers was contributorily negligent as he proceeded against the traffic signal and without assuring himself that it was safe to do so. He was assessed 40 per cent liability. He was awarded $220,000 for pain, suffering, and loss of enjoyment. He was also awarded $222,627 for past wage loss and $421,957 for future loss of income to age 60. An additional $120,000 was awarded thereafter. He was awarded $80,000 to reflect the decreased value of his pension. Special damages of $12,383 were awarded as agreed. Additionally, Frers' wife was entitled to $100,000 in trust reflecting her care prior to trial. Future care costs were to be agreed by counsel. |

**Statutes, Regulations and Rules Cited:**

Emergency Driving Regulation, [*B.C. Reg. 133/98, ss. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RCB1-FC1F-M1TN-00000-00&context=), 2, 4(1), 4(3), 4(6), 6, 7(b).

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, ss. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ31-JKB3-X2FB-00000-00&context=)(c), 122(1), 122(2), 122(4), 125, 129(1), 129(4)(b), 150(1), 150(2), 158(1), 158(2), ,165(2), 166, 174, 177, 200.

**Counsel**

M. Slater and R. Nairne, for the plaintiff. M. Ragona, Q.C., and M. Wright, for the defendants.

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| **C.L. SMITH J.** |

INTRODUCTION

**1**  Ernie Frers suffered severe trauma to his head with damage to his brain in an accident while he was on duty as a motorcycle police officer in 1998. He seeks damages from the owner (Helmut De Moulin) and driver (Siegfried De Moulin) of the other vehicle involved in the accident. The defendants' position is that Mr. Frers was wholly responsible for the accident or alternatively that he was contributorily negligent. The defendants also take the position that if they are found liable, the plaintiff is not entitled to the amount of the damages which he claims and that he has failed to mitigate his losses. The claim against the Insurance Corporation of British Columbia was dismissed by consent.

REVIEW OF EVIDENCE AND FINDINGS OF FACT

1. The Accident
2. General description of the accident

**2**  The plaintiff, Ernie Frers, was on duty as a motorcycle police officer in the traffic division of the Delta Police Department on May 5, 1998 at the intersection of Scott Road and 72nd Avenue. It was a bright and warm day.

**3**  To the east of the intersection 72nd Avenue has four lanes westbound, including a left-turn and a right-turn lane as well as two through lanes. Scott Road, which runs north-south, has six lanes. The traffic lights at the intersection go through a cycle which includes a period where eastbound and westbound traffic have a left-turn signal. Subsequently, there is a green light for eastbound and westbound traffic and vehicles will enter the intersection to await the orange light in order to complete their left-hand turns.

**4**  Traffic in the afternoon rush hour at the intersection of Scott Road and 72nd Avenue in Delta is normally heavy. May 5, 1998 was no exception. Siegfried De Moulin, who was then 18 years of age, was driving his father's mini-van westbound on 72nd Avenue with his younger brother Eric as a passenger. The traffic signal at Scott Road was green for westbound traffic. When Mr. De Moulin entered the intersection he collided with Mr. Frers on his motorcycle, about one-half metre from the eastern crosswalk.

1. Witnesses

**5**  Because of his injuries, the plaintiff is unable to remember anything about the accident or the period immediately preceding it.

**6**  Counsel for the plaintiff called seven witnesses to the accident. At the time of the collision four of them were south of the intersection, either heading north on Scott Road (Marsha Arnold, Sughra Mohammed, Mary Brousseau) or stopped at the same southwest corner where Mr. Frers had stationed himself (Nicola Rueschmann). One was in the middle of the intersection (John Garrett), one was west of the intersection in the right-hand west-bound through lane of 72nd Avenue (David Ellis), and one was in the westbound left turn lane of 72nd Avenue east of the intersection, two lanes over from the one in which the defendant was travelling (Claire Breitkreuz).

**7**  All of these witnesses were wholly independent of both parties and of one another, with the possible exception of Claire Breitkreuz, who testified that she has retained the firm representing Mr. Frers in connection with a personal injury action of her own (although not the same lawyers). I concluded that these witnesses, without exception, were attempting to describe the events accurately as they remembered them.

**8**  The plaintiff called other witnesses who testified to the operation of the motorcycle and its lights and siren, and to Mr. Frers's motorcycle driving skills and training. These witnesses included Ernie Frers, Constable Alison Brooks, Casey Fisher, Sergeant David Greenhalgh and Wayne Burns.

**9**  In addition to the defendant Siegfried De Moulin and his brother Eric De Moulin, counsel for the defendants called two witnesses to the accident: Wesley Gross and Jeanne Seeck. They were both stopped in the westbound through lane of 72nd Avenue east of the intersection, immediately to the left of the lane in which the defendant was travelling, when the collision occurred. Mr. Gross and Ms. Seeck were independent of the parties and of each other and, as with the witnesses called by the plaintiff, I was satisfied that they were attempting accurately to describe the events which occurred.

**10**  In addition the defendant Helmut De Moulin, the owner of the vehicle, testified as to its condition.

**11**  The plaintiff called Amrit Toor, a mechanical engineer and a specialist in accident reconstruction. The defendants did not call any expert opinion evidence on liability issues.

1. Review of testimony regarding the accident

**12**  Nicola Rueschmann was stopped at the Shell station at the southwest corner of the intersection. She testified that she saw a motorcycle police officer on that corner, appearing to monitor traffic. She then saw him turn on the siren and drive off slowly through the intersection, blasting his siren from time to time. When everybody had stopped everywhere, she testified, the police officer moved further and was struck by a minivan. She said that it was about 15 seconds from the time he first put the siren on until the impact. She did not think that any other vehicles were moving at the time he was struck.

**13**  Ms. Rueschmann testified on direct examination that the plaintiff never went faster than walking speed, but on cross-examination she agreed that she had told an adjuster in July, 1998, that when the police officer moved forward after the cars stopped, he accelerated fairly fast for one car length before he hit the driver's door of the van in the right westbound lane of 72nd Avenue. In the same statement to the adjuster, she said that it took about one to two seconds for him to go that car length distance. She testified that those statements were true. On re-examination she testified that what she had meant was that at the end he had attempted to accelerate but never actually got his speed up to anything higher than it was.

**14**  Ms. Rueschmann saw the impact. She testified that after the plaintiff hit the front corner of the van, the motorcycle pretty much stayed where it was while he flew up about five feet in the air.

**15**  Marsha Arnold, who was travelling northbound on Scott Road, had stopped for a red light at the south crosswalk in the intersection. She testified that as she stopped, she heard a loud siren coming from her immediate left. She saw a police officer moving slowly eastbound in front of her, around a red vehicle which was stopped in the middle of the intersection. He then turned north. As he got further north a green van came very quickly into the intersection and hit him. She recalled one or two vehicles in the lane to the left of the one in which the van was travelling. She estimated that Constable Frers was in the intersection for 9-12 seconds and that he was proceeding at a fast walking pace, never any faster than that. She did not see the van until just before the collision.

**16**  Ms. Arnold stated that it appeared that the front of the van struck the police officer on the right side of his body. She described him as taking the full impact on the side of his body and then "slumping" to the ground.

**17**  John Garrett, driving a red Chevrolet Lumina, had been heading west on 72nd Avenue and had then entered the left turn bay to turn south on Scott Road. After several vehicles ahead of him made their turns with the advanced left signal in their favour, that signal turned amber. Mr. Garrett had noticed a police officer at the southwest corner and decided not to continue on the amber, instead waiting in the intersection for the through traffic to clear. From that position he saw a driver, originally heading south on Scott Road, make a U-turn. He said the police officer activated his lights and siren and proceeded out of the gas station where he had been parked. Mr. Garrett inferred that the police officer had spotted the traffic violation and was going to go after the offender.

**18**  Mr. Garrett described the plaintiff as drifting slowly across the intersection, almost at an idle, trying to get a space to go through the eastbound traffic. He testified that although vehicles continued to move through the intersection after the police officer activated his siren and lights, once the eastbound vehicles did stop and the officer passed by them, there were no other vehicles moving in the intersection.

**19**  After the police officer went northward behind Mr. Garrett's vehicle, Mr. Garrett looked in his right side-view mirror. The only car he could see appeared to be stopped in the lane to his right (the left through lane). He estimated that the vehicle in the lane to his right (which would have been the Gross vehicle) was stopped for "three to four long seconds" before the collision and that the police officer was at the southeast corner of the intersection when the Gross vehicle stopped. He estimated that about 10 seconds passed from the time the police officer first activated his lights and siren until the impact.

**20**  Mr. Garrett lost sight of the officer in his rear-view mirror after he passed behind him; then he heard the motorcycle engine roar. One to two seconds later he heard the sound of a crash.

**21**  On cross-examination Mr. Garrett agreed that some cars could have continued to enter the left-turn bay while the police officer was making his way through the intersection. He said that he only looked at the car stopped in the lane to his right (the Gross vehicle) once, probably three to four seconds before the accident, for a split second. Asked whether it was possible that it moved farther westward into the intersection after he saw it, he said it was possible but he highly doubted it.

**22**  Mary Brousseau was stopped south of the intersection when she heard the siren, which she described as "very loud". She estimated that the plaintiff was in the intersection with the siren on for about 15 seconds. When she first saw the Gross vehicle she thought that it was stationary, and that at the time the police officer had not yet turned north. She described him going through traffic very slowly until, at a certain point, he lifted his feet to accelerate. She said that he was just beginning to accelerate when he was into the lane to the left of that in which the De Moulin vehicle was travelling. Ms. Brousseau said that the De Moulin van was maybe a car length and a half from the intersection when the police officer began to accelerate. She testified that the van was going so fast that it drew her attention away from the motorcycle and that it did not appear to slow down before the impact.

**23**  Ms. Brousseau saw the impact. She testified that the police officer hit with his right shoulder side and went up at least to the height of his windshield or the height of the van, and then fell forward while the motorcycle went in the opposite direction, to the right. She agreed with the suggestion on cross-examination that the point of impact was about a metre from the eastern crosswalk on 72nd Avenue.

**24**  Sughra Mohammed testified that she first heard the siren when she was in the left-turn bay approximately 75 metres from the intersection heading west on 72nd Avenue.

**25**  David Ellis, who was driving his convertible with the top down, heard the siren from the west side of 72nd Avenue, approximately 100 metres away.

**26**  Claire Breitkreuz witnessed the accident from the left-turn lane westbound on 72nd Avenue. She had just started to merge into the left-turn bay when she heard the siren. Her window was open and she had the radio on "lightly". She recalled one or possibly two vehicles ahead of her in that lane. She said that she saw, or partially saw, the police officer moving slowly through the intersection with the motorcycle lights flashing, heading east. She recalled two vehicles in the "fast" through lane to her right (that is, the lane where the Gross and Seeck vehicles were) and said they both stopped at the same time that she did. Her evidence was that the vehicle at the intersection in that lane (presumably the Gross vehicle) had been stopped for 5-6 seconds when she turned, perhaps in response to her daughter in the back seat. She saw over her right shoulder a white van in the right through lane or right curb lane heading quickly toward the intersection. (She was mistaken as to the colour of the van, which was green). She estimated that the van was going very fast and did not slow down as it approached the intersection. She testified that she commented to herself, "He doesn't see him, oh my goodness he doesn't see him". This van then collided with the motorcycle. She estimated that the time between hearing the siren and the impact was 10-12 seconds.

**27**  In cross-examination Ms. Breitkreuz agreed that she had told the police that the driver (presumably, Mr. Gross) in the lane to the right had slammed on his brakes and stopped over the crosswalk. She agreed on cross-examination that it was clear that the police officer did not see the van. She agreed that in her statement to the police, made on the evening of the event, she had said that she thought the police officer was completing a U-turn in the intersection when she first saw him. She also agreed that she had told the police that the plaintiff was thrown off the motorcycle quite high and hit the ground with a thump, and that that was true.

**28**  Wesley Gross, a retired businessman, testified that he was driving west on 72nd Avenue toward Scott Road behind a bus. It was easing into the left-turn lane in front of him and almost brought him to a complete stop. He started to accelerate again to go through the intersection but had not reached more than 15 miles per hour when he perceived a blur in front of his face and slammed on his brakes. He could not estimate the speed of the blur but said that it was going "pretty good". He did not hear a siren or see emergency lights at any time, and testified that his hearing is fine. Having slammed on his brakes and then hearing the noise of a crash, Mr. Gross thought that he had hit someone. He got out of his vehicle and learned that he had not, but that the collision had involved another vehicle coming from the lane to his right.

**29**  Jeanne Seeck testified that a couple of blocks before the 72nd Avenue and Scott Road intersection she was proceeding westbound in the right through lane behind the De Moulin van but then changed to the left through lane because the van was travelling too slowly for her. She was behind the Gross vehicle heading toward the green light when she saw that it was stopping. Ms. Seeck's evidence was that she had no trouble stopping and did not leave a skid mark, although it was a pretty quick stop. She agreed on cross-examination that, prior to the collision, she was able to observe Constable Frers moving slowly northward, to see the flashing lights on his motorcycle and his white helmet, and to be aware of the green van coming up the lane to her right because she had just passed it. She said it all happened so quickly that she was unable to get her head around to look for the van. She gave two to three seconds as her best estimate of the time between when she began to stop and when the van and Constable Frers collided. She testified that she did not hear a siren at any time. Ms. Seeck testified that her windows were rolled up and she was listening to her radio.

**30**  Siegfried De Moulin, who was 18 at the time of the accident, testified that he was driving his younger brother Eric, then 12 years old, to the swimming pool. He testified that he had previously been involved in a fatal accident as a driver and that he was a cautious driver as a result. His evidence was that he had changed lanes at some point while he was westbound on 72nd Avenue, from the "fast" (left) through lane to the "slow" (right) through lane, although he agreed that after the accident when he gave a statement to the police and to an adjuster he had been unable to say precisely which lane he had been in at the time of the accident. He testified that he was driving at the speed limit, 50 kilometres per hour, and that the light was green as he approached the intersection. He said that the vehicle's air conditioner was on, the windows were rolled up (inferring that from the fact that the air conditioner was on), the radio was on with music playing and he and his brother were talking. He agreed that he would turn his head from time to time while talking to his brother. He testified that just before the impact he saw or heard something, but he did not know what it was. He did not reduce his speed or apply the brakes until after the collision. He testified that there was no audible or visible warning that there was a police officer crossing the intersection. He could not recall noticing any traffic in the left turn lane or the "fast" through lane stopped at the intersection and he could not recall passing any traffic to his left within a half block of the intersection. On cross-examination when asked whether he recalled seeing any traffic in the intersection, he responded, "I recall no obstructions in the way. It was clear sailing."

**31**  Siegfried De Moulin agreed on cross-examination that if there had been traffic stopped or slowing down in the lane to his left, he would not have proceeded past it into the intersection until he was sure that he could do so safely.

**32**  Although the plaintiff could remember nothing of the accident, he did testify regarding his training and driving practices. His evidence was that while he was on duty at the intersection he would wear a yellow Gore-Tex jacket and a motorcycle helmet and sunglasses. He would station himself, on his Harley Davidson motorcycle, at the Shell station at the southwest corner of the intersection. He said that he would initially give the siren some short "wail" blasts to gain the attention of pedestrians, and would then turn on the continuous "yelp" siren until everyone stopped. He said that safety of himself and of the public was the number one consideration in assessing whether to go after a traffic violator.

**33**  Constable Al Brooks, who was assigned to the Delta Police traffic section in 1995, testified that he and Constable Frers were often stationed at the intersection of 72nd Avenue and 120th Street (Scott Road) where their main responsibilities were to enforce intersection violations as well as to be highly visible, with the goal of reducing the number of crashes at that intersection.

**34**  Constable Brooks testified that the Harley-Davidson motorcycles have a blue light on the right side of the headlight, a red light on the left side of the headlight and four blue and red lights at the back of the motorcycle. He said that the lights all flash when activated.

**35**  Constable Brooks also testified that two days after the accident he examined the van driven by the defendant Siegfried De Moulin. He said he was familiar with the van because he owned one exactly the same. Because he was going to drive it to a location where stopping distance tests would be performed, he turned on the ignition. He said that the radio came on, and that it was turned up to quite a high volume.

**36**  Sergeant David Greenhalgh has been a police officer since 1972 and he has known the plaintiff since 1982. For a time he was Constable Frers's supervisor in the traffic section. He testified that he obtained from the Delta police garage the siren which had been on Constable Frers's motorcycle at the time of the accident and provided it for a videotaped demonstration of its various sounds which was presented in court. He testified that the siren was so loud that, when he was standing 40 metres from the siren during the taping, he had to cover his ears because it was painful. Sergeant Greenhalgh agreed on cross-examination that the sound is somewhat reduced when heard at a 90 degree angle, and that the sound of the siren may be over-ridden by other factors such as sound barriers and competing noise. He also agreed that there is a "confusion factor" with respect to the audibility of sirens, that is, that it may take some time for a listener to ascertain from where a siren is coming. He also agreed that the fact that people drive with air-conditioning on, with their windows rolled up, with their radios on, is known to police officers and that police officers are aware of what could affect the audibility of their sirens. He agreed that police officers know that the longer their sirens are on the greater the likelihood they will be heard.

**37**  Sergeant Greenhalgh testified that the emergency lights on the motorcycle, when activated, are high intensity strobe lights. On cross-examination he agreed that from a 90 degree angle, the lights at the front of the motorcycle would only show a "slit" of the lens while the lights at the rear are more conspicuous from the side because they wrap around to some extent. He testified that they are at the same height as the rear seat of the vehicle. He agreed that in daylight there are circumstances in which the lights may not be visible to other vehicle operators.

**38**  This witness further testified that the Harley Davidson motorcycle has a large V-twin engine, the gyroscopic effect of which enables the operator, by revving the engine, to move the motorcycle very slowly and yet keep it perfectly upright. He said that all officers are trained to do this and that he personally could operate the motorcycle at one kilometre per hour. He said that he had seen Constable Frers use the technique.

**39**  On cross-examination Sergeant Greenhalgh was asked whether the siren mechanism was such that the siren would continue to wail in the middle of the intersection after the accident if it had been on in continuous mode prior to the accident. He said that it would continue if the ignition switch remained on, but that damage to the wiring could have caused it to stop. He said that the upper switch that controls the siren would be in the "on" position if the siren was on, although later he observed that anything could have happened to the switch at the point of impact.

**40**  Sergeant Greenhalgh also testified on cross examination that conspicuity is a concern with respect to motorcycles - drivers tend to see motorcycles less than they see cars - but that typically when an officer is on a motorcycle his head is above the height of the average car. He agreed that the top of the roof of a van would be higher than the top of the head of the policeman.

**41**  He agreed on cross-examination that proceeding across a lane into which you could not see would be a fundamental error insofar as defensive driving is concerned. He testified that the only time where an officer would knowingly put himself at risk is where he is directly intervening to save a life and he agreed that it is paramount in the operation of a motorcycle that each officer weigh the seriousness of the offence committed against the danger to himself and others who may be affected by a pursuit or interception. He agreed that common sense coincides with police training, which is to weigh the risk to oneself against the risk that the violator might pose to the public.

**42**  Sergeant Greenhalgh testified that the normal procedure would be, once the officer had ascertained that it was safe to proceed, to accelerate as quickly as possible because the less time spent in the intersection the better.

**43**  Casey Fisher instructed motorcycle training programs for police officers between 1986-1999. Mr. Frers was one of his students. He said that Mr. Frers would be in the top group of his 300-500 students over the years. He described him as being among the least aggressive of the group of riders in Delta. On cross-examination he agreed that motorcycles are not as conspicuous as cars. He testified that the front emergency lights are only slightly visible from the side in daylight, although the rear post light would be more visible.

**44**  With respect to whether Constable Frers was driving in a manner consistent with training, Mr. Fisher said that he understood why he had taken the route he did through the intersection although it departed from mainstream training. He commented that by using his siren and keeping the vehicle going in the easterly direction, Constable Frers presumably was allowing his siren to play down the road before turning and coming across. In response to a question from the court he testified that normally when a violator is moving away from you a straight line would be taken but the eastbound then northbound route may have been necessary because of the left-turning traffic westbound on 72nd Avenue. He agreed that it would be an error to cross into a lane where there is an oncoming vehicle. He also agreed that if the van was centred in its lane and was not speeding, it would have been only feet away when the motorcycle crossed into the lane.

**45**  Wayne Burns is a City of Vancouver superintendent in charge of the maintenance garage which maintains and services Vancouver Police vehicles, including motorcycles. He was asked to inspect the motorcycle on which Constable Frers had been riding, and prepared a report dated May 12, 1998. He said that he found no mechanical problems with the bike except somewhat low tire pressure. He noted that when he turned the ignition on, the lights and siren were activated.

**46**  Dr. Amrit Toor testified as an expert in mechanical engineering, qualified to give evidence in the field of accident reconstruction. He was given some basic information about the accident and the vehicles involved. He did not see the vehicles themselves but did have photographs of the accident scene, of the two vehicles and of the intersection, as well as the Delta Police scene diagram showing the rest positions of the vehicle and rider. In his report he provided an opinion regarding the time/distance relationship between the Frers motorcycle and the De Moulin vehicle, and the collision evasion potential for the De Moulin vehicle operator.

**47**  Dr. Toor assumed in his report that the collision occurred in the westward projection of the northern westbound lane (the right through lane) of 72nd Avenue, about a half meter from the crosswalk. He based that assumption on evidence of a gouge mark in the pavement at that location. His opinion, based on the damage to the vehicles, was that the left side of the front end of the De Moulin vehicle collided with the front fork/wheel of the motorcycle which, upon impact, was likely displaced in a westward direction such that the rear of the motorcycle articulated and slapped the fender and door of the De Moulin vehicle. He stated that the damage to the A-pillar windshield of the De Moulin vehicle was likely caused by the impact of the motorcycle driver launching forward and upwards and colliding with this region of the van. On cross-examination he gave the opinion that the physical evidence was more consistent with the motorcycle alone having struck the side of the van than with the person of Constable Frers having struck the side of the van.

**48**  Making the assumption that "the northbound displacement of Constable Frers resulted from his motorcycle pre-impact velocity and his westbound displacement resulted from momentum transfer from the De Moulin vehicle", Dr. Toor testified that he calculated Constable Frers's pre-impact speed to have been 6.3-7.5 kilometres per hour and the pre-impact speed of the De Moulin van to have been at least 42 kilometres per hour. He agreed on cross-examination that his analysis of the likely speeds of the vehicles depended on the assumption that Constable Frers had not struck the side of the van before striking the A-pillar.

**49**  In connection with the time/distance relationship between the two vehicles, Dr. Toor assumed that the Frers motorcycle was stationary at the Shell gas station before it accelerated at a "normal" rate, then decelerated to about 10 kilometres per hour and continued at that velocity to the point of impact. He said he overestimated the speed at 10 kilometres an hour in order to be conservative. He assumed the speed of the De Moulin vehicle to be 50 kilometres per hour. On those assumptions, and assuming a path which took Constable Frers due east until he reached the crosswalk on 72nd Avenue, then due north, he stated the opinion that Constable Frers was in the intersection for 13.9 to 16 seconds before the impact. If the De Moulin vehicle was travelling more slowly, for example at 42 kilometres per hour, the time in the intersection would have been longer. He agreed on cross-examination that if Constable Frers had taken a more diagonal path across the intersection than he had assumed, then it would have taken less time for him to cross the intersection.

**50**  With respect to "evasion potential", he calculated that, if Mr. De Moulin was a 50th percentile unalerted vehicle operator with a perception/response time of about 1.1 seconds, he would have needed about 3.1-3.5 seconds to come to a complete stop or about 5.6 seconds to decelerate and delay reaching the point of impact until the Frers motorcycle had cleared his path. Again if the De Moulin vehicle was travelling more slowly, that would have further enhanced the opportunity to avoid the collision. He testified that a perception/reaction time of 1.1 seconds is the average, and the actual time can vary from .7 to 2.5 seconds depending on factors such as the age of the individual. He testified on cross-examination that he had not taken into account sight-lines or actual possibilities of the driver of the De Moulin vehicle receiving audible or visible signals alerting him to the need to evade Constable Frers on his motorcycle. He also testified that if the driver of the De Moulin van was travelling at 50 kilometres per hour and applied heavy braking after having perceived and reacted to the hazard, the van would travel almost 7.5 car lengths, or 37.1 meters, before coming to a stop.

**51**  Dr. Toor's evidence was that the defendant could have avoided the collision if he had taken action between about 5.6 and 3.1 seconds before the collision.

**52**  There was no other expert opinion evidence regarding the circumstances of the accident.

**53**  I note at this juncture that I decline to draw an adverse inference from either the plaintiff's or the defendants' failure to call the acoustical engineers who had prepared reports. The defendants' counsel had provided a copy of an expert opinion report pursuant to Rule 40A to the plaintiff, and after a voir dire I ruled that it would be admissible. However, after the plaintiff's case was closed, the defendants declined to call that evidence, as they were entitled to do. The plaintiff's counsel had obtained a rebuttal report which was then not tendered in evidence. No adverse inference is appropriate in either instance.

1. Findings of Fact

**54**  With eleven witnesses describing the same event from eleven different vantage points, inevitably there will be contradictions and inconsistencies. I have put more weight on the evidence of some witnesses than others, based on their position in the intersection and thus their ability to see and hear the events, or on my impression of their ability to retain the information and relate it accurately in court. I will comment on those weighting decisions at appropriate junctures.

**55**  The two independent witnesses called by the defendants (Wesley Gross and Jeanne Seeck) were driving west on 72nd Avenue with relatively heavy traffic in the lanes to their left and did not see or hear the motorcycle until immediately before the accident; their testimony is therefore not of much assistance in determining Constable Frers's driving behaviour prior to the few seconds just before the accident. In finding the facts regarding the plaintiff's actions prior to the collision, I rely primarily on the testimony of Marsha Arnold, John Garrett, Mary Brousseau, Nicola Rueschmann and Claire Breitkreuz. I also take into account the evidence regarding Constable Frers's standard driving practices.

**56**  I find that on the afternoon of May 5, 1998, Ernie Frers was monitoring traffic from a position at the southwest corner of the intersection when he saw a southbound vehicle perform an illegal U-turn and head north on Scott Road. I find that he activated his Harley Davidson's emergency lights which were blue on the right side and red on the left, and both blue and red at the rear.

**57**  I find that, after creating an initial short burst of siren sound, Mr. Frers put his siren on in continuous mode. He then gave it extra short bursts from time to time, probably in order to catch the attention of particular drivers as he began to make his way on his motorcycle eastbound and then northbound through the intersection. (It does not matter whether the siren was on "wail" or "yelp" mode since both are loud, attention-getting sounds.)

**58**  While the defendants argued that that Constable Frers was only operating the siren manually, in short bursts, a number of witnesses testified that it was on continuously and none who heard it said that it was sporadic. Further, I find that it was Ernie Frers's standard practice to have the siren on continuously until the traffic stopped and that it is more likely than not that he followed his standard practice. Thus, I reject the defendants' argument that I should infer, from the apparent position of the switch in one of the photographs of the motorcycle taken two days after the accident and from the absence of evidence that the siren continued to wail or yelp while the motorcycle lay on its side in the intersection after the accident, that the siren was not in continuous mode. I decline to draw that inference because of the clear and unshaken evidence from witnesses to the accident to the contrary. I note that the photograph is somewhat unclear; further, the switch could have been moved in the accident and the accident could have affected the connection between the ignition and the siren. I do not place weight on the evidence of Wayne Burns that the siren came on as soon as he switched on the ignition; the motorcycle was not necessarily in the same condition when he examined it on May 7 as when it left the scene of the accident.

**59**  I find that the siren produced a loud sound. The witnesses who heard it said that it was loud or very loud. Some heard it from 75 or 100 metres away (Mr. Ellis and Ms. Mohammed), another indication that it was loud. The plaintiff showed a videotape to various witnesses in which a siren (which I find, based on the evidence of Sergeant Greenhalgh, was the siren recovered from Constable Frers's motorcycle) was operated in an empty parking lot. The videotape demonstrated that the siren was capable of a very loud sound. However, the conditions in which the tape was made were substantially different from those at the scene of the accident: there were neither sound barriers nor competing noises. Thus, in reaching my conclusions about the audibility of the siren I have not relied on the videotape but instead on the testimony of the accident witnesses and to a minor degree on the testimony of the witnesses who were familiar with the siren on the motorcycle in question (Sergeant Greenhalgh and Constable Brooks).

**60**  Mr. Frers did not proceed on a diagonal but instead first went east across Scott Road, then north across 72nd Avenue. This was likely because cars were continuing through the intersection. Although most traffic on 72nd Avenue had been stopped to allow an advanced left turn from the westbound left turn lane on 72nd Avenue, the light had turned green for westbound and eastbound traffic during the plaintiff's passage on his motorcycle across the intersection.

**61**  As he proceeded across the intersection Constable Frers moved quite slowly, meandering his way through the traffic. I find that he was going at walking speed or less for most of the time.

**62**  Wesley Gross, who was slowly driving west on 72nd Avenue in the left-most through lane toward a green light, did not hear a siren or see any lights, but stopped suddenly when he perceived a "blur" in front of him. Jeanne Seeck stopped behind Mr. Gross. She saw Constable Frers crossing 72nd Avenue but did not hear the siren. At that point all traffic had stopped on the east side of the intersection with the possible exception of vehicles in the right-turn lane, although no witness testified to seeing movement there.

**63**  The defendant Siegfried De Moulin was coming up the right through lane heading west on 72nd Avenue, toward the green light. He was travelling at about 50 kilometres per hour (on the basis of his own evidence, and the report of Dr. Toor.)

**64**  Mr. De Moulin did not see or hear the plaintiff's vehicle, lights or siren. The point of impact was about one-half metre west of the crosswalk. Mr. Frers separated from the motorcycle. The appearance of the De Moulin vehicle and the testimony of most of the witnesses, as well as the expert opinion evidence of Dr. Toor, lead me to conclude that Constable Frers was launched into the air. I conclude that Marsha Arnold's testimony that, once hit, he "slumped" over and fell to the ground, is mistaken.

**65**  The most plausible possible explanations for Constable Frers heading across the right through lane are that he did not see Mr. De Moulin's vehicle, that he saw it but made the false assumption that the other driver had seen him and would stop as had other traffic in the intersection, or that he saw it but miscalculated Mr. De Moulin's speed and his own ability to "gun" the motorcycle fast enough to cross the lane unharmed. There is no way of knowing which of these was the case.

**66**  I find that Constable Frers began to accelerate as he passed in front of Mr. Gross's vehicle. Several witnesses said that they saw him begin to accelerate, or accelerate, and others described the "vroom-vroom" sound of the motorcycle. I note that that sound could also have been caused by his revving the engine to remain stable at low speeds. I accept the evidence of those witnesses who were watching Constable Frers and who had a good view, in particular Mary Brousseau, Marsha Arnold, Nicola Rueschmann and Claire Breitkreuz, over the evidence of others who did not really see him at that point. I find that Constable Frers never attained a speed of more than 10 kilometres per hour, probably less. I find that the most likely scenario on the evidence is that Mr. Frers's motorcycle struck the side of the van, then Mr. Frers himself struck the "A pillar" as he was thrown upward. I accept Dr. Toor's evidence that on that scenario Mr. Frers's speed was likely around 7.5 kilometres per hour, but that a conservative approach would put it at 10 kilometres per hour.

**67**  With respect to how long Constable Frers was in the intersection before the accident with his motorcycle siren yelping or wailing and its emergency lights strobing, a number of witnesses estimated that it was in the range of 10-15 seconds. Dr. Toor estimated that the plaintiff would have been in the intersection for around 14 seconds. I find that he was in the intersection with the siren and lights activated for at least 12 seconds.

**68**  How far was the defendant Siegfried De Moulin from the intersection when Mr. Gross stopped? If Mr. Garrett's evidence is accepted, then about four seconds elapsed between Mr. Gross stopping and the collision. Mr. Garrett's evidence is supported by that of Mary Brousseau, who testified that she thought that the Gross vehicle was stationary when she first saw it, at a time when Constable Frers was at the southeast corner of the intersection. It is also supported by the evidence of Claire Breitkreuz, who estimated that the Gross vehicle had been stopped for 5-6 seconds before the impact.

**69**  Counsel for the plaintiff argued that, even if it was assumed that Ms. Seeck was only going 50 kilometres per hour and she braked at maximum force (.7 g) as soon as she perceived the Gross vehicle to be stopping, she would need 29.3 metres or about 3.1 seconds to come to a stop. Therefore, taking into consideration the average reaction time of 1.1 seconds which Mr. Gross would have needed, a minimum of 4.2 seconds passed from the time Mr. Gross first saw something on his left to the time that Ms. Seeck came to a stop. Mr. De Moulin would have been 58.3 metres away if he was driving at 50 kph. If another two seconds is added to account for the time during which Ms. Seeck, while stopping and looking ahead, saw the plaintiff moving from her left to her right, the defendant would be 86.1 metres from the point of impact when Mr. Gross first saw Constable Frers. However, if Ms. Seeck did not brake at .7 g but instead at .4 g (which is said to be somewhere between normal braking and locked wheels), and keeping all of the other assumptions about Mr. Gross's braking and the average reaction times, the defendant would have been 102.8 metres from the point of impact at the time when Mr. Gross first saw Constable Frers and applied his brakes.

**70**  I find that there was a period of at least five seconds between Mr. Gross coming to a stop at the intersection and the collision occurring. In reaching this conclusion I am discounting to some extent the testimony of Mr. Gross that he stopped extremely suddenly in reaction to a rapidly-moving "blur" in front of him. I accept that he stopped quickly, but there was no evidence of skid marks and Ms. Seeck had no difficulty in stopping behind him. Further, the evidence of Claire Breitkreuz, Mary Brousseau and John Garrett supports the conclusion that Mr. Gross had been stopped for from three to six seconds before the van came down the lane to his right and struck Constable Frers. Although counsel for the defendants argued that Mr. Gross and Ms. Seeck were in the best position to know how long it took them to stop, and they both testified that it was a sudden stop, I find that the other witnesses who were observing the accident from stationary positions, such as Mr. Garrett, Ms. Breitkreuz and Ms. Brousseau, are more likely to be accurate in their estimate of the timing of events than was Mr. Gross who, having thought that he had struck someone, was probably shocked and upset. I also note that Ms. Seeck said that she did have time, after she stopped, to watch the plaintiff proceeding across the lane and to realize that the defendant was approaching in the lane to her right.

**71**  I find that, for at least five seconds, as the defendant drove toward the green light in the intersection, two lanes of cars to his left (that is, the cars in the left-turn bay and the left through lane) were stopped and all other traffic at the west of the intersection and in the intersection had halted, with the exception of Constable Frers on his motorcycle. I also find that Siegfried de Moulin had the air conditioning and the radio on and was talking to his brother as he approached the intersection. I do not rely on the evidence regarding the high volume at which the radio was set when the van's ignition was turned on by Constable Brooks a few days after the accident, because of the absence of evidence that the radio volume had remained unchanged. I do find that the radio was at least at normal volume, based on the evidence of the defendant and his brother.

1. The Plaintiff's Injuries

**72**  The plaintiff was thrown approximately 11.11 metres from his motorcycle after he collided with the defendants' van. Found unconscious and bleeding from a head wound, he had an initial Glasgow Coma Score of 3/15 (this is the lowest possible score, indicating that he was deeply comatose) according to the ambulance records. He was treated at Royal Columbian Hospital, where he remained in a coma for approximately three weeks. He was discharged after six weeks to Eagle Ridge Hospital where he received rehabilitation for one month, being sent home on July 24, 1998.

**73**  In a report dated June 3, 2001, Dr. Dean Foti, who is a neurologist specializing in behavioural neurology, summarized Mr. Frers's injuries as follows:

The most significant injury that he suffered was head trauma, with other injuries including a separated right shoulder, a C6 transverse process fracture, and soft tissue injuries to his right knee and neck. He has post-traumatic amnesia of a few weeks, and an initial Glasgow Coma Score of three at the scene and four at the hospital. By all the usual parameters used to estimate severity of brain injury, Mr. Frers suffered a severe traumatic brain injury. His brain scans showed injuries very consistent with diffuse axonal injury, indicating shear hemorrhages in the left frontal lobe and the corpus callosum. The corpus callosum is an important tract of fibers that connects the left and right hemispheres, is important for processing information, and is a well-recognized location for shear hemorrhages as a result of diffuse axonal injury.

**74**  Dr. Foti summarized his diagnoses as follows:

Severe traumatic brain injury as result of the MVA of May 5, 1998.

Significant persistent cognitive deficits as a result of diffuse axonal injury from traumatic brain injury. In particular, there is slowness of information processing, verbal memory retrieval deficits, slowness in speech, and distractibility.

Cognitive and physical fatigue as a result of traumatic brain injury.

Balance difficulties as result of traumatic brain injury. No evidence of significant inner ear dysfunction. Dizziness increases in times of fatigue.

Mild depressive symptoms as result of losses due to the effects of traumatic brain injury.

Poor coordination in both hands, right [worse than] left, as result of diffuse axonal injury.

Sensory loss over the right face, arm, leg and body as a result of left hemisphere brain injury.

Right shoulder separation as result of the MVA, resulting in pain and proximal arm weakness.

C6 transverse process fracture as result of the MVA, with minimal clinical consequence.

Sleep disturbance as a result of traumatic brain injury.

**75**  The plaintiff's medical evidence was uncontradicted. The plaintiff testified that, at the request of the defendants, he saw three doctors and two other persons who gave him tests. Counsel for the plaintiff stated that the defendants served expert reports pursuant to Rule 40A with respect to two of the physicians (a neurologist and a psychiatrist) and two other experts (a work capacity evaluator and a psychologist) and that the plaintiff gave notice that all of these experts were required for cross-examination if their reports were admissible. Mr. Slater and Mr. Nairne argued that in these circumstances I should draw an adverse inference from the defendants' failure to call evidence from any of those witnesses. Counsel for the defendants submitted that because there was not much dispute on the medical evidence as to the injuries sustained by the plaintiff it was not appropriate to protract the trial unnecessarily by calling the medical experts who had seen the plaintiff at the defendants' request and there was no adverse inference to be drawn from a decision not to call unnecessary evidence.

**76**  Having had the defendants' expert reports, it was open to counsel for the plaintiff to compel attendance of the experts as part of the plaintiff's case if counsel were of the view that these witnesses' evidence would add to the evidence already before the court.

**77**  In these circumstances, where the defendants reached the conclusion that they would not challenge the plaintiff's medical evidence except through cross examination and where the plaintiff had notice of the opinions of the experts retained by the defendants, it is appropriate to accept the plaintiff's medical evidence as basically unchallenged. However, it is not appropriate to assume, as the plaintiff's argument would suggest, that the evidence of the defendants' experts would make the plaintiff's case even stronger. I decline to draw an adverse inference from the defendants' failure to call medical expert evidence.

**78**  The defendants accept that the plaintiff sustained multiple injuries in the accident, including a severe brain injury. They dispute, however, the degree of pessimism expressed by counsel for Mr. Frers regarding his likely improvement in the future. While the defendants' position is not that Mr. Frers will make a complete recovery, it is that there are good prospects for continuing improvement of his functional abilities.

**79**  Later, in my discussion of the issues regarding damages, I will review the evidence regarding the impact of the injuries on the plaintiff, and will set out my findings of fact in that regard.

ANALYSIS

1. Were the defendants negligent?
2. Legislation

**80**  The following sections of the Motor Vehicle Act, *R.S.B.C. 1996, c. 318* are relevant:

1. In this Act ...

"emergency vehicle" means ...

1. a motor vehicle driven by a peace officer, constable or member of the police branch of Her Majesty's armed Forces in the discharge of his duty....

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.

125 Unless otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian must obey the instructions of an applicable traffic control device.

129(1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.

...

1. When a red light alone is exhibited at an intersection by a traffic control signal, ...
2. except when a left turn permitted by this paragraph is prohibited by a sign at the intersection, the driver of a vehicle facing the red light at the intersection of not more than 2 highways, and which in obedience to it is stopped as closely as practicable to a marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, as closely as practicable to the intersection, may cause the vehicle to make a left turn into a highway on which traffic is restricted to the direction in which he or she causes the vehicle to turn, but the driver must yield the right of way to all pedestrians and vehicles lawfully proceeding as directed by the signal at the intersection, and ...

...

150(1) The driver of a vehicle must confine the course of the vehicle to the right hand half of the roadway if the roadway is of sufficient width and it is practicable to do so, except

1. when overtaking and passing a vehicle proceeding in the same direction,
2. when the right hand half of the roadway is closed to traffic while under construction or repair,
3. on a highway designated and marked by signs for one way traffic,
4. if necessary when operating snow removing equipment, or
5. if
6. the movement of a vehicle, or combination of vehicles, is permitted by and is done in conformity with the terms of the oversize permit issued under the Commercial Transport Act, and
7. the width of a vehicle, or combination of vehicles, or the width of a load on the vehicle makes the operation of the vehicle or combination of vehicles on the right hand half of the roadway unsafe.
8. The driver of a vehicle proceeding at less than normal speed of traffic at the time and place and under the conditions then existing must drive the vehicle in the right hand lane then available for traffic, or as closely as practicable to the right hand curb or edge of the roadway, except when overtaking and passing a vehicle proceeding in the same direction, or when preparing for a left hand turn at an intersection or into a private road or driveway.

...

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

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

...

165(2) When the driver of a vehicle intends to turn it to the left at an intersection where traffic is permitted to move in both directions on each highway entering the intersection, the driver must

1. cause the vehicle to approach the intersection in the portion of the right 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. keep the vehicle to the right of the marked centre line or centre line of the roadway, as the case may be, at the place the highway enters the intersection,
3. after entering the intersection, turn the vehicle to the left so that it leaves the intersection to the right of the marked centre line of the roadway being entered, or if there is no marked centre line then to the right of the centre line of the roadway being entered, and,
4. when practicable, turn the vehicle in the portion of the intersection to the left of the centre of the 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.

...

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

...

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.

...

200 A driver must not drive on a sidewalk, walkway or boulevard, except when entering or leaving a driveway or lane or when entering or leaving land adjacent to a highway, or by permission granted under a bylaw made under section 124.

**81**  Section 122(1) refers to regulations. The relevant portions of the Emergency 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=), approved and ordered April 21, 1998, are as follows:

Definitions

1 In this regulation:

"attempting to close the distance" means attempting to close the distance between a peace officer's vehicle and another vehicle but does not include a pursuit;

"emergency equipment" means

1. an audible signal bell, siren or exhaust whistle, and
2. a flashing red or blue light;

"indictable offence" means an offence under the Criminal Code or another statute of Canada which may be prosecuted by indictment and includes dual offences as described in the definition of "indictable offence" in the Interpretation Act (Canada);

"pursuit" means the driving of an emergency vehicle by a peace officer while exercising the privileges granted by section 122 (1) of the Motor Vehicle Act for the purpose of apprehending another person who refuses to stop as directed by a peace officer and attempts to evade apprehension.

Application

2 This regulation establishes the circumstances and conditions that apply to the exercise of the privileges granted by section 122 (1) of the Motor Vehicle Act.

...

Emergency response by peace officer

4(1) A peace officer operating an emergency vehicle for

purposes other than pursuit may exercise the privileges

granted by section 122 (1) of the Motor Vehicle Act if

1. the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and
2. the peace officer operates emergency equipment.

...

1. In considering whether there are reasonable grounds under subsection (1), (2) or (5) a peace officer must
2. consider the factors described in section 3 (2), and
3. weigh the degree of risk of harm to members of the public against the seriousness of the nature and circumstances of the suspected offence or incident.

...

1. Factors which will increase the risk of harm to members of the public for purposes of subsections (1), (2) and (5) include
2. attempting to close the distance between a peace officer's vehicle and another vehicle,
3. if there is poor visibility,
4. if there is pedestrian or other vehicular traffic on the highway, and
5. if the peace officer must disregard a yield sign or pass through a crosswalk or uncontrolled intersection.

...

Entering an intersection

1. The driver of an emergency vehicle exercising the privileges granted by section 122 (1) of the Motor Vehicle Act must slow that vehicle to a speed consistent with reasonable care when approaching or entering an intersection.

Limitation on application of sections 3 and 4

1. A peace officer may not engage in a pursuit as described in section 3 or operate an emergency vehicle as described in section 4, if

...

1. the peace officer operating the emergency vehicle fails, on or after a date specified by the Attorney General, to follow the guidelines for operating the emergency vehicle published by the Police Services Division.

...

1. Positions of the Parties
2. The Plaintiff's Position

**82**  The plaintiff's position is that the defendant Siegfried De Moulin was 100% responsible for the accident. Mr. Slater and Mr. Nairne for the plaintiff argued that this defendant breached s. 158 of the Motor Vehicle Act in overtaking and passing vehicles on the right when it was unsafe to do so and in failing to yield the right of way to an emergency vehicle as required by s. 177 of the Act, and that the defendant was negligent in failing to avoid the collision when he had the opportunity to do so.

1. The Defendants' Position

**83**  The defendants' position is that the plaintiff was entirely responsible for the accident. Mr. Ragona and Ms. Wright for the defendants argued that prima facie Siegfried De Moulin had the right of way, because when the collision occurred the traffic signal was green in the direction in which he was travelling while the traffic signal was red in the direction in which Ernie Frers was travelling. They argued that Mr. Frers was in violation of Motor Vehicle Act ss. 129, 150, 165 (2), 174, and 200. They submitted that Mr. Frers also contravened the Motor Vehicle Act s. 144 by failing to exercise due care and attention and driving without reasonable consideration for other persons using the highway.

**84**  The defendants' position is that s. 177 only applies when the emergency vehicle gives an audible signal and shows a visible flashing red light, and that on the evidence the signals were not audible or visible to a person in the position of the defendant Siegfried De Moulin.

**85**  They further submitted that, where the driver of the emergency vehicle is in the intersection against a red light, s. 177 can only apply if the driver has first met the requirements of s. 122. The defendants say that the plaintiff bears the onus to prove that he gained the right of way as the driver of an emergency vehicle, and that on the evidence Mr. Frers did not meet the requirements in s. 122 (1) of the Motor Vehicle Act and the Emergency Vehicle Driving Regulation. They argued that because Mr. Frers did not meet those requirements the defendant Siegfried De Moulin had the right of way and was entitled to proceed on the assumption that all other drivers would be obeying the rules of the road.

**86**  Counsel for the defendants submitted that Siegfried De Moulin met the exception provided by s. 158(1)(b) in that he was travelling on a road with more than one unobstructed lane of traffic in his direction of travel. They argued that the real issue is whether the defendant caused his vehicle to overtake and pass another vehicle on its right when the movement could not be made safely, as proscribed by s. 158(2)(a). They submitted that under subsection 158(2) a party may be found partially at fault for an accident, but only in circumstances where visual cues provided that driver with sufficient notice that the vehicles were stopped due to a hazardous situation which the driver should avoid. Whether such cues existed is, they argued, a factual determination.

1. The Plaintiff's Response

**87**  With respect to audibility and visibility, the plaintiff's position is that s. 177 does not require an officer to satisfy himself or herself that all other motorists have heard or seen the emergency equipment. Counsel for the plaintiff argued that, having activated an audible siren and visible emergency lights, the officer is entitled to assume that other motorists will obey the rules of the road and yield the right of way, according to the general principle set out in Walker v. Brownlee and Harmon, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.)

**88**  Counsel for the plaintiff disagreed that s. 177 only applies if the driver of the emergency vehicle first meets the requirements of s. 122. They submitted that the purpose of s. 177 is to provide protection to emergency vehicles that contravene the Motor Vehicle Act provided an audible siren and visible lights are activated, and to place an onus on other motorists to yield to such vehicles. They argued that the protection of s. 177 would be eliminated if s. 122 must first be satisfied, and urged that s. 122 only creates the possibility of contributory ***negligence***, allowing a party to attempt to establish that the driver of an emergency vehicle failed to take care under the circumstances.

1. Discussion

**89**  Regarding the interpretation of ss. 122 and 177 of the Motor Vehicle Act, I am persuaded by the plaintiff's position and conclude that s. 177 gives the driver of an emergency vehicle the right of way, whether or not the requirements of s. 122 have been met. If the legislature had meant the right of way under s. 177 to be conditional on meeting the s. 122 requirements, it could have so stated. Drivers have a duty under s. 177 to yield the right of way to emergency vehicles so long as those vehicles are giving the audible and visible signals specified in the legislation. But having the right of way does not give emergency vehicles free rein. While drivers of such vehicles may breach certain rules of the road, they may only do so within the limits set by the Emergency Driving Regulation (by virtue of Motor Vehicle Act s. 122(2)) and constrained by the duty to drive with due regard for safety (s. 122(4)).

**90**  I have found as fact that the plaintiff was operating the siren and lights on his vehicle from the time he left the south-west corner of the intersection until the accident - a period of about 12 seconds. I have found that the siren was capable of a high volume of sound and that it was heard by many of the drivers on the road, including some who were at a considerable distance and some who were in the left-most westbound lanes on 72nd Avenue on the east side of the intersection. The lights were visible, although not highly visible on the right hand side in daylight. Mr. Frers was a police officer driving in the course of his duties; I find that the motorcycle was an "emergency vehicle" within the meaning of the Motor Vehicle Act.

**91**  I have also found as fact that the defendant Siegfried De Moulin did not hear the siren or see the lights, and that two of the drivers on his side of the road did not hear the siren. One (Wesley Gross) also did not see the lights; the other (Jeanne Seeck) did not see the lights until she was quite close to the intersection.

**92**  For the driver of an emergency vehicle to have the right of way, the legislation (s. 177) requires not only that it be an emergency vehicle but also that it be "giving an audible signal by a bell, siren or exhaust whistle" and "showing a visible flashing red light".

**93**  What is the measure of audibility and visibility for emergency signals? The plaintiff's position is that, as in Grand Trunk Railway v. McAlpine, [1913] A.C. 838 (J.C.P.C.), which dealt with the statutory duty on a railway company to provide a warning signal of approaching trains, the duty of the police officer in the plaintiff's situation is not to ensure that the warning was heard, but instead to ensure that the warning was sounded in such a way that the reasonably alert person would have sufficient time to take action as a result of the warning. In that case the Privy Council stated at 844:

... it is not necessary for the protection of the company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient for such a person as the one above-mentioned to avoid it.

That test was endorsed by the majority of the Court in Eggins v. Beeclay, [*[1943] 1 W.W.R. 682*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JSXV-G0P4-00000-00&context=) (B.C.C.A.) at 688 in the context of a motor vehicle accident and the interpretation of the predecessor section to s. 177, which referred to "repeated and audible signals and warnings."

**94**  Indeed, counsel for the plaintiff argued, British Columbia courts have determined that there is a duty on motorists, when it is difficult or impossible for them to hear the approach of an emergency vehicle, to exercise a greater degree of care and attention in operating their vehicles than might otherwise be necessary. In Blackburn v. British Columbia, [*[2001] B.C.J. No. 1647*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23WX-00000-00&context=), a police vehicle with lights and siren activated collided with another vehicle proceeding through an intersection on a green light. That driver, who was hearing-impaired, had completely failed to hear the siren and entered the intersection in the outside through lane despite the fact that traffic in the inside through lane was stopped. Meiklem J. held that the defendant police officer was 20% responsible for the accident. The plaintiff, he held, was negligent and 80% responsible in that she did not reduce her speed or exercise caution as she approached the intersection and had the volume of her radio or cassette player turned up very loudly, which impeded further her ability to hear sirens. He stated at para. 18:

There is a certain subjectivity to the reasonable person test when physical disabilities are present. It is not negligent for a deaf person not to hear a siren. But a deaf person driving a car must reasonably be aware that their own safety and the safety of other motorists might be affected by that disability if reasonable compensations are not made. Visual attentiveness takes on added importance.

**95**  Obviously, members of the public cannot insulate themselves against reception of emergency signals and then escape liability for the consequences. As counsel for the plaintiff argued, where there is a hearing impairment, whether natural or artificially created (for example, by the playing of loud music), a driver has a duty to pay special attention to visual cues or to take other steps to improve his or her ability to hear emergency signals.

**96**  Equally, drivers of emergency vehicles cannot assume that as soon as their sirens and lights are activated they are perceived by all other drivers. The test for audibility and visibility is whether the reasonably alert driver would perceive the signal. The reasonable driver must be alert to the possibility of emergency vehicles on the road but the reasonable emergency vehicle operator must be alert to the possibility that the perception of, and response to, emergency signals may not be immediate.

**97**  In Krauss v. Vancouver (1964), 47 W.W.R. 364 (B.C.C.A.) the Court of Appeal set aside the decision of the trial judge apportioning liability 70/30% in favour of the defendant fire truck driver, and found the plaintiff 100% responsible for the accident. The plaintiff proceeded through an intersection on a green light. He had his window closed and the radio on in the car although not at a high volume. Davey J.A. wrote at 368:

The evidence of Shaffer, the driver of the fire truck, is that when he saw that he would be crossing Cambie St. against the red light, he reduced his speed and changed from fourth to third gear to slow down the truck and to be in a position to gain speed and carry on across the intersection if he should find that the intersection was sufficiently clear of traffic. The intersection was clear of traffic. When approximately 20 feet from the easterly crosswalk on Cambie St. he was able to see a considerable distance to his right., He saw the Monarch approaching on Cambie St. 100 or more feet away. The Monarch did not appear to be speeding. He assumed, as he was entitled to do, that the driver of the Monarch would hear the siren and would comply with the law and pull in to the curb.

**98**  To similar effect, in Douglas v. Graham, [*[1993] B.C.J. No. 3038*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S11H-00000-00&context=) (S.C.), Selbie J. summarized his conclusions as follows at para. 9:

On all the evidence there is no question but that the defendant was creeping across the intersection with all the emergency equipment going well before the plaintiff entered it. If the plaintiff had been paying proper attention he would have seen him and, I find, could have stopped. The constable was entitled to assume that any vehicle keeping any sort of look-out from as far back as the plaintiff must have been would have stopped in the circumstances as they existed. The constable was entitled to assume that any cars not at the intersection when he entered it would see him and give him the right of way.

**99**  In Gropp v. British Columbia, [*[1997] B.C.J. No. 493*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21JR-00000-00&context=) (S.C.), Coultas J. found that the plaintiff was 100% responsible for the accident when he made a left turn and failed to see or hear an ambulance which was travelling northbound in the southbound lane, given that the ambulance driver had the emergency equipment activated and had not contravened the provisions of s. 118 (now s. 122) of the Motor Vehicle Act.

**100**  The defendants' counsel pointed out that the motorcycle had blue lights on the right side and red lights on the left side, and suggested that because the blue lights were on the side facing the defendant, there were not visible flashing red lights and therefore s. 177 did not apply. However, both red and blue lights were flashing at the rear of the motorcycle. Jeanne Seeck testified that she saw the flashing lights. She also testified that she thought she did not hear the siren because she had the air-conditioning on full blast and was listening to the radio.

**101**  The plaintiff was sounding warnings in such a way that the reasonably alert driver could perceive them. I find that the plaintiff met the requirements of s. 177 regarding audible and visible emergency signals and that he had the right of way.

**102**  The defendant Siegfried De Moulin approached the intersection with a green light in his favour. He did not hear the siren or see the emergency lights. For at least five seconds the Gross vehicle was stopped on his left and by the time he actually reached the intersection the Seeck vehicle was stopped as well. He passed both of them on his left. On cross-examination, he testified that if he had seen a vehicle stopped in the fast lane to his left on a green light, he would not have proceeded into the intersection until he knew it was safe. He did not offer an explanation as to why he failed to see the stopped vehicles.

**103**  The defendants' position is that Siegfried De Moulin was not negligent; he did not have time to react to the stopped traffic on his left as he entered the intersection on a green light.

1. Conclusion on Defendants' Liability

**104**  I have concluded that the defendant Siegfried De Moulin was negligent. He was not alerted by the unusual circumstance of vehicles stopped at a green light in the through lane to his left. The first vehicle, driven by Mr. Gross, began to stop when the defendant was 80 - 100 metres from the intersection. It was stopped for at least five seconds as the defendant approached. I find that the defendant was not paying sufficient attention to his driving as he approached the intersection, whether because of conversation with his brother, the music on the radio or for some other reason. When he testified at trial that he "did not see any obstructions, it was clear sailing", I find that he accurately stated what he perceived at the time, but it was an erroneous perception. An alert driver would have refrained from sailing through in the right-hand through lane in those circumstances.

**105**  I accept that there was a sound barrier created by the vehicles in the intersection. Nevertheless, drivers have a duty to be alert. Ms. Breitkreuz, who was behind Ms. Seeck, did hear the siren. Mr. Gross and Ms. Seeck, who did not hear it, were alert enough to perceive something and to stop, even though they had to do so suddenly. Mr. De Moulin could have done the same. He was significantly further back (over 80 metres) when Mr. Gross stopped. That stop, followed by Ms. Seeck's, provided a visual cue to which he had sufficient time to react. If he had reacted by slowing and proceeding with caution, he could have avoided the accident.

**106**  Having found that the defendant was negligent, the remaining question is the extent of the plaintiff's responsibility for the accident.

1. Was the plaintiff contributorily negligent?

**107**  For reasons which will probably never be known, Mr. Frers made the bad decision to drive across the lane in which the defendant was travelling. He failed to see, or to avoid, the defendant's vehicle. Although counsel for the plaintiff argued that he should bear no responsibility for the accident, that is an untenable conclusion in these circumstances. Counsel for the defendants submitted that he was 100% responsible, but I have rejected that conclusion because I have found that the defendant Siegfried De Moulin was negligent. Under 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), I am required to apportion liability between these two parties.

**108**  Here, neither party saw the other in time to avoid the collision. Mr. Frers was in the intersection in pursuance of his duties and operating his emergency equipment. He had the right of way under s. 177. However, that does not confer immunity upon him. He must still conduct himself without ***negligence***. Section 122 (1), (2) and (4) of the Motor Vehicle Act are repeated for ease of reference:

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.

**109**  There was no suggestion that Constable Frers was properly in "pursuit mode" (given that there was no evidence that an indictable offence had been committed nor that the "U-turning" driver was refusing to stop). Therefore, the applicable regulations are:

4(1) A peace officer operating an emergency vehicle for

purposes other than pursuit may exercise the privileges

granted by section 122 (1) of the Motor Vehicle Act if

1. the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and
2. the peace officer operates emergency equipment.

6 The driver of an emergency vehicle exercising the privileges granted by section 122 (1) of the Motor Vehicle Act must slow that vehicle to a speed consistent with reasonable care when approaching or entering an intersection.

**110**  With reference to the factors contemplated in s. 122(4), I note that the urgency of catching up with someone who has made an illegal U-turn is much lower than that in many other situations in which emergency vehicles are used. I do not find that the so-called "New York policing" or "Broken Windows philosophy" program which some of the police witnesses described (deal with the small things and the large ones will follow) heightened the urgency. I note that there was moderately heavy to heavy traffic and that the risk which the plaintiff took in heading across the right through lane, into which he would not have been able to see, was high.

**111**  As the defendants argued, the plaintiff was in breach of a number of provisions of the Motor Vehicle Act, given his path through the intersection and the traffic signals which he faced. Counsel for the defendants suggested that, even if the plaintiff fell under the provisions of s. 177, he went beyond the four specific areas which it contemplates. However, I find that most if not all of what the plaintiff did would fall under s. 122 (1) (b) or (c) in that he went against a red light and disregarded "rules and traffic control devices governing direction of movement or turning in specified directions".

**112**  Counsel for the plaintiff argued that the plaintiff was entitled to assume that the defendant would obey the rules of the road and yield the right of way. Counsel argued that cases involving pedestrians in crosswalks are analogous, citing Petijevich v. Law, [*[1969] S.C.R. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22WM-00000-00&context=), Coso v. Poulos, [*[1969] S.C.R. 757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22YK-00000-00&context=) and Woodhouse v. Gill, [*[1996] B.C.J. No. 482*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2C5-00000-00&context=) (S.C.), in all of which the pedestrian was found not to have been contributorily negligent. Mr. Slater and Mr. Nairne submitted that the words of the Supreme Court of Canada in the Coso case are particularly appropriate. In that case the pedestrian was hit when he passed in front of a truck which had stopped for him to cross an intersection in an unmarked crosswalk. The defendant overtook and passed the truck on its left. The court affirmed the ruling of the trial judge, stating at 760:

Was the plaintiff guilty of contributory ***negligence***? He had the right of way and was entitled to expect that motorists would respect it. The truck did respect it. Was he not then entitled to expect that vehicles to the south of the truck would observe the action of the truck and act accordingly? I think he was. I do not say that he might not, by the exercise of extreme vigilance, have avoided this accident but I do not think that in the circumstances such a degree of vigilance was required of him. I find that the defendant is wholly liable.

**113**  On the other hand, counsel for the defendants submitted that cases involving pedestrians are quite different from cases involving vehicles, even if they are emergency vehicles which might have the right of way. Mr. Ragona and Ms. Wright pointed to Walker v. Brownlee, supra, as the seminal case on the duty of a driver having the statutory right of way, standing for the following principles: (1) drivers are entitled to proceed more or less upon the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets; (2) a driver entering an intersection, even though he has the right of way, is bound to attempt to avoid a collision if reasonable care on his part will prevent it (in other words, the driver having the right of way ought not to exercise that right of way if the circumstances are such that the result of his so doing will be a collision which the driver reasonably should have foreseen and avoided); and (3) in order for the servient driver to cast any blame upon the driver having the right of way, the servient driver must establish that from the point in time the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's disregard of the law, that the dominant driver had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed.

**114**  With reference to that third point there can be no doubt that, by the exercise of reasonable care, Mr. Frers could have become aware that Mr. De Moulin was not slowing as he approached the intersection and Mr. Frers could have avoided the accident.

**115**  Counsel for the defendants drew to my attention a number of cases considering accidents involving drivers of emergency vehicles: Whitehead v. City of Victoria [*(1957), 12 D.L.R. (2d) 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62JC-00000-00&context=) (B.C.C.A.); Sinclair v. Siddle (1965), 53 W.W.R. 14 (B.C.C.A.); Valley v. Po [*(1971), 23 D.L.R. (3d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-JNY7-X1X5-00000-00&context=) (B.C.S.C.); Wilford v. Deboersap, [*[1994] B.C.J. No. 3341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M22J-00000-00&context=) (S.C.); McKay v. Gibbins, [*[1996] B.C.J. No. 1779*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61M5-00000-00&context=) (S.C.); Smith v. City of Victoria Police Department, [*[1997] B.C.J. No. 3163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M23V-00000-00&context=) (S.C.); Bates v. Ewachniuk, [*[2001] B.C.J. No. 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2W1-00000-00&context=) (S.C.); and Delalis v. City of Nepean, [*[1997] O.J. No. 3624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD11-FJDY-X51T-00000-00&context=) (Ont. Gen. Div.)

**116**  In several of these cases the courts emphasized that, in order to have the benefit of s. 122 of the Motor Vehicle Act, the driver of an emergency vehicle must show that he or she has driven with due regard for safety, having regard to all the circumstances of the case. Due regard for safety may vary with the degree of urgency in the case. In the Whitehead case, where the defendant fire truck driver was held 25% at fault for entering an intersection at too great a speed and the plaintiff 75% at fault for failing to pay attention to what was going on about her, the court stated:

In this case the speed at which the driver proceeded through the intersection must be tested by balancing the urgency of the duty to which he was responding against the danger of going past that blind corner and through the intersection on a red light (p. 602).

...

If the fire truck had been going directly to the fire I would doubt if that finding [of no liability on the driver] should be disturbed. However, the driver was not going to the fire: he was going into reserve. While he was entitled to go through the red light in order to get to headquarters as quickly as reasonably possible, I see no urgency that would justify him in making that difficult manoeuvre through the intersection at a speed which required him to devote his entire to attention to it and prevented him giving any attention to the obvious dangers on his left created by the blind corner and the green light for cross traffic .... (pp. 603-4).

**117**  Counsel for the plaintiff (having pointed out that in Sinclair v. Siddle the British Columbia Court of Appeal declined to follow the reasoning of the majority in the St. James case) drew to my attention the following discussion by Schultz J.A. in his dissenting judgment in St. James (City) v. Cargo Carriers Ltd. (1964), 51 W.W.R. 18 (Man. C.A.) at 23:

It is apparent that the legislature, having regard to the interests of society as a whole, has given important and exceedingly significant privileges to drivers of emergency vehicles; so much so that in order to enable them to take full advantage of such privileges, it has imposed definite limitations on the right of way of other motorists in order to facilitate the quicker passage of the emergency vehicle. It is perhaps unnecessary to observe that this special right of way conferred on the drivers of emergency vehicles is not an absolute right of way, a point which this court emphasized in Fingerote v. Winnipeg (City) and Reid (1963-64) [*45 W.W.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JJK6-S4F8-00000-00&context=). There never is an absolute right of way for the driver of a motor vehicle at any time or place if by "absolute" is meant the right to proceed regardless of the circumstances or the consequences. Certain drivers have preferred rights over other drivers under certain circumstances, which rights are determined and regulated by those sections of The Highway Traffic Act dealing with the rules of the road. Obviously, traffic operation and control would be impossible unless such preferred rights, in a given circumstance, were recognized. But all such rights are relative, whether those of an emergency driver answering an emergency call or those of a motorist facing a green light, and in each and every case there may be collateral circumstances which limit or restrict the preferred right.

Counsel for the plaintiff also relied on the following passage from Schultz J.A.'s Reasons at 25:

The argument of counsel for the defendants that the blind corner made it compulsory for the plaintiff to slow down sufficiently to avoid any possibility of collision with a motor vehicle entering from his right overlooks completely the fact that, under the circumstances, its driver could reasonably be expected to hear the sound of the fire truck siren. Moreover, such argument inevitably leads to the conclusion that at every blind corner an emergency vehicle -- though sounding a clearly audible signal -- must stop or slow down to a crawl on the assumption that there possibly might be a motor vehicle, like the defendants', so extraordinarily noisy that its driver could not be expected to hear any signal, however audible. Considering that in most of the metropolitan area, and in all of the commercial area, every corner is a blind corner, such an interpretation would defeat the whole purpose and intent of the emergency vehicle legislation.

**118**  While Schultz J.A.'s discussion of the general principles is important, I do not find the facts of that case comparable to those before me. The cogent difference is that the evidence before me does not support the conclusion that Siegfried De Moulin should be expected to have heard the siren as he approached the intersection. Although I have found that the siren signal was audible for the purpose of determining whether the plaintiff fell under s. 177 of the Motor Vehicle Act, it does not follow that all drivers, at any distance, or under any conditions, should be assumed to have heard that siren. The plaintiff was aware or should have been aware, as a trained and experienced police officer, that: (a) it takes time for drivers to react to sirens and to identify accurately the direction from which they are coming; (b) heavy traffic may create a sound barrier; (c) lights, particularly the blue lights on the right side of the vehicle, are not particularly conspicuous in daylight; and (d) drivers may be employing air conditioning and have their radios on. While having the right of way, the plaintiff still had to exercise due care.

**119**  Here, the defendant should have been alerted by the slowing and stopping traffic. If he had slowed down in response to that cue, he would have had the opportunity to hear the siren or see the lights and to avoid the accident.

**120**  However, even though the defendant was negligent in failing to slow or stop when the traffic on his left did so, the plaintiff could have avoided the accident by the exercise of appropriate caution. I find that responsibility for the accident should be apportioned 60% to the defendant and 40% to the plaintiff.

1. What damages did the plaintiff suffer as a result of the accident?

**121**  As described above, Ernie Frers suffered very serious injuries when he was struck by the van and thrown off his motorcycle. The severe traumatic brain injury has left him with what will, in all likelihood, be life-long deficits. Mr. Frers, who was 53 years of age at the date of trial, has not worked since the accident. He lives with his wife of 13 years, Janet Frers, and his two daughters, who were 11 and 8 years old at trial.

**122**  Dr. Foti, neurologist, reported that as late as one month after the accident Mr. Frers exhibited very impaired cognitive skills and significant disorientation. He testified that one of the major indicators of severe traumatic brain injury is the length of post-traumatic amnesia, that anything over seven days is considered quite severe, and that in Mr. Frers's case it was three weeks.

**123**  Since that time the plaintiff's cognition and speech abilities have gradually improved, although as he became more active in rehabilitation he developed increased symptoms of dizziness with activity. Dr. Foti believes that the dizziness flows from the brain injury rather than from an unrelated inner ear problem. As of June 3, 2001, Dr. Foti reported that Mr. Frers continued to show impaired attention and dysarthria (dysarthria is a speech disorder that is due to a weakness or incoordination of the speech muscles, causing speech to be slow, weak, imprecise or uncoordinated). He reported relatively preserved language structures, impaired verbal fluency and a short-term memory for verbal information adequate for simpler tasks but showing impairment with increasing complexity or when distractions are present.

**124**  Dr. Foti found that Mr. Frers did not demonstrate any significant decline in his intellect and his nonverbal memory seemed relatively preserved. On the other hand, one of his main problems is slowness in processing information although he can be accurate if given enough time. Dr. Foti also found evidence of significant injuries to the connections between Mr. Frers's brain and his limbs, leading to slowed finger movements on both hands, especially on the right (fortunately, he is left-handed). He found sensation loss over the right head and body which may contribute to a reduction in dexterity.

**125**  Regarding the prospect of further recovery, Dr. Foti's report is not encouraging. He wrote:

Mr. Frers has shown the expected early recovery in the months following his traumatic brain injury, but then has slowed in further advances. The brain shows a very limited capacity to further recover beyond two years following injury, especially in individuals who are older at the time of head trauma. Mr. Frers is older than the majority of individuals suffering severe traumatic brain injury, and older age limits the brain's adaptability. I do not expect significant further recovery from this point forward, although using cognitive rehabilitation strategies he may be able to reduce frustration and improve functioning to a slight degree.

...

Mr. Frers has shown optimism about returning to work, and I believe he does lack some insight into the severity of his neuropsychological deficits. He also does not seem to understand limitations in his balance skills and the slowness with which he works.

He concluded that despite the tremendous support Mr. Frers has had from his family, workplace and religious beliefs, promoting a positive outlook and avoiding the additional complications of depression, social isolation and substance abuse that often occur in persons who have suffered traumatic brain injury, Mr. Frers's level of cognitive and physical recovery will not enable him to return to his previous employment. In support of this opinion he referred to Mr. Frers's slowness and tendency to fatigue easily and to his cognitive difficulties even when he is rested - particularly with respect to attention and speed of information processing. His opinion is that Mr. Frers does not have a significant language disorder but does show difficulties with verbal fluency and articulation, particularly when he is fatigued.

**126**  In his testimony, Dr. Foti stated that damage to the brain does not heal; instead, the individual develops ways to work around the damage.

**127**  Commenting that Mr. Frers has fortunately not experienced severe injuries to the very front part of the brain and parts of the temporal lobes which are important to behaviour, Dr. Foti notes that he has nevertheless become more withdrawn socially and is more easily angered than in the past, which are predictable reactions given the cognitive difficulties.

**128**  A report from Dr. Artzy, neuropsychologist, who did an assessment of Mr. Frers in 2000, is consistent with Dr. Foti's findings. She found that Mr. Frers's "Full Scale IQ" was slightly lower than his estimated pre-accident level (101 from about 109). Testing showed that he had serious difficulty with "executive function" or "abstraction/problem solving/planning". She said those results suggest weak mental control and slowed thinking. His results on tests of attention and concentration were also weak. His reading test showed average vocabulary, weak comprehension and a slow reading rate (3rd percentile). His ability to learn and recall was weak, although his performance on a test of visual learning and recall was within normal limits (78th percentile). His manual dexterity was weak for both hands with the left hand somewhat better than the right. Manual grip strength was within normal limits for both hands.

**129**  Having summarized the symptoms of which Mr. Frers complained (dizziness and blurred vision, noise and light sensitivity, slowed thinking, speech and language difficulties, reduced memory, right-sided changes in motor ability and sensory perception, increased irritability, headache, neck and hip pain, disturbed sleep and fatigue), Dr. Artzy stated:

Neuropsychological test results are consistent with this man's injury and complaints. He shows slowed information processing speed, reduced thought flexibility, increased distractibility, and reduced working memory. These impairments seem to affect his learning recall for auditory material... .

**130**  Dr. Artzy wrote, with respect to Mr. Frers's personality and adjustment:

Mr. Frers's responses to the MMPI-2 yielded a clinical profile that was interpretable and valid. Though within normal limits, validity indices suggest a tendency to minimize symptoms of emotional distress. Despite this tendency, six of the ten basic clinical scales were elevated suggesting significant psychological turmoil. Mr. Frers's response [sic] indicate concerns with neurological symptoms and general health concerns, depressed mood, and cognitive impairments consistent with his complaints. Mr. Frers remains positive about his return to the police force and may have limited insight into the severity of his injury.

**131**  In her report Dr. Artzy referred to information that Mr. Frers has a positive attitude and commented:

... it appears he is making quite an effort to maintain his positive attitudes and may be avoiding dealing with the high probability of permanent disability as a result of his severe injuries. Additional support and counselling may be required in the future to help Mr. Frers with the emotional aspects of his loss and the drastic changes to his life.

With reference to the possibility of his return to work, Dr. Artzy stated:

Mr. Frers expressed a wish to return to active duty with the police force. His wife suggested he may be able to utilize his past knowledge and experience regarding drug control. In my opinion, Mr. Frers should concentrate his efforts in the near future on rest, rehabilitation of his stamina, speech and language, and learning the use of memory aids. Once these have reached a plateau, he may benefit from vocational evaluation to help in finding him an appropriate role within the police force.

**132**  A further report, dated February 19, 2001, was tendered from Dr. van Rijn, physiatrist, who also testified at the trial. Dr Van Rijn discussed improvements he had seen in Mr. Frers since about ten months post-injury, for example in his visual function and his sense of imbalance. He stated the opinion that any further recovery will be due to further adaptation. He wrote that with constant practice Mr. Frers's speech and language functioning and higher cognitive functioning, including attention and memory, will probably show some improvement, as will his higher level balancing and coordination.

**133**  Dr. Van Rijn testified that the shoulder separation was third degree (the worst kind, being an almost complete disruption of the ligaments which normally hold the joint together) and in his report referred to the consequences of the shoulder separation injury:

Physically he is restricted because of his shoulder separation and associated pain making him less capable of heavier physically demanding tasks, especially involving increasing elevation of his arm, and/or pushing and pulling activities. These symptoms are likely to persist in the future, possibly worsening if he develops post-traumatic arthritic changes.

He testified that with this type of injury there is an increased risk for developing arthritis.

**134**  Dr. Van Rijn wrote, with respect to Mr. Frers's educational or employment capabilities:

Mr. Frers will not likely ever be able to qualify for active police duties; however, there may be some particular aspects of police work that he might be able to undertake. Whether or not he would be paid for such work remains to be seen, especially if he had to 'compete' with other able-bodied members of the police force for the same job. Physically he is limited to work of a more sedentary nature. Because of his neurocognitive problems, he is limited to work where mental flexibility, speed of thinking, and good working memory are not prerequisites of an occupation. However, when looking at all the problems that Mr. Frers still has, he is probably not competitive in the work force.

**135**  A report from Vernette Bot, physiotherapist, dated July 1, 2000, states that Mr. Frers is able to perform all activities of daily living though at a slower than normal pace, and that he is able to bicycle for ten to fifteen minutes on the road with very low traffic. The report further notes improved balance, but continuing difficulties with sustained exertion due to fatigue, dizziness and diminished strength.

**136**  Ruth Casanova, speech/language pathologist, administered tests to determine Mr. Frers's competencies and reported that as of July, 2000, he performed reasonably well in many areas. She commented that his prognosis "would appear to be above average due to his attitude, severity level, as well as his support systems (family, friends and church)." She recommended an immediate course of treatments. In a second report based on an assessment on May 30 and June 2, 2001, Ms. Casanova reported progress on a number of the tests. She again recommended weekly sessions for one to two years, but it does not appear that Mr. Frers has continued with speech and language therapy as recommended. In her testimony she stated the overall conclusion that Mr. Frers has advanced minimally and that although there is still some progress, it is not at a high rate.

**137**  Julia Jellis, neurorehabilitation physiotherapist, stated in a letter dated March 14, 2000, that Mr. Frers "has good insight into his present physical status, and was accurate in relating the chronological order of his recovery, and listing his current problems." (She testified, however, that he had written down a list of his problems in advance of the discussion.) Ms. Jellis said that physiotherapy is necessary for Mr. Frers to address cardio-vascular fitness, neuro-muscular defects and balance/vestibular abnormalities. She emphasized the urgency of such treatment, and that she was willing to defer payment for her services in order to permit treatment to proceed. She also noted that Mr. Frers was eager to seek and to comply with treatment.

**138**  In his evidence, Mr. Frers described the following ongoing problems since the accident:

On the right side of his body, numbness on the entire side, earaches, pain behind the right eye when he gets tired, no taste buds on the right side, acidic taste in his mouth, trouble with his throat and with swallowing on that side, as well as tingling in the jaws, teeth, tongue and lips on that side;

Neck cracking every time he turns his head;

Right shoulder bone sticking up and the bone loose on both ends, causing pain such that he will lose sleep or require painkillers;

Numb right arm with no sensation, and pain in the two middle fingers;

Aching in the right hip;

Soreness in the right leg, mainly in the knee and ankle;

Difficulty in walking, although that is improving;

Right ankle sometimes gives out when he is tired;

Back muscles become sore and in spasms, mainly when he first gets up;

Memory difficulties, for example in remembering his neighbours' names or in remembering where he is in the process of doing tasks;

Some difficulty in reading;

Reduced ability to concentrate, which he described as

about four times slower than before the accident; and

Reduced ability to drive, such that he had driven, he estimated, five times since the accident, for example to church, but once the stretch between Merritt and Kamloops.

**139**  Janet Frers testified that the biggest change in her husband is that from a vibrant person he has become very withdrawn and without motivation to do the things he once did. She said that a lot of the time she is like a single parent, and must do things on her own without him. She said the most significant improvement took place during the six to eight month period starting in the spring of 1999 when, under the direction of Julia Jellis, he was constantly with the "rehab people", and they were working on him one-on-one. Ms. Frers said that because of money they could not carry on with that level of treatment, although Mr. Frers saw a physiotherapist and a neurorehabilitation worker each once a week for another five month period. He also saw a psychologist for a short period, but Ms. Frers did not think that those treatments were of much assistance. She testified that he has not been evaluated or prescribed any medication by a psychiatrist regarding possible depression.

**140**  Norman Sawatzky, who is Janet Frers's father and thus the plaintiff's father-in-law, said that he had never met anyone who could do so much in a practical way in the construction area as can Mr. Frers, and that he was a very special individual in terms of his personality as well. He gave evidence about the work which Mr. Frers performed on both the Sawatzky and Frers homes. Asked to describe changes in Mr. Frers, he said that in his personality he is still a gentle soul and a good person, but so far as his skills are concerned, the difference is like night and day. He has tried to do some things, such as put in some block paving around the pool in the back of his house, but it is very methodical and very laborious. He needs a lot of rest. He slurs his words a lot and is difficult to understand. Although prior to the accident he was quite involved with his children, he is now unable to take them anywhere, and all of that is left to Janet Frers. He becomes tired and stressed if he is with people or in traffic; any movement affects him. Mr. Sawatzky said that there has been some improvement, but it had seemed to plateau about a year ago.

**141**  George Frers, the plaintiff's brother, testified that Ernie Frers can do very little of what he could do prior to the accident in the realm of construction work, and that he is not able to enjoy the same things he did prior to the accident because of his slowness. He said that his speech is hard to understand, although with practice he has been able to learn to understand him. Prior to the accident he was nicknamed "Mr. Mingle" because he enjoyed socializing, but now he secludes himself as much as he can. His concentration is affected and his reading has become very slow. He walks with poor balance. George Frers said that since the accident he has done things for his brother, such as assist with basement renovations, fix a garburetor and sink and put up Christmas lights.

**142**  Peter Luongo testified that his family and the Frers family have become good friends over the ten years they have been neighbours. He described Mr. Frers as a man of conscience and of heart, a person constantly on the go, who "lived to do", and who was very active and enthusiastic, helpful to neighbours and looked up to by others in the community. He said that to call him a handyman would understate it: he could have been a master craftsman. Since the accident, Mr. Luongo said, Mr. Frers is a shadow of his former self. His walk has become a shuffle. His speech is slurred to the point where Mr. Luongo has to ask him to repeat himself. He tires very easily, and although he offers to help his neighbours as he did before, he is realistically not able to do much of assistance. On cross-examination Mr. Luongo agreed that he has seen Mr. Frers doing some weeding and planting hanging baskets, but said he had not seen him doing any mowing. He agreed that Mr. Frers seems to feel better being active.

**143**  Constable Brooks said that he would compare Ernie Frers's current state with that of someone who has had a stroke: he has problems with balance, dizziness, keeping track of certain things and lack of stamina. He said that he is at most a third of the person he used to be in his physical abilities.

**144**  David Greenhalgh described Ernie Frers before the accident as an outstanding, hard-working employee, with leadership ability, competence, motivation, skills and work ethic such that he was assigned as a team leader in the trucking inspections project. His description of Mr. Frers after the accident was that his positive approach seemed to be unchanged but that in many other respects he seemed a completely different person. Mr. Greenhalgh said that Mr. Frers's ability to speak was severely impaired compared with his ability previously, and that he seemed very slow compared with his previous self.

**145**  A videotape was produced by the defendants, reflecting surveillance over a six day period in 2000. It showed Mr. Frers carrying an aluminum ladder, silk plants and some boards. He is also shown climbing a few steps up and down a ladder, using a drill to hang lattice board, using a leaf blower for 4 - 5 minutes (until he handed it off to his brother), sawing a board in two and backing up a truck a short distance in a driveway. Aside from that very brief episode of driving, at all other times Mr. Frers was a passenger. Defendants' counsel point out in their submissions that on October 2, 2000, the day on which a full day of surveillance was recorded, the plaintiff was active throughout the day without taking protracted breaks or naps, in contradiction of reports that fatigue is a problem for him.

**146**  Although there is no doubt that the videotape shows Mr. Frers carrying on the activities described above, it shows him doing so with a slow deliberation and sometimes tentativeness that is entirely consistent with the way in which he comported himself in the courtroom.

**147**  Mr. Frers agreed in cross-examination regarding the videotape that the film accurately depicts his activities, although he noted that the plants he was moving weighed about five pounds. He was asked whether there has been an improvement in his condition since October 2000, and he responded, "I think that every day there is an improvement."

**148**  My conclusion, based on the evidence as well as on my impression of Mr. Frers gained from his testimony and from the surveillance video, is that he is a determined man, with a strong spirit. He maintains a positive approach, and has retained some of his pre-accident sense of humour. But he is not the same man that he was on the morning of May 5, 1998. From an active, athletic, energetic family man who was a well-respected member of the Delta Police force and an ambitious and successful hobby carpenter and builder, he has become a man who needs assistance with remembering things or making phone calls or appointments, who cannot do more than simple carpentry projects, who no longer does any sports, who fatigues easily and who cannot drive unaccompanied or for more than short distances in low traffic. His relationship with his wife and children has changed for the worse. Activities with his family have been greatly reduced. He angers easily. He has some trouble speaking and in being understood. He has become withdrawn socially and has ceased to attend church regularly. He has not been able to carry on any form of employment since the accident.

1. Quantification of the Plaintiff's Damages
2. Non-pecuniary loss

**149**  Counsel for the plaintiff submitted that because his enjoyment of life has been so greatly reduced, Mr. Frers should receive the upper limit of damages for non-pecuniary awards. Citing Blackstock v. Patterson, [*[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=) (B.C.C.A.) for the proposition that a case with devastating injuries qualifies for the upper limit notwithstanding that there may be even more severe cases receiving the same damages, counsel argued that $270,000 is the appropriate award in this case. Counsel also referred to Wilson (Guardian ad litem of) v. Russell [*(2000), 145 B.C.A.C. 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2CS-00000-00&context=), [*2000 BCCA 611*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2CS-00000-00&context=), where $250,000 in non-pecuniary damages was awarded to a plaintiff who had suffered serious brain injury.

**150**  Counsel for the defendants submitted that the correct approach is to compare the situation of the plaintiff with an individual who has sustained the most catastrophic injuries at a young age. Alternatively, counsel urged comparison between this case and others where there were comparable injuries, citing Williams (Guardian ad litem of) v. Grisdale-Verschoore, [*[2000] B.C.J. No. 1338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22BV-00000-00&context=) (S.C.) and Anderson (Guardian ad litem of) v. Bicknell, [*[1998] B.C.J. No. 1847*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2S7-00000-00&context=) (S.C.). Counsel argued that here the plaintiff is fully ambulatory, is able to do some carpentry, perform the activities of daily living and some household and yard chores and to converse at the same level as he did before (according to his brother), and shows continuing improvement. The defendants' position is that the appropriate range for non-pecuniary general damages is $160,000 to $180,000.

**151**  The plaintiff's life has been utterly changed by the accident. He has a serious neurological deficit and some physical restrictions. He still suffers physical pain from the separated shoulder, and emotional difficulty manifested in his withdrawal from family and friends. Although he may continue to improve, he will not recover. The authorities cited by the defence are not comparable in that in both cases the plaintiff had made an almost complete recovery. At the same time, Mr. Frers has not suffered wholly devastating injuries. He is able to continue to do a number of things, including most of the activities of daily living. Recognizing that his injuries were very serious, I do not find that they were so devastating as to make the upper limit of damages the appropriate award. I find that he is entitled to $220,000 in non-pecuniary general damages.

1. Loss of past income
2. Extent

**152**  Mr. Frers worked for the Delta Police for 18 years and has not returned to that work since the accident.

**153**  The plaintiff seeks $177,128.45 for past loss of income. Counsel for the plaintiff argued, based on the report of Robert Carson, economist, that the plaintiff's gross wage loss from the accident to the date of trial is $222,627, which, net of 25% tax, is $166,970. The Corporation of Delta and Manulife have paid him a total of $177,128.45. (Counsel said that the difference is explained by the fact that Delta and Manulife paid tax on the plaintiff's behalf.) Mr. Carson's calculations were made on the assumption that Mr. Frers would continue to work overtime to the same extent as he did in the years preceding the accident, and that he would have received a promotion as of January 1, 1999 to 110 percent of a constable's basic pay grade.

**154**  Counsel for the defendants countered, based on the report of Mr. Hildebrand, M.B.A., that the total of lost income is (assuming that Mr. Frers did not work any overtime) between $203,479.25 and $213,170.75, depending on whether it is assumed that Mr. Frers progressed to the next highest pay grade during the period. Those figures were calculated before the impact of tax and s. 54 of the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231* was considered. Section 54 reads:

54 Despite any other enactment or rule of law but subject to this Part, a person who suffers a loss of income as a result of an accident or, if deceased, his or her personal representative, is entitled to recover from designated defendants, as damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, not more than the net income loss that the person suffered in that period as a result of the accident.

**155**  I am satisfied on the evidence that Mr. Frers would have progressed to the next highest pay grade (110%) on January 1, 1999. His employment records show good performance, he had the seniority, and he gave evidence that he intended to complete the necessary courses. I am also satisfied on the evidence that he would have worked the same amount of overtime as he had in the preceding years. I find his gross wage loss between the accident and the trial was $222,627.

**156**  The parties agreed that the effect of s. 54 of the Insurance (Motor Vehicle) Act on the past wage loss claim will be argued at a later date.

1. Deduction of "collateral benefits"

**157**  The collective agreement between the Corporation of Delta and the police officers' association requires members who make claims against third parties to include all sick pay as part of their claim. Mr. Frers received his full salary for the first six months after the accident, pursuant to that agreement. He then became eligible for long term disability. The insurer, Manulife, initially refused to pay benefits because Mr. Frers had not made a Workers Compensation claim. Later, it accepted his claim and instituted long term disability benefits, including a retroactive payment to November 5, 1998. He has entered into a subrogation agreement with Manulife and the defendants do not contend that the Manulife benefits are deductible.

**158**  During the period in which Manulife was refusing to pay benefits, the Corporation of Delta continued to pay the plaintiff's wages and benefits. In a letter dated August 26, 1999 to Mr. Frers's law firm, Superintendant Gord Adams of the Delta Police Department wrote, "Under the circumstances, the employer is seeking reimbursement for all wages and benefits paid to Constable Frers beginning from the time of the accident to the conclusion of his civil case." Mr. Frers received a total of $116,184.83 in wages and $9,144.88 in benefits from Delta between the date of the accident and July 6, 2001. Mr. Frers repaid Delta $33,751.04 when Manulife changed its position on the long term disability claim.

**159**  The defendants' position is that all of the wage payments (not benefits) from Delta should be deducted from the plaintiff's past wage loss claim, less the amount by which he has already reimbursed Delta (thus, a net deduction of $82,433.79). Counsel for the defendants referred to 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=), where the court held that, in general, wage benefits paid by an employer must be brought into account and deducted from the claim for lost earnings to avoid double recovery.

**160**  Counsel for the plaintiff referred to Cunningham v. Wheeler, [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=) where the majority held that where there is evidence that an employee has paid in some manner for disability benefits under a contract of employment or collective agreement, the benefits are comparable to those under a private insurance policy and no deductions should be made for such benefits from the award for lost wages. Cory J. explained the policy rationale for the rule regarding non-deductibility of collateral benefits at 400-1:

I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.

Recovery in tort is dependant on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

**161**  Counsel for the plaintiff also referred to Kask v. Tam [*(1996), 21 B.C.L.R. (3d) 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2CN-00000-00&context=) (C.A.), where the Court of Appeal, questioning how much remained of the Ratych v. Bloomer approach, stated at 19:

There will be few cases where the tortfeasor can escape paying compensation to an employee for lost time at work when the absence was covered by the employer or its insurer. Either the employer was obliged by contract to pay or to provide insurance coverage, in which case it can be easily shown that the benefit formed part of the overall compensation package, or the employer was under no obligation but continued the salary ex gratia, in which case the law says that the tortfeasor cannot take the benefit of another's generosity.

**162**  In L. Klar et al., Remedies in Tort (Toronto: Carswell, 2000 Rel. 6 Vol. 4) at 27-162.10, it is stated:

In most cases the courts have refused to make deductions where the plaintiff's employer gratuitously provided the plaintiff with monetary assistance notwithstanding that this may result in double recovery.

**163**  The plaintiff's position is that for the first six months the benefits were payable pursuant to the collective agreement and therefore, as in Cunningham v. Wheeler, he had effectively made trade-offs in order to acquire those benefits. The plaintiff's position with respect to the balance of the payments is that they were made pursuant to an agreement that he would repay the Corporation of Delta, and that this is a subrogated claim. Alternatively, his position is that if the amount was a gratuitous payment there should still be no deduction.

**164**  The collective agreement requires Mr. Frers to include a claim for sick pay in his claim against third parties, he has done so, and the employer is taking the position that it should be recompensed for those benefits. Thus, there is a subrogated claim with respect to the first six months. After that time, there were payments to tide Mr. Frers over pending resolution of his dispute with the private insurer. These were gratuitous payments, although the employer is seeking to be recompensed for them as well. With respect to those payments, Mr. Frers gave evidence that he feels a moral obligation to repay them. Applying the principles set out in the authorities, I conclude that there should be no deduction.

1. Future loss of income earning capacity
2. Extent
3. Wages and Benefits

**165**  The plaintiff's position is that Mr. Frers would have continued to work for the Delta Police until he was 60, the mandatory retirement age. The defendants do not dispute that assumption. However, the defendants dispute that Mr. Frers would have continued to work overtime hours until he was 60 if there had been no accident.

**166**  Counsel on behalf of Mr. Frers submitted that it is unlikely that he will ever be competitively employable, and that although it may be assumed that Delta would make every effort to accommodate him in some capacity, there are no positions which would fit his post-accident level of skills. Sergeant Greenhalgh testified that he is familiar with Mr. Frers's capabilities before and after the accident, and that, from his knowledge of work available in the Delta Police, including the "Light Duty" desk and comparable positions, there clearly are no positions which the plaintiff is capable of filling. Mr. Frers himself testified that he is hopeful that he will improve to the point where he will be able to work again, but the expert opinion evidence, as described above, does not support much optimism.

**167**  The plaintiff's position, supported by the report of Mr. Carson, is that, on the assumption he would have qualified for promotion by January 1, 1999 to 110% pay grade and would have continued to work the same amount of overtime as he had in the past, the present value of his lost wages to age 60 is $454,210. With reference to contingencies, Mr. Carson stated in his report:

Various forms of disability benefits (WCB, CPP, LTD) offset risks to employment such as sickness or injury. Given that the offset may not be perfect, negative contingencies might have some net negative effect on earnings in work with the police force -- perhaps in the range of 5 to 10%. I would expect the net effect of negative contingencies to retirement from the police force to be closer to the low end of the range.

**168**  The defendants' position, supported by the report of Mr. Hildebrand, is that the present value of lost wages to age 60 is $381,287 (without promotion) and $399,448 (with promotion). Mr. Hildebrand does not assume any overtime work. He also stated some minor differences of opinion with Mr. Carson regarding the impact and the possible inclusion of some non-wage benefits in past T-4 earnings amounts. With respect to contingencies, Mr. Hildebrand's opinion was:

With a mandatory retirement at age 60 for Police Officers, application of the statistical labour force participation rate may be of limited value in this case, except for the risk of involuntary withdrawal before age 60 attendant to the occupation of police officer. Hence, an overall negative labour market contingency adjustment of about 6% appears appropriate and concurs with Mr. Carson's estimate of the lower end in the 5 - 10% range.

Defence counsel submitted that because Mr. Hildebrand's calculations include "the usual negative contingencies" and because there was no evidence at trial to support the assumption made by Mr. Carson that Mr. Frers would continue to work overtime, Mr. Hildebrand's numbers should be accepted.

**169**  The plaintiff testified that he received overtime in each of the years 1993 through 1997, on a reasonably consistent basis, and that he had no reason to believe that the overtime would not continue. His counsel submitted that he has young children and would have continued to need the extra income from overtime work so long as it was available. Mr. Carson's calculations assume the overtime would continue at the same level. I find that Mr. Frers would have continued to work some overtime until he reached retirement at 60 although possibly not to the same extent that he did previously.

**170**  It does not appear that Mr. Carson's calculations include an adjustment for negative contingencies. If Mr. Carson's estimate of $454,210 is reduced by 6% for contingencies, it is $426,957. On the assumption that overtime work would be somewhat reduced as Mr. Frers approached the age of 60, I make a further reduction of $5,000. I find that the present value of Mr. Frers's income loss to age 60 is $421,957.

**171**  With respect to income earning capacity after the age of 60, the plaintiff testified that he intended to work with his brother George Frers doing home renovations after his retirement from the Delta Police, and counsel argued that it should be assumed that he would do so full-time initially, tapering down to full retirement at age 70. There was evidence that before the accident Ernie Frers possessed advanced carpentry skills, and that he had done fairly elaborate projects, such as large deck construction and kitchen cabinet work, on his own and other family members' homes. George Frers testified that he paid $25 per hour for unskilled labour and $30 for some skilled work.

**172**  Mr. Carson's report, tendered by the plaintiff, estimates the plaintiff's future loss of income between age 60 and 70 to be $127,077, based on an overall average of one-half of what full-time hours would be at $19.65 per hour (the average wage for B.C. carpenters). Counsel for the plaintiff argued that this is a conservative approach because the hours worked would be higher at the beginning, resulting in a higher present value than evenly-distributed half-time hours over the whole period. Mr. Carson does not make a deduction for contingencies but states:

With regard to earnings in carpentry after retirement, I advise that unemployment risks among carpenters are relatively high (13% in the 1996 Census, 18% in 1991), and that part time work is more prevalent after age 60. Participation in paid work is predominantly a matter of choice. About 66% of males with trades certificates (a roughly equivalent group) aged 60 to 65 are labour force participants if they were participants in the 55 to 69 year age range. About a third of those working in the age range 60 to 64 continue to work after age 65.

**173**  Mr. Hildebrand's report, tendered by the defendant, refers to the potentially significant employment contingencies which include declining labour force participation rates, high unemployment rates and high part-time rates, and states:

Given the magnitude of "statistical contingencies" and the overall uncertainty beyond age 60, one approach is to assume a part-time income stream over the period and apply the multipliers from Table 1. For example, assuming an annual contingency-adjusted income at $10,000 between age 60 and age 70, the Plaintiff's income from this source can be estimated by using multipliers in Table 1 as follows:

Future Income Between Age 60 and Age 70

= ($10,000 / $1,000) x $6,468 = $64,680

**174**  On cross-examination, Mr. Hildebrand provided the present value of earnings at $25 per hour full time between ages 60 and 65 and half time from 65 to 70, which he said was $251,525. Counsel for the plaintiff argued that that figure more accurately represents Mr. Frers's lost income following retirement from the police force, given the clear evidence of his strong work ethic, than does the figure provided by either Mr. Carson or Mr. Hildebrand in their reports. Counsel for the plaintiff argued that he should receive $251,000 for lost income for that period.

**175**  The range of figures provided for lost income after age 60 is from $64,680 (Hildebrand report, part time work, contingencies accounted for) through $127,077 (Carson report, half time work at $19.65, no contingencies accounted for) to $251,000 (present value of full-time work for five years, half-time work for five years, at $25.00, no contingencies accounted for).

**176**  Taking into account all of the evidence from the expert witnesses and from the plaintiff himself and his family members regarding his work habits and his love of doing carpentry and renovation work, I think that if the accident had not occurred he would have pursued some remunerated work in this area and, with his high level of skills and the assistance of his brother, he would have found such work. I will make the relatively conservative assumptions upon which Mr. Carson made his calculations, and will reduce the amount he calculated to $120,000 to account for negative contingencies.

**177**  The plaintiff will receive $120,000 for lost capacity to earn income after age 60.

1. Pension benefits

**178**  The plaintiff seeks $81,900 to compensate him for pension benefits lost as a result of the accident. This number was calculated by Mr. Carson on the premise that Mr. Frers would have been promoted to 110% First Class Constable, and that he will retire at the age of 60 after receiving long-term disability benefits until that time.

**179**  Mr. Hildebrand, called by the defendants, calculated the value of the lost pension benefit if Mr. Frers retires at age 60 to be $76,747 (assuming the promotion). Counsel for the defendants submitted, however, that, in considering this aspect of the plaintiff's damages, I should take into account that the plaintiff could maximize his pension by taking early retirement. Mr. Hildebrand in his report sets out that Mr. Frers would gain $21,593 if he started his pension at age 53 (his age at the trial) and would gain $2,035 if he started his pension at age 55 (on the assumption of the promotion to 110% First Class Constable). The defendants argue that the evidence shows that Manulife will not necessarily deduct the pension payments from their long term disability payments. The letter dated April 18, 2000 from Manulife Financial to Delta's Employee Benefits department in which Mr. Frers's claim was approved states:

Please advise Mr. Frers that he must notify our office of any sources of income he is currently receiving or may receive in the future while he is on claim with Manulife Financial. Examples of other sources of income are, but not limited to, the following: any retirement or pension plan payments.... It is possible that these sources of income could impact Mr. Frers' benefit payment. Early notification will avoid an overpayment and the subsequent recovery process.

The subrogation agreement with Manulife which Mr. Frers signed does not specify pension plan payments, but does include "any other offsets set out in the Contract". The defendants' counsel submitted that as the plaintiff has a duty to take all reasonable steps to mitigate his losses, and as the plaintiff's position is that the long-term disability payments are collateral and therefore irrelevant, they should be considered irrelevant to the calculation of pension losses as well.

**180**  Counsel for the plaintiff responded that the point is not whether pension benefits would be deductible from the disability benefits: rather, it is that, in order to receive pension benefits, Mr. Frers must retire. After retirement, he will not be eligible for disability benefits, a point confirmed by the defendants' expert witness, Mr. Hildebrand.

**181**  If the plaintiff retires before 60 he will receive a slightly higher pension than if he retires at 60, but he will lose the salary replacement benefits he is currently receiving from Manulife, and will be worse off economically. I am not persuaded by the defendants' argument that Mr. Frers should be expected to take early retirement.

**182**  I find that the plaintiff is entitled to $80,000 in compensation for the decreased value of his pension.

1. Deduction for residual earning capacity

**183**  The defendants submitted that the plaintiff has not established that he will never work again, and that once the court is satisfied that there is a real or substantial possibility that Mr. Frers will work again at some time in the future, the court must determine the likelihood of such an event occurring. Counsel for the defendants submitted that there is a real or substantial possibility that the plaintiff will be able to work at some time in the future, referring in particular to the evidence of his strong desire to return to the police force in some capacity, to Sergeant Greenhalgh's evidence that Mr. Frers is well liked and that the police force would make every effort to find a suitable position for him and to the medical evidence indicating that there is ongoing improvement in the plaintiff's condition.

**184**  I am not persuaded by the defendants' submissions. The preponderance of the evidence shows that Mr. Frers's ability to work competitively was destroyed by the accident. Sergeant Greenhalgh testified that he was familiar with the positions in the Delta Police Department and that it was clear that none of them would be within Mr. Frers's post-accident capacity. Other witnesses testified to his greatly reduced ability to do carpentry or construction work. Though Mr. Frers still harbours some hope, I find that there is no real or substantial possibility that he will work again in the future.

1. Cost of future care

**185**  Counsel for the plaintiff argue that he will require substantial care in the future, focused on assisting him in learning to cope with and accommodate for his deficits. They also submit that he will need to pay for certain kinds of home maintenance work that previously he did himself.

**186**  Mr. Slater and Mr. Nairne submitted that it cannot be assumed that Mr. Frers's wife, Janet, will always be there to care for him, and in any event he should not be required to rely on the voluntary assistance of family members, citing Andrews v. Grand & Toy Alberta Ltd., [*[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=) (S.C.C.) and Pittman v. Bain [*(1994), 112 D.L.R. (4th) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-FCCX-63WF-00000-00&context=) (Ont. Gen. Div.).

**187**  The plaintiff seeks an award of $506,920 under this heading. This is based upon a report from Janice Landy, a rehabilitation nurse, and present value calculations of Mr. Carson.

**188**  The defendants objected to the admissibility of Ms. Landy's report and I ruled at trial that it could be used in evidence although the question of its weight was yet to be determined. The concerns regarding its weight derive from the fact that, although Ms. Landy lists a number of clinical records and reports and states that she consulted with Dr. van Rijn (physical medicine and rehabilitation specialist), Julia Jellis (neurorehabilitation physiotherapist) and Ruth Casanova (speech and language therapist), her report does not in many instances tie those records or consultations into, and thus make clear, the basis for her recommendations. Further, Ms. Landy recommends services such as continued physiotherapy, psychological counselling and medication, which are outside her areas of expertise. I rejected a third argument, which was that the report should not be admitted because Ms. Landy is not a medical doctor. I held that where there is a medical diagnosis of a condition, health practitioners in various fields may have useful opinion evidence to assist the court in determining the plaintiff's future care needs with respect to that condition.

**189**  The report recommends:

1. one-to-one rehabilitation support six to eight hours per week for his lifetime to assist Mr. Frers in maintaining a structured day program, a program of physical conditioning and avocational programming, with the goal of integrating his occupational therapy, physiotherapy and speech and language therapy;
2. speech and language therapy weekly for two years, biweekly for one year, then monthly for one year;
3. physiotherapy with a neurorehabilitation physiotherapist to address cardiovascular fitness, neuromuscular deficits, balance and vestibular abnormalities, with 40 hours of intervention plus clinical and at-home assessments in the first year, then 20 hours in the second year and 15 hours in each of the third and fourth years;
4. occupational therapy home assessment to facilitate equipment endorsed for safety, with 25 hours in the first year and a further 12 hours in the second year;
5. psychological counselling to assist the plaintiff in the adjustment to and acceptance of the permanence of his physical and cognitive difficulties, for 20 sessions, plus some joint counselling for his family;
6. interior/exterior home maintenance services for Mr. Frers's lifetime to replace those which Mr. Frers can no longer perform;
7. avocational counselling for five years to assist the plaintiff in identifying projects in the community to assist in skill and compensatory strategy acquisition;
8. rehabilitation case management, to design a rehabilitation program, co-ordinate the team and monitor the quality and quantity of rehabilitation interventions, at six hours monthly for the first two months then four hours monthly for the next ten months, and two hours monthly thereafter for Mr. Frers's lifetime;
9. medications (Melatonin to assist with sleep);
10. wall mounted grab bar in shower; and
11. membership in the B.C. Brain Injury Association.

**190**  Counsel for the defendants submitted that Ms. Landy's report should be given little or no weight because the list of items she generated is not based on the medical evidence, is extravagant and fails to provide the factual foundation for some of the recommendations. The defendants' position is that the award for future care should be based instead upon the report of Dr. Van Rijn, who wrote:

Mr. Frers continues to require assistance with speech and language functioning and I believe this probably can be continued for a while longer. He has also experienced some help from a personal trainer which might be of benefit for a short period of time, with periodic interventions to ensure he is maintaining his fitness level and activities.

The opinion of a vocational counsellor would be of benefit to see if there are any avocational work opportunities that Mr. Frers might consider, and the possibility of any selective "employment" in the police force.

Mr. Frers is capable of undertaking most mundane home activities for maintaining most of his property, although heavier and more physically demanding activities (such as working on a ladder, reaching above his head, or those requiring a considerable degree of balance and dexterity) are likely still too difficult to undertake and help in this respect is necessary.

Mr. Frers has a need for ongoing medication to help control his pain.

He may require psychological counselling in the future if, in spite of his strong "constitution", he experiences mood dysfunction related to his chronic state.

A home visit by an occupational therapist would be of help to see if there are any additional aids, accessories, or activities he might undertake that would provide future improvement in his quality of life and his ability to undertake leisure activities.

**191**  Ms. Landy has had long experience in the field of rehabilitation, having worked with 500 - 600 clients who have suffered traumatic injuries, 60% of those with brain injuries. She has been the case manager for a number of individuals, retained by government agencies or by insurance companies. Insofar as she 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 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.

**192**  Ruth Casanova, the speech and language therapist who has worked with Mr. Frers, recommended one to two years of weekly sessions. Mr. Frers's speech and language abilities may still improve with therapy, according to the evidence, and I find that he is entitled to an award of the present value of 96 sessions at $90 per hour over a two year period.

**193**  Given Mr. Frers's condition and his needs, I find that rehabilitation support of eight hours per week is warranted. Based on the costing of rehabilitation support services by Janet Landy, there will be an award of the present value of $15,000 per year for Mr. Frers's lifetime (taking the middle of the cost range which Ms. Landy provided). These services will assist Mr. Frers to maximize his adaptation to his condition, and they will, to a significant extent, replace services which his wife, Janet Frers, has been providing.

**194**  I find that rehabilitation case management is warranted, but not to the extent or for the period of time recommended by Ms. Landy. The evidence indicates that Mr. Frers is most likely to reach a plateau at a certain point, after which case management will not likely be necessary. There will be an award of the present value of rehabilitation case management for six hours monthly for the first two months, then two hours monthly for the next three years at the rate of $90 per hour plus travel time and disbursements.

**195**  I find that physiotherapy or personal trainer services are warranted and there will be an award of the present value of 40 hours in the first year, 20 hours in the second year and 10 hours each year thereafter for Mr. Frers's lifetime at $60 per hour.

**196**  There will be an assessment by an occupational therapist as recommended by Dr. Van Rijn, for five hours, at $80 per hour.

**197**  Mr. Frers may need psychological counselling according to Dr. Van Rijn, and the award will provide $2,500 to that end, the figure recommended by Ms. Landy and accepted by the defendants as appropriate. I will not discount the award for the possibility that he will not need the counselling because, on the evidence, I am satisfied that he will need it. There will not be an additional award for counselling for family members, the need for which was not established on the evidence.

**198**  I note the defendants' submissions regarding the need for assistance with heavier and more physically demanding household tasks, as recommended by Dr. Van Rijn, and find that the plaintiff is entitled to $2,000 per year to age 70, at which time he would likely have required assistance in any event.

**199**  I reject the claim for avocational consultation, which does not have support in the evidence. I accept the defendants' submission that Dr. Van Rijn's recommendation for an opinion by a vocational counsellor should be accepted. There will be an award of $1,000 to cover the cost of obtaining such an opinion.

**200**  There was insufficient evidence regarding medication needs and expenses, and there will be no award in this regard.

**201**  The shower grab bar and membership in the B.C. Brain Injury Association are appropriate and the cost of these will form part of the award.

1. Special damages

**202**  In addition to a claim for expenses of $12,383.81 (an amount which the defendants conceded in argument was recoverable), the plaintiff seeks an "in trust" award for services rendered by his wife, Janet Frers. Ms. Frers testified that although in the beginning it seemed like 24 hours a day, as of the date of trial, she was spending four to six hours per day looking after her husband's needs. She testified that she does her own part-time work (as a book-keeper) for two to three hours per day at home, at night or when her husband is sleeping. Mr. Frers confirmed that he relies on his wife in many respects - driving, assistance with rehabilitation including his speech, some yard work and maintenance that he previously did himself, organization of his appointments and of his life in general. The plaintiff's position is that Ms. Frers's services should be valued at the rate of $20 per hour, a lower rate than would be paid for comparable services from a qualified one to one rehabilitation worker ($30 - $45 per hour plus tax, according to Ms. Landy). On the basis of that rate for an average five hours per day of care from the accident to the date of trial, the plaintiff seeks $121,545.

**203**  For future services by Ms. Frers, which the plaintiff says will still be required even if Ms. Landy's future care recommendations are accepted, the plaintiff seeks an award to cover three hours per day for the remainder of Mr. Frers's predicted lifetime, with a present value of $349,326. In support of this aspect of the case the plaintiff pointed to the evidence of medical witnesses and to the evidence of Ruth Casanova, to the effect that the support and labour of a spouse can make a crucial difference to patients with traumatic brain injury. Various witnesses commented very favourably on the support which Janet Frers had provided to her husband, and on the extra load that participation in rehabilitation can put on someone who is already providing other forms of care to an injured spouse.

**204**  The defendants object to the plaintiff advancing these claims, arguing that they were not pleaded, no notice was given of them to counsel prior to the commencement of the trial, the plaintiff was not examined for discovery on them, and there was no discovery of documents with respect to them. They also take the position that the plaintiff has failed to establish these claims on the evidence. They argue that the evidence of what Ms. Frers does is non-specific and it is impossible to know how many hours per day she is performing services which were not performed before the accident. The defendants' position is that the only compensable services, based on the evidence, are those which otherwise would have been provided by professionals at a cost.

**205**  The plaintiff responds that it is not necessary to plead an "in trust" claim because it falls within special damages, and such a claim should not have taken the defendants by surprise given the medical evidence, which disclosed Janet Frers's involvement in her husband's rehabilitation. Counsel for the plaintiff argue that the "in trust" claim was disclosed in the plaintiff's opening and the defendants made no objection at that time, suggesting that if the defendants were prejudiced, that was the time to raise the issue.

**206**  Reviewing the plaintiff's written opening, there is a reference to a claim for an "in trust" award for services provided by his wife. In the transcript, counsel for the plaintiff stated in his opening, "And we'll be claiming an award for his wife for what she did since his return from the rehabilitation hospital". In the context of argument regarding the admissibility of certain evidence which counsel for the defendants proposed to elicit from Janet Frers on cross-examination, Mr. Slater referred to the fact that the plaintiff was seeking an "in trust" award for what Ms. Frers "has done". There does not appear to be any reference to claims for the present value of future services. Neither side in its questions to Ms. Frers addressed issues regarding future services, or how those services would mesh with the proposed care to be provided by a rehabilitation case manager and a rehabilitation assistant.

**207**  Thus, it appears that the plaintiff did give notice of the "in trust" claim for past services, but did not do so with respect to future services. As for the pleadings, special damages were claimed, but only the past services would fall under that rubric.

**208**  The principles relating to "in trust" awards were considered 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.). In that case, the plaintiff's husband performed all of the domestic chores in the house which took him four hours or more each day. These were duties that the plaintiff performed before the accident. In considering whether this work was compensable, Wallace J.A. noted that it is now generally accepted that a plaintiff is entitled to compensation for the value of the services he or she requires which are rendered by members of the immediate family. He went on to state at 128:

It would appear from the review of the authorities cited that a claim for nursing and domestic services rendered by members of the injured party's immediate family are allowed where the plaintiff established the need for such services as a consequence of the injury, and provided that they are rendered to or on behalf of the plaintiff.

**209**  In McCloskey v. Lymn [*(1996), 26 B.C.L.R. (3d) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-618T-00000-00&context=) (S.C.), the court considered whether the services in question must be of a professional nature to be compensable. Rejecting that view, Spencer J. stated at 130:

The test for granting an in-trust award for care provided by a family member has undergone change in recent years. That change is illustrated by the discussion in 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=) (B.C.S.C). In that case Huddart J., as she then was, traced the development through Canadian and English cases and concluded at page 34 that an award may be made for services a spouse provides outside the normal range of duties and which would have to be done by a hired third party if the spouse did not perform them. It is no longer necessary, as was thought in DeSousa v. Kuntz [*(1989), 42 B.C.L.R. (2d) 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-218X-00000-00&context=) (C.A.), that the services would be of a professional nature....

**210**  The premise that services need not be of a professional or paraprofessional nature to attract compensation was also addressed in West v. Cotton [*(1995), 10 B.C.L.R. (3d) 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0TG-00000-00&context=) (C.A.), where Taylor J.A. stated at 81-2:

The appellant says that these services were not of a "paraprofessional" nature, calling on Mrs. West's training as a nurse or counsellor, but rather the sort of services which could have been performed by any spouse and contends that such services are not in law compensable, citing the decisions of this court in DeSousa v. Kuntz ..., and Pickering v. Deakin, [*[1984] B.C.J. No. 1982*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F528-G1H7-00000-00&context=). Those decisions have expressly been overruled by this court 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=) ..., insofar as they suggest that services rendered by one spouse to another in respect of injury suffered in an accident will not be compensable if they fall within the class of services which one spouse can ordinarily be expected to perform for the other in the event of sickness or incapacity.

It is clear from the authorities that an "in trust" award is appropriate where a spouse performs duties which would otherwise have to be performed by a paid worker, and additionally that domestic services which are not deemed professional or paraprofessional are nonetheless compensable.

**211**  With respect to Janet Frers's services before trial, I find that the claim does fall under the claim for special damages and that the evidence supports an award. The evidence did not establish the exact amount of time Ms. Frers has spent providing assistance above and beyond that which she spent before the accident. I am confident, however, given the evidence as a whole, that it has been a substantial amount, approaching her estimate of five hours per day. I find that an award of $100,000 is appropriate in those circumstances.

**212**  With respect to the claim for an award regarding Janet Frers's services to be performed after the trial, I find that it should have been pleaded. If the pleadings had disclosed this claim, the defendants could have examined Mr. Frers about it and could have sought discovery of documents and examination of Ms. Frers as a witness before trial. Further, there was no reference to this aspect of the claim in the plaintiff's opening and the defendants did not cross-examine about it. Finally, the evidence did not establish specifically what services Ms. Frers would be providing for her husband into the future. The claim for an award post-trial is dismissed.

1. Did the plaintiff fail to mitigate his losses?

**213**  The plaintiff considered, and rejected, the option of applying for workers' compensation benefits. Under s. 10 of the Workers' Compensation Act, *R.S.B.C. 1996, c. 492* he had an election to either sue the tortfeasor or accept benefits. Because he was a "worker" at the time of the accident, Mr. Frers was not eligible for Part VII benefits under the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*. After he was discharged from hospital he did not receive rehabilitation services through the "team approach" which might have been available either through the Workers' Compensation Board ("WCB") or through Part VII benefits.

**214**  Counsel for the defendants submitted that because the plaintiff decided not to accept workers' compensation benefits, he failed to receive the medical and vocational rehabilitation, assistance with household needs and other benefits available through the WCB. Counsel argued that the plaintiff thereby failed to pursue an advisable course of action, in the light of the medical evidence from Dr. Van Rijn and Dr. Foti that early intervention by a team of medical and other practitioners is important for the patient to maximize and expedite recovery. They referred to the testimony of Janet Frers that he "fell between the cracks" and to the letter of Julia Jellis describing the urgent need for rehabilitation services. Counsel submitted that the plaintiff did not receive an appropriate level of treatment from six months post-accident to the trial and that the plaintiff's reason for failing to pursue treatment options, that he could not afford the cost, is unacceptable given that the treatment was available through WCB and he had very little to lose by taking the WCB benefits. In this case the evidence disclosed that Mr. Frers has been granted a suspension of benefits and could seek them after the conclusion of this action. Ernie and Janet Frers testified that an important consideration in deciding to seek the suspension and pursue this tort claim was that they wished to have conduct of the action themselves. They also testified that they were concerned about the complexity and difficulties inherent in WCB claims.

**215**  Scott Neilson, a lawyer with the WCB, testified that Mr. Frers would not necessarily have given up his opportunity to sue the tortfeasor if he elected to receive WCB benefits because in some cases the board will sue the tortfeasor on behalf of a claimant. It will keep from the award an administration fee of 29% and the amount of all benefits it has previously paid to the plaintiff. Further, he testified, in some cases the board will allow the plaintiff to hire his or her own lawyer to pursue the lawsuit.

**216**  The defendants' position is that the plaintiff made an informed choice to forego the benefits and the treatments, in that he had professional legal advice beginning shortly after the accident and he and his wife were provided information from the WCB soon after the accident explaining its procedures. Acknowledging that the plaintiff had the legal right to decline or delay the receipt of WCB benefits, counsel for the defendants argued that that is no answer to the plea of failure to mitigate.

**217**  The defendants referred to 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=); 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.) and Zahynacz v. Kozak, [*[1998] B.C.J. No. 1947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0D0-00000-00&context=) (S.C.) and conceded that they have the onus to establish three elements:

1. there were steps that the plaintiff could have taken that might have avoided or reduced the loss;
2. those steps were reasonable; and
3. the amount by which those steps would have avoided or reduced the loss.

**218**  Counsel for the defendants argued that, as in Zahynacz, it is unnecessary for the defendants to establish that the plaintiff's condition would have improved by a specific percentage. They submitted that the evidence shows that had treatment been undertaken via the WCB system, the plaintiff would likely have been better off, and his losses reduced. The defendants' position is that they cannot be made to pay for consequences stemming from the plaintiff's unreasonable choice, analogous to a choice to decline recommended medical treatment.

**219**  The plaintiff does not dispute the governing principles, but his position is that he has done everything he can to help in his own rehabilitation. Mr. Slater argued that the medical evidence established that there is little further rehabilitation to be expected after the initial period, and that Mr. Frers was receiving appropriate rehabilitation during that initial period. He argued that the plaintiff's decision to elect a tort action was reasonable but that even if it was unreasonable, there is no evidence that the decision would have made any real difference to Mr. Frers's condition. Finally, he argued that the defendants may in the end be better off with Mr. Frers's choice because if he had opted for WCB benefits and WCB had incurred significant rehabilitation costs before trial, the defendants would have been pursued for those rehabilitation costs in a subrogated action.

**220**  Were there steps which the plaintiff could have taken that might have avoided or reduced his loss? Although brain injuries do not heal, adaptation does occur, and is accelerated by prompt action. The evidence indicated that Mr. Frers possibly would have been better off if he had pursued more intensive treatment options between six months after the accident and the trial, but there was also evidence that a patient can experience more harm than good as a result of too much rehabilitation work. Mr. Frers was unable, for example, to pursue the speech and language therapy sessions recommended by Ms. Casanova, due to cost. However, the question is whether he eschewed treatment which would have reduced his losses.

**221**  There is no authority that opting for a tort claim rather than WCB benefits can per se constitute failure to mitigate; such a conclusion would seem inconsistent with the policy behind the legislature's having provided this option. The real issue is whether the plaintiff availed himself of appropriate recommended medical treatment-whatever its source. Whether failing to submit to certain medical procedures constitutes a failure to mitigate is a question of fact, and the onus is on the defendants to establish that the plaintiff unreasonably rejected medical treatment which would have lessened the impact of his injuries or hastened his recovery.

**222**  The defendants did not call any medical evidence; they relied on the testimony of the plaintiff's medical witnesses. There was nothing in that evidence to suggest that if the plaintiff had taken more speech and language therapy sessions or had gone to a physiotherapist more, he would likely now be in a position to return to work, or to climb ladders and paint his house. In other words, the possible improvements in his condition would not likely have reduced his losses to a measurable extent.

**223**  Further, as counsel for the plaintiff argued, the specific decision of which the defendants complain, that is, to forego intensive treatment options during the period from six months after the accident to trial, would not self-evidently have reduced the losses for which the plaintiff seeks compensation - it might have increased them because of the WCB's right to pursue a subrogated claim for the expense of those treatments.

**224**  I conclude that the defendants have not established that the plaintiff has failed to mitigate his damages.

SUMMARY OF CONCLUSIONS

**225**  I have found that the defendant was negligent in that he was not paying sufficient attention to the driving conditions, in particular to the presence of stopped cars in the left through lane, which should have alerted him to the hazard in the intersection and caused him to slow or stop. I have found the plaintiff contributorily negligent, in that he accelerated in front of the defendant's vehicle, against the traffic signal and without assuring himself that it was safe to do so. I have accordingly apportioned liability 60% to the defendant and 40% to the plaintiff.

**226**  For non-pecuniary general damages, I have awarded the plaintiff $220,000 as reflecting the seriousness of this injury, his pain and suffering and loss of enjoyment of life.

**227**  For loss of past income, I have determined that the plaintiff's gross wage loss was $222,627 and that it is not subject to a deduction to reflect payments received by the plaintiff from his insurer or his employer.

**228**  Under future loss of income earning capacity, I have awarded the sum of $421,957, net of contingencies, representing loss of income from the date of trial to age 60. I have awarded an additional $120,000 representing loss of income thereafter, again adjusted for contingencies. I have determined that the plaintiff is entitled to $80,000 to reflect the decreased value of his pension. I have declined to make a deduction for residual earning capacity.

**229**  I have made an award for the cost of various aspects of future care and I ask counsel to reach agreement on the present value of the total amount.

**230**  As for special damages, I have awarded the claim for $12,383.81 which was agreed upon by the parties. In addition, I have found that the plaintiff is entitled to the sum of $100,000 as an "in trust" award reflecting the work of Janet Frers in providing care prior to trial. I have declined to make an "in trust" award for future care on the basis that the evidence is insufficient to establish such a claim and there was no notice of it to the defendants.

**231**  I have concluded that the defendants did not establish that the plaintiff has failed to mitigate his damages.

**232**  Counsel may set down a time for hearing before me through the registry for submissions regarding costs and the matters left outstanding at the trial.

C.L. SMITH J.

**End of Document**

[***G.R.A.M. Contracting Ltd. v. Biosource Power Inc., [2014] B.C.J. No. 372***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61N1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D. Kloegman J.

Heard: November 25-29 and December 2-6, 2013.

Judgment: March 3, 2014.

Docket: S124533

Registry: Vancouver

**[2014] B.C.J. No. 372** | 2014 BCSC 350

Between G.R.A.M. Contracting Ltd., Plaintiff, and BioSource Power Inc., Defendant, and G.R.A.M. Contracting Ltd., Defendant by Way of Counterclaim, and FMI Bioenergy Inc., Brent Wiren and Paul Adams, Third Parties

(96 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Particular orders — Special orders — Unproved allegations of fraud — Action by plaintiff for debt owing allowed — There was valid and binding contract for plaintiff to deliver logs and for defendant to accept and pay for them — Third parties had actual authority to bind defendant — Logs were delivered and defendant accepted them — Plaintiff and third parties were awarded special costs — Most significant misconduct by defendant toward plaintiff was unfounded claims of fraud and conspiracy and refusal to disclose documents — Third parties should never have been obliged to participate in action.**

**Commercial law — Sale of goods — Contract — Contract of sale — Passing of property — Duties of buyer — Accept and pay — Rights of unpaid seller — Unpaid seller — Action by plaintiff for debt owing allowed — There was valid and binding contract for plaintiff to deliver logs and for defendant to accept and pay for them — Third parties had actual authority to bind defendant — Logs were delivered and defendant accepted them — Plaintiff and third parties were awarded special costs — Most significant misconduct by defendant toward plaintiff was unfounded claims of fraud and conspiracy and refusal to disclose documents — Third parties should never have been obliged to participate in action.**

**Commercial law — Agency — Authority of agent --- Relationship of principal and third person — Liability of principal to third person — Contract — General principles — Action by plaintiff for debt owing allowed — There was valid and binding contract for plaintiff to deliver logs and for defendant to accept and pay for them — Third parties had actual authority to bind defendant — Logs were delivered and defendant accepted them — Plaintiff and third parties were awarded special costs — Most significant misconduct by defendant toward plaintiff was unfounded claims of fraud and conspiracy and refusal to disclose documents — Third parties should never have been obliged to participate in action.**

**Creditors and debtors law — Proceedings — Practice and procedure — Costs — Considerations — Action by plaintiff for debt owing allowed — There was valid and binding contract for plaintiff to deliver logs and for defendant to accept and pay for them — Third parties had actual authority to bind defendant — Logs were delivered and defendant accepted them — Plaintiff and third parties were awarded special costs — Most significant misconduct by defendant toward plaintiff was unfounded claims of fraud and conspiracy and refusal to disclose documents — Third parties should never have been obliged to participate in action.**

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| Action by the plaintiff for a debt owing. The plaintiff delivered logs to the defendant's mill site. The defendant paid invoiced amounts prior to, during and up to a month after delivery, but refused to pay further invoices, arguing alternatively that there was no contract, that any contract was between the plaintiff and third parties that the defendant hired as consultants, that the third parties acted outside their authority, that property in the logs never passed to the defendant and that the logs were misrepresented and of inferior quality. The defendant counterclaimed for the return of the amounts paid and for breach of contract and sued the third parties for breach of contract, ***negligence***, fraud, breach of fiduciary duty and conversion. The plaintiff and the third parties sought special costs against the defendant.  HELD: Action allowed.  There was a valid and binding contract for the plaintiff to deliver the logs and for the defendant to accept and pay for them. The defendant's signature was on the contract and there was no evidence that the signature was forged. The plaintiff addressed the invoices to the defendant. The third parties had the actual authority to bind the defendant by virtue of the consulting agreement. The defendant admitted that the third parties were its agent and that the plaintiff and the third parties entered into the contract. The defendant ratified the contract by signing it. The logs were delivered and the defendant accepted them. The defendant made payments after delivery, used the logs and never complained about their quality until months later. The statement that the defendant relied on to claim that the plaintiff misrepresented the quality of the logs was made months after the contract was signed. The plaintiff and the third parties were awarded special costs. The most significant misconduct by the defendant toward the plaintiff was unfounded claims of fraud and conspiracy and a refusal to disclose documents. There was no reasonable basis for the defendant's claim that the plaintiff fraudulently misrepresented the quality of the logs or, alternatively, defrauding the defendant by knowingly delivering logs of inferior quality. There was no evidence for the claim that the third parties induced the defendant to enter into the contract at a price that exceeded the value of the logs. The defendant failed to disclose records relating to the processing of the logs, despite a court order. The third parties should never have been obliged to participate in the action. |

**Statutes, Regulations and Rules Cited:**

Sale of Goods Act, [*RSBC 1996, CHAPTER 410, s. 32*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JG59-2156-00000-00&context=), s. 39

**Counsel**

Counsel for the Plaintiff: J.D. Shields.

Agent for the Defendant: J. Dizon, In Person.

Counsel for the Third Parties: N.M. Safarik.

**Reasons for Judgment**

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| **D. KLOEGMAN J.** |

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| **I.** | **INTRODUCTION** |  |

**1**  The plaintiff, G.R.A.M. Contracting Ltd., is in the business of logging and supplying timber cuts to the wood processing industry. The defendant, Biosource Power Inc., for the purposes of this lawsuit, is the co-owner of land in Kamloops, British Columbia, on which stands a pellet mill and bale shavings mill.

**2**  The third party, FMI Bioenergy Inc. ("FMI"), was hired by the defendant as its consultant in the wood industry. The third parties, Brent Wiren and Paul Adams were principals of FMI at all material times.

**3**  This lawsuit came about in June 2012 because during October 11 and November 17, 2011, the plaintiff delivered logs (the "Logs") firstly to the defendant's mill site, and later in November to a second, temporary site at the instructions of FMI.

**4**  The plaintiff claims that the defendant, through its agent FMI, agreed to purchase the Logs from the plaintiff at a price of $2,275 per truck load. Further, the defendant agreed with the plaintiff to engage its log loading equipment at a rate of $165 per hour. The plaintiff delivered 85 truck loads of Logs and invoiced the defendant accordingly. The plaintiff also invoiced for the rental of the log loader at 171 hours for the sum of $28,215 plus tax and interest.

**5**  The defendant paid the plaintiff $25,000 prior to the first delivery of Logs, $25,000 during delivery of the Logs, and $5,000 about a month after delivery of the Logs had been completed.

**6**  The defendant refused to pay any further sums to the plaintiff on account of the Logs or rental of the log loader, and the principal amount of $202,053.90 remains outstanding on the invoices presented by the plaintiff to the defendant between October 26 and November 23, 2011.

**7**  The plaintiff sues alternatively in debt, breach of contract and *quantum meruit*.

**8**  The defendant denies liability to the plaintiff, alleging that:

1. there was no contract, or alternatively;
2. if there was a contract for the delivery of the Logs it was made between the plaintiff and the third parties directly, not as agent for the defendant; and
3. if the third parties were acting as agent in entering the contract on behalf of the defendant, they acted outside their actual authority in doing so;
4. property in the Logs never passed to the defendant; and
5. the Logs were misrepresented, not of merchantable quality and not fit for the purpose.

**9**  The defendant counterclaimed against the plaintiff for return of the $55,000 paid by the defendant on account of the Logs, less any revenues received by the defendant for processing and selling the Logs. The defendant also claimed for damages for breach of contract, including the alleged difference between the value of the quality of Logs for which they contracted and the value of the Logs which they received. Finally, the defendant seeks an order "assigning the responsibility and liability of the contract to the third party as principals".

**10**  The defendant sues the third parties for breach of contract, ***negligence***, fraud, breach of fiduciary duty and conversion, all arising out of the consulting relationship and the plaintiff's contract for supply of the Logs.

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| **II.** | **CREDIBILITY OF WITNESSES** |  |

**11**  The only witness who was not credible in large parts of her testimony was Ms. Juliet Dizon, the representative of the defendant. By and large, I had no concerns over the credibility of the other witnesses who testified. Mr. Johnson admitted to having a poor memory, Ms. Janine Walker was working under some unproven assumptions, and the impartiality and accuracy of Mr. Gray's evidence was questionable, but these witnesses, like most of the other witnesses, seemed to be making an honest effort to give reliable evidence within their own genuine limitations.

**12**  Ms. Dizon's evidence, on the other hand, was unreliable. She had the misfortune to be saddled with the conduct of the defendant's case at trial and to be its primary witness. Through her endeavour to be both counsel and witness she showed confusion about her role as the legal representative of the defendant, her role as a witness testifying under oath, and the role of the defendant as litigant. Thus at times she appeared to be giving evidence, instead of submissions, and vice versa.

**13**  Furthermore, Ms. Dizon either failed, or refused, to comprehend my instructions to her regarding document disclosure. She attempted on a number of occasions to tender documents that should have been much earlier disclosed and were not. On more than one occasion I admonished her to bring all relevant, undisclosed documents in her possession and make them available to counsel for the plaintiff and counsel for the third parties. Even when I replaced my admonition with a court order, she did not comply. To this day she has not produced highly relevant documentation relating to the defendant's utilization of the Logs.

**14**  Ms. Dizon's ignorance of procedure may be excusable to some extent as she was an inexperienced lay person, but her inconsistent evidence under oath cannot be excused and has tainted the reliability of anything she said that was not corroborated by documents or other witness testimony. Most telling were her prior inconsistent statements that were audio recorded by Mr. Adams and used in cross-examination by counsel for the third parties.

**15**  Ms. Dizon had a partner, Leo Fung, also a shareholder of the defendant, who had been privy to many of the communications between the parties. He attended court during most days of the trial, yet chose not to testify. I do not draw an adverse inference from his failure to testify, but it does highlight the lack of corroboration of Ms. Dizon's statements which were often contradicted by the plaintiff and third party witnesses.

**16**  Ms. Dizon's testimony and statements in her role as representative of the defendant were not only inconsistent with each other from time to time, but they were inconsistent with the pleadings which had been prepared for the defendant when it had been represented by legal counsel. For example, the defendant alleged in paragraph 10 of its response to civil claim that the defendant never had any direct discussions with the plaintiff until January 2012. On her examination for discovery, Ms. Dizon deposed that she had met with Guy Lennea, principal of the plaintiff, in the summer of 2011 to talk about the supply of Logs to the defendant. As another example, the defendant alleged in paragraph 24 of the response to civil claim that the defendant only received the plaintiff's November 23, 2011 invoice on January 26, 2012. On her examination for discovery, Ms. Dizon deposed that she had received it on November 23, 2011.

**17**  The inconsistent allegations, evidence and submissions of Ms. Dizon and the defendant are strongly suggestive of reconstruction after the fact to justify the defendant's inability to pay the plaintiff's bill. The incontrovertible fact is that the defendant did not have its funding in place when it commenced this business venture. Ms. Dizon and her partner naïvely charged into what was for them the unknown and complex territory of the logging industry by purchasing a mill and endeavouring to get it up and running before they had sufficient capital in place to pay for anything - whether supplies, parts and equipment, or labour.

**18**  I have no doubt that had the funding from the defendant's potential investors come through, this lawsuit would never have materialized. The plaintiff would have been paid, the pellet mill would have been repaired, the cant mill would have been installed, and the Logs would have been processed and profits made. Ms. Dizon was always careful not to antagonize either the plaintiff as the defendant's timber supplier, or the third parties, as its consultants. She continued the promise of payment until it became clear that the defendant could not raise the capital to commence operations, and the plaintiff would no longer wait for payment but chose instead to sue for the balance outstanding.

**19**  At that point, in a desperate attempt at damage control, Ms. Dizon aggressively opposed the plaintiff's claim on the basis of everything from "there was no contract" to "the lumber was defective" to "the defendant's consultant conspired with the plaintiff's supplier" to "the defendant made payments on the plaintiff's account as a show of good faith, not to signify acceptance of the Logs". None of these theories presented by Ms. Dizon on behalf of the defendant were sufficiently supported by the evidence to displace the plaintiff's overwhelming proof of debt owing to it by the defendant.

**20**  It is against this background of financial stress and the eventual failure to raise the necessary capital that Ms. Dizon's credibility and the defendant's defences and claims must all be measured.

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| **III.** | **THE CONTRACT** |  |

**21**  The onus is on the plaintiff to show that a valid contract existed between it and the defendant for the purchase of the Logs. The plaintiff relies on a Log Purchase Agreement in writing and the evidence of Brent Wiren, Eli Lennea and Paul Adams.

**22**  The Log Purchase Agreement is dated October 2011 and is signed by Ms. Dizon on behalf of the defendant and Mr. Guy Lennea, principal of the plaintiff. The timber is identified as Timber Mark 84525, the location is described as Okanagan 32 km Stuart FSR and deliveries were to be made October, November, and December 2011. Instead of describing the species of trees, the timber is described as "burnt pulp $32 per cubic metre" or "$2,275 per B train load". As the defendant had no scale on site, and as the Logs were cut from an Innovative Timber Sale Licence ("ITSL") which did not require the Logs to be scaled, the defendant was charged per truck load.

**23**  The defendant pleaded that it had not seen nor signed the Log Purchase Agreement, but Ms. Dizon led no evidence from herself or anyone else under oath that the person who wrote the name Juliet Dizon as buyer was not her, or that the signature was forged. The evidence from Mr. Brent Wiren was that Ms. Dizon signed the Log Purchase Agreement on the same day as she signed the Parts and Components Agreement for the pellet mill. That latter agreement also bears the date October 8, 2011, and the signature of Ms. Dizon appears the same as on the Log Purchase Agreement.

**24**  Although the Log Purchase Agreement was not signed until October, the evidence established that an oral agreement was already in place for the plaintiff to provide about $200,000 worth of burnt Logs from an ITSL to the defendant for use in a pellet mill, shavings mill, and possibly a cant mill in the future. The defendant had no loading equipment so it rented a log loader and manpower from the plaintiff for $165 per hour.

**25**  The oral arrangement for the supply of the Logs and log loading services was made between Mr. Wiren of FMI and Mr. Guy Lennea of the plaintiff. FMI had entered into a consulting agreement with the defendant dated August 2, 2011 (the "Consulting Agreement"), whereby it agreed to act on behalf of the defendant to establish long term fibre contracts, among other things. "Fibre" is the industry term for timber that can be processed into other lumber products. Mr. Lennea understood that Mr. Wiren's company was acting only as agent for the defendant - hence he asked for a deposit from the defendant before starting any deliveries. The defendant paid a deposit to the plaintiff of $25,000 by way of cheque made out to G.R.A.M. Contracting Ltd. and dated October 11, 2011.

**26**  The plaintiff addressed all its invoices to the defendant, not FMI, and the defendant provided further cheques made out to the plaintiff.

**27**  Ms. Dizon admitted in chief that FMI was the agent of the defendant. She also admitted that FMI and the plaintiff had entered into a contract for the supply of the Logs. However, she maintained in submissions that neither she nor Mr. Fung had knowledge of the contract until after the fact, and that FMI was never authorized to enter into it.

**28**  It is trite law that the authority of an agent to bind a principal can be actual or ostensible. Actual authority is the authority which the principal gives the agent under an express, or in some cases an implied, agreement between the principal and the agent that the agent should represent the principal. Actual authority can also exist as a result of ratification by the principal of an originally unauthorized act of the agent: Gerald Fridman, *Canadian Agency Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at p. 60.

**29**  Ratification is a question of fact. It must be evidenced by clear, adoptive acts, manifesting the principal's intention to be bound by what the agent has done. If the principal takes any benefits or profits of the agent's acts, that is strong evidence of such an intention. Ratification operates retrospectively to endow the agent with actual authority to perform the act in question, as if the agent had been given such authority prior to performing the act. The burden of proving ratification is on the party alleging that ratification has occurred: *Canadian Agency Law* at pp. 35-47.

**30**  Apparent or ostensible authority is the authority an agent is held to possess in law, over and above, or in the absence of, the agent's actual authority. It is dependent on the way a reasonable third party would understand the conduct or statements of the principal in ostensibly authorizing the agent to act on its behalf. The existence and scope of an apparent authority is governed largely by the class of agent employed - provided the agent acted in accordance with its ordinary trade, business or profession - or by some custom of the agent's particular trade, business or profession on which such apparent authority can be predicated: *Canadian Agency Law* at pp. 72-77.

**31**  In the case at bar, FMI had the actual authority to bind the defendant to a fibre contract by virtue of the Consulting Agreement. Furthermore, Ms. Dizon on behalf of the defendant, ratified the contract when she signed the Log Purchase Agreement. She further manifested an intention to bind the defendant by receiving the Logs, making some payments on account to the plaintiff, and utilizing some of the Logs in the defendant's bale shaving operations.

**32**  Even if I were to accept Ms. Dizon's premise that FMI was premature in binding the defendant to a fibre contract and therefore was without authority, FMI had the ostensible authority to do so because the defendant had retained it to establish fibre contracts as per the Consulting Agreement, and the plaintiff had no knowledge of the alleged lack of authority, nor any facts which might have put it on enquiry.

**33**  I find that there was a valid and binding contract for the plaintiff to deliver the Logs and the defendant to accept and pay for them. Under s. 32 of the *Sale of Goods Act*, *R.S.B.C. 1996, c. 410*, payment and delivery are mutually dependent. The test is not whether property has passed in the Logs, but whether the Logs were delivered. Delivery was proved by the plaintiff through the evidence of Mr. Lennea and his son, the photographs and load delivery slips.

**34**  The defendant's obligation to accept the Logs was subject to the right to reject them upon delivery, if they did not meet the description, or were unfit for the purpose, or of unmerchantable quality. However, under s. 39 of the *Sale of Goods Act*, a buyer is deemed to have accepted the goods when:

1. the buyer intimates to the seller that the buyer has accepted them,
2. the goods have been delivered to the buyer, and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, or
3. after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.

**35**  There was no evidence that the defendant was not allowed a reasonable time to inspect the Logs, or that the defendant pointed out defects in the Logs within a reasonable time. In fact, Ms. Dizon drove to the mill site from Vancouver and saw some delivered Logs on the site and other Logs being unloaded from a truck. She knew previously that the Logs came from a forest fire and she saw for herself that the Logs were burnt, but made no complaint or attempt to reject them. After that visit on October 31, 2011, Ms. Dizon paid a further $25,000 to the plaintiff on account, and then a further $5,000 on December 19, 2011, weeks after delivery of the Logs had been completed. She never questioned any of the invoices sent by the plaintiff and kept promising payment. On December 14, 2011, she wrote an email stating:

Please be advised that we have sent a partial payment to be credited to our total balance owing. Please accept this payment in good faith. Cheques to cover the balance will be sent to you within the next few weeks. Again, we apologize for this terrible inconvenience but we hope to clear this up as soon as possible.

**36**  The day before this email, Ms. Dizon had met with Mr. Paul Adams and made comments to him that she knew that the defendant had gotten a good deal, and all that remained was to get the funding in place to pay the bills.

**37**  At trial, Ms. Dizon testified that she told Mr. Adams in a meeting on October 28, 2011, to stop deliveries of the Logs. This is completely inconsistent with the tenor of her aforescribed documented communications and her conduct at the time. It is glaringly noticeable that Ms. Dizon never complained about the existence of the contract or the quality of the Logs until the spring of 2012 when it became apparent that the defendant had lost its funding and could not pay the plaintiff for the Logs or loading services. By that time the defendant had already used some of the Logs for shavings.

**38**  There is no doubt that the plaintiff has proved that there was a contract, that the Logs in question were delivered and unloaded, and that the defendant accepted delivery of the Logs. Any right of rejection that the defendant may have asserted was lost long before the defendant attempted to rely on it as a defence to this lawsuit. The defendant is liable for nonpayment of the principal balance outstanding to the plaintiff of $202,053.90, plus court order interest. I am not satisfied that any agreement to pay interest at the rate arbitrarily imposed on the plaintiff's statements of account was established.

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| **IV.** | **QUALITY OF THE LOGS** |  |

**39**  The defendant's claim that the Logs were misrepresented by the plaintiff, or not of merchantable quality, or unfit for the purpose could still form the basis of a breach of contract claim by the defendant for damages from the plaintiff. However, the onus was on the defendant to prove these allegations as they formed the basis of its counterclaim.

**40**  Ms. Dizon alleged that Mr. Guy Lennea of the plaintiff "represented" that 30% of the logs were saw logs. Even if the representation was untrue, the defendant could not show any reliance on it because Ms. Dizon said this statement was purportedly made by Mr. Lennea in March 2012, months after the contract had been signed and the Logs delivered and partially utilized. It is trite law that to prove negligent misrepresentation a claimant must show ***negligence*** in making the representation and reasonable, detrimental reliance on it.

**41**  In any event, the defendant did not prove that the representation, if made, was untrue.

**42**  It became patently obvious as the trial progressed that Ms. Dizon's understanding of the term "saw logs" was different than the literal meaning of the word or the meaning the word bears in the lumber industry. Ms. Walker, expert scaler, explained that "lumber", "wood", "timber", "fibre", and "saw log" are all interchangeable terms used to refer to a product from a tree, as distinct from the product of a pellet. "Saw log" simply means a felled tree that can be sawed into measured boards such as 2x4s or 4x6s, or into larger squared off boards known as "cants". Referring to timber as saw logs has nothing to do with the quality of the log which is defined by grade of lumber.

**43**  Ms. Walker opined in her report dated April 30, 2013, that the representative sample of wood with which she was provided by the defendant would not be able to produce any merchantable lumber due to the burnt portions and heavy splitting of the logs. However, on cross-examination she admitted that she had no experience with burnt logs. She was aware that if the burn could be removed, the logs could be used for some things, depending on the grade. They could be used for shavings and industry pellets and cants, depending on the size of the log.

**44**  More importantly, Ms. Walker was not involved in choosing the 1% sample of logs with which she had been provided, did not personally know the source of the logs, when they were cut, who cut them, or what happened to the logs after they were cut.

**45**  If the sample logs did come from the Logs, Ms. Walker attended the site to scale them on April 15, 2013, some 17 months after the Logs had been delivered. Ms. Walker was concerned that the Logs had been sitting in the hot Kamloops sun and subject to weather extremes before she had been asked to appraise their quality and quantity. She explained that logs lose weight quickly in the sun; moisture wicks from the ends and causes logs to deteriorate. She could not determine whether the Logs had contained 50% saw logs back in November 2011, because there had been so much deterioration since then. She could not determine when the logs she scaled experienced "checking" (splitting). The weight of the sample logs was low because the wood was so dry.

**46**  In my view, although Ms. Walker tried to be helpful, it was obvious that she could not speak to the quantity or quality of the Logs as delivered in November 2011. By the time she saw them, the Logs had dried out, and their quality had deteriorated. Some of them had already been utilized for shavings. She could not see any timber marks and could not even be sure if what she had been asked to inspect came from the ITSL in question. Finally, she initially assumed that because 30% of the Logs were burnt, they could never have been used for cants, but later agreed they could have been cantable depending on the size of the log and the extent to which the burn could have been removed.

**47**  In any event, the contract referred to "burnt pulp" quality fibre which was suitable for the defendant's existing pellet mill and shavings mill. The contract made no mention of saw logs. The defendant had no cant mill, only plans to install one on the site. Once again, if the defendant had procured the funds to operate the pellet mill and install the cant mill, it is likely that the Logs would have been utilized in a timely fashion for the purpose for which they were purchased.

**48**  When I consider the totality of the evidence, including the Lenneas' and Brent Wiren's evidence that the Logs made ideal cants and shavings and good pellets, the trucks were "bursting full", and the price was lower than the price of similar logs sold to other mills, it is my opinion that the defendant has failed to prove that the quality of the Logs was misrepresented, that the Logs were not of merchantable quality or that they were unfit for the purposes of pelletizing, shaving or canting.

**49**  Accordingly, I find that the counterclaim should be dismissed against the plaintiff.

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| **V.** | **CLAIMS AGAINST THE THIRD PARTIES** |  |

**50**  The claims by the defendant against the third parties were difficult to comprehend because they confused a number of general legal principles, and because they kept changing throughout the trial and throughout the defendant's lengthy written submissions. Furthermore, the defendant did not specify which claims were against the personal third parties and which were against the corporate third party.

**51**  As best as I could decipher, the defendant's complaints about the third parties appear to be along these lines:

1. The third parties were negligent and/or in breach of the Consulting Agreement with the defendant because:
2. the third parties did not have the authority to order the Logs, or incur other expenses on behalf of the defendant;
3. the third parties were premature in ordering the Logs, as the pellet mill was not operational and no cant mill had yet been installed;
4. the City of Kamloops would not allow the defendant to store all the Logs on the mill site and some of the Logs had to be delivered to a temporary location down the road and later returned to the site, at a cost to the defendant; and
5. the third parties should have rejected the Logs on behalf of the defendant due to misrepresentations and their poor quality.
6. The third parties breached their fiduciary duty to the defendant by acting in their own best interests, before those of the defendant;
7. The third parties were liable for the intentional torts of fraud and conversion because:
8. the Logs never contained 50% saw logs, as represented;
9. the load slips were fabricated; and
10. Mr. Wiren stole equipment from the site before the defendant took possession of it.

**1.** **Breach of Contract/*Negligence***

**52**  The allegations set out in 1(a) through 1(d) above can only be directed at the corporate third party, FMI, because Messrs. Wiren and Adams were not parties to the Consulting Agreement and had no other contract, verbal or otherwise, with the defendant. The evidence did not disclose any duty of care towards the defendant on the part of Messrs. Wiren and Adams, nor were there any material facts to support such a duty pleaded in the third party notice.

**(a)** **Lack of Authority**

**53**  I have already found that FMI had the actual authority to enter into the Log Purchase Agreement by virtue of the Consulting Agreement. That latter agreement also authorized FMI to act on behalf of the defendant to establish "commitments to satisfy the defendant's ongoing needs". The plain meaning of this wording is that FMI was authorized to incur expenses on behalf of the defendant for items required to run the mills.

**54**  Ms. Dizon complained that FMI failed to obtain signed purchase orders from the defendant and thus FMI entered into unauthorized transactions. Ms. Dizon, Mr. Wiren and Mr. Adams all agreed in their testimony that they, along with Mr. Fung, had met a few days after October 28, 2011, to discuss implementing a purchase order system for the defendant. Mr. Adams set up a purchase order system which was described in an email to Ms. Dizon and Mr. Fung dated November 2, 2011. In that email, Mr. Adams outlined the new purchase order system that he had set up, and attached purchase orders relating to transactions that had previously been made with the defendant's prior approval.

**55**  Subsequently, Mr. Adams set up a purchase order system for future expenses to be approved and paid by the defendant using a Cloud account and drop box software. He sent email invitations to Ms. Dizon and Mr. Fung so that they could access the drop box account and download the purchase orders for approval. Ms. Dizon never accepted the invitation to access the drop box account. Mr. Fung did accept the invitation, but never acknowledged the purchase orders. In fact, the purchase orders were ignored by the defendant.

**56**  None of this evidence was negated and once again, this allegation of "no purchase orders" appears to have been raised long after the fact to try and justify the third party claim. The alleged unauthorized expenses that Ms. Dizon complains about were included in the capital and operating budgets that she approved on behalf of the defendant; they were referred to in planning and scheduling emails to which the defendant never responded negatively. The defendant was aware of the upcoming expenses, when they would be incurred, and why they were necessary. Most importantly, the defendant never objected to any of these items. The only objection came long after the fact because the defendant could not pay for them.

**(b)** **Timing of the Log Purchase**

**57**  Ms. Dizon submitted that the defendant relied on the expertise of the third parties to advise the defendant as to the timing of fibre purchase, and that the third parties should never have obligated the defendant to purchase fibre before the pellet mill was operational. She admitted that installing a cant mill was always something to be done in the future, not right away.

**58**  The background to the purchase of the Logs is as follows. The defendant and the third party met in April 2011. In May 2011 Ms. Dizon toured the mill site with Mr. Wiren and examined financial information with a view to purchasing the property from Farm Credit Canada. Farm Credit Canada had foreclosed on the previous owner Fire Master Gold Standard, the former employer of Mr. Wiren and Mr. Adams. During this on- site visit, Mr. Wiren advised Ms. Dizon that there had been some vandalism, but the pellet mill could be made operational once the electricity was restored, consumables replaced, and spare parts purchased.

**59**  Before FMI entered into the Consulting Contract, Mr. Adams provided the defendant with a capital budget of approximately $6.2 million. The budget included $3.6 million for the expansion of the existing pellet mill, $2 million for the acquisition of a cant mill, and an initial operating budget of $600,000, which included $200,000 for purchasing fibre and $150,000 for the purchase of spare parts for the pellet mill. FMI also provided the defendant with an initial operating budget of approximately $775,000 for items required for the immediate start-up of the pellet and shavings operations, including the repair and upgrade of the electrical system at the pellet mill for $12,500.

**60**  After executing the Consulting Agreement, Ms. Dizon created a Feasibility Study, using the information and budgets from FMI. The purpose of the Feasibility Study was to attract investors who would contribute up to $10 million of capital funding to finance the defendant's business plan. This plan included the expansion of the existing pellet mill and shavings operation and future acquisition of 40 acres of adjacent property to install a cant mill. Ms. Dizon consistently told the third parties that the funding was imminent and that they should begin making the necessary arrangements for the commencement of operations and implementation of the business plan. According to Mr. Wiren and Mr. Adams, Ms. Dizon also wanted to ensure that any potential investors who visited the site would see logs stockpiled there and know that the defendant was in business.

**61**  In an email dated September 9, 2011, Mr. Wiren warned Ms. Dizon that there was a chance that the defendant could lose both its shavings business and log supplier unless they got started. The Logs needed to be harvested and delivered before the plaintiff's timber licence expired and the plaintiff wound up operations for the winter. In an email later the same day, Mr. Wiren stated that although the defendant had "an opportunity to get some good quality logs for the long term" through the plaintiff, he would only commit to as many logs from the plaintiff as could be used for the shavings operation.

**62**  In my view, the purchase and delivery of the Logs was not premature. In fact it had been delayed from what was contemplated at the time the Feasibility Study was prepared by Ms. Dizon. However, as a result of difficulties with the purchase of the property through foreclosure and a court supervised selling process, the transaction did not complete until October 5, 2011. The defendant did not enter into the Log Purchase Agreement, or Parts and Components Sales Agreement until October 8. By November 7, the defendant still had not approved the amount of $12,500 for repair and upgrade of the mill's electrical system, plus other items. Most importantly, the defendant never paid the outstanding amount under the Parts and Component Sales Agreement, so the spare parts were not delivered, and the pellet mill could not be made operational.

**63**  Once again, through the third parties' efforts the Logs were in place, the agreement for parts and labour to render the pellet mill operational was in place, but the money was not in place to pay for these items. I have no doubt that if the money had been available and the recommendations of the third parties followed, the mill would have been up and running and processing the Logs voraciously.

**64**  At no time did Ms. Dizon suggest to the third parties that she might not be able to raise the capital required and that FMI should hold off completing the steps required to commence operations. If Ms. Dizon is to be believed, she herself had no idea that her funding would never materialize.

**(c)** **City of Kamloops**

**65**  The alleged premature timing of purchase of the Logs overlaps with another of the defendant's complaints concerning its inability to store the Logs on site.

**66**  Part way through the plaintiff's delivery of the Logs, the City of Kamloops objected that there were too many logs piled on the site and that they were visible from the highway. The City ordered the defendant to cease stockpiling and the plaintiff was told to stop delivery for a few days. Meanwhile FMI arranged on behalf of the defendant for the rest of the Logs to be delivered down the road to a temporary yard owned by someone else.

**67**  Ms. Dizon submitted that the third parties were negligent in failing to determine whether the zoning would allow the delivery of the Logs to the defendant's site, thereby causing damage to the defendant in the form of costs for storing the Logs at the Woodco site and subsequently moving them back to the defendant's site.

**68**  Unfortunately, the defendant led no evidence to establish ***negligence*** or breach of contract in this regard. Mr. Wiren testified that there had been a sawmill or pellet mill on the defendant's property since the 1960s and there had never been an issue with the City. The problem raised by the City was in connection with the long term storage of the Logs without processing them. Once again, if the defendant had received funding from its investors to enable it to pay for the parts and labour required to render the pellet mill operational and install the cant mill, the Logs would have been quickly processed and there would have been no need to store the Logs long term.

**69**  Even if Ms. Dizon had led some evidence establishing conduct on the part of any of the third parties that amounted to breach of a duty of care, any such breach was not the cause of the additional expense incurred by the defendant in moving the Logs elsewhere and later retrieving them. The cause was the failure of the defendant to fund the commencement of operations on the property.

**(d)** **Rejection of the Logs**

**70**  I have already found that the Logs were not defective, were fit for the purpose and of merchantable quality, and that their quality was not misrepresented by the plaintiff.

**71**  Ms. Dizon submitted that the quality of the Logs was also misrepresented by the third parties. Mr. Adams described them as being 50% saw log grade and 50% pulp wood, and Mr. Wiren described them as 50% good saw log, or maybe up to 70%+ saw log quality. The difficulties with these alleged misrepresentations are twofold:

1. there is no way of determining that the Logs were otherwise than described by Messrs. Guy and Eli Lennea in their testimony - that is, they had delivered to the defendant Logs that were 50% cantable (i.e. sawable); and
2. there is no evidence to suggest that the defendant relied on any representations by the third parties (or the plaintiff) before entering into the Log Purchase Agreement.

**72**  Finally, with respect to all the breach of contract and ***negligence*** claims, the defendant has not proved that the third party caused it any losses. In fact, the defendant led no evidence at all of any damages, except the cost to move the Logs back to the site. Even this evidence was suspect because upon closer examination it was shown to have included costs of cleaning up the defendant's site, which was entirely unrelated to the need to move the Logs and would have been on the defendant's account in any event.

**2.** **Breach of Fiduciary Duty**

**73**  It was clear that Ms. Dizon did not understand the legal concept of breach of fiduciary duty. The essential elements of a cause of action for breach of fiduciary duty are neatly summarized in *F.A. v. Henley*, [*2006 BCSC 1008*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G33N-00000-00&context=) at para. 69:

It appeared to be common ground that a fiduciary relationship will exist where the following three elements are established (as laid down in *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=) at 136, and confirmed in several later decisions):

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

**74**  Instead of leading evidence to support a finding of the above essential elements, the defendant put forward a very convoluted theory to the effect that Mr. Wiren and Mr. Adams had conspired with the plaintiff to sell inferior fibre to the defendant to make up for the plaintiff's loss as a creditor of Mr. Wiren's and Mr. Adams' former employer, Firemaster Gold Standard which was insolvent. Initially the defendant also maintained that Mr. Wiren, or his company, was indebted to the plaintiff and this was a means of paying the plaintiff back. Frankly, the claim made little sense on the pleadings, even less on the evidence, and none on the submissions. There was no evidence of a debt owed to the plaintiff by Firemaster Gold Standard, Mr. Wiren, or any company in which he may have held a beneficial interest. The claim of breach of fiduciary duty is dismissed.

**3.** **Fraud and Conversion**

**75**  The claim of fraud seems to be rooted once again in the allegedly defective nature of the Logs. Ms. Dizon submitted that the third parties knowingly entered into a contract for 50% sawmill quality logs and 50% lower quality logs at current market prices, and instead received 85 loads of burnt, low value logs at a price about 50% above market prices. I have already decided that the Logs were as represented, of merchantable quality and fit for the defendant's purposes. Furthermore, Mr. Lennea's evidence established that given the costs of transporting the Logs from the location where the Logs were cut to the location where they were delivered, their price was below market value.

**76**  The claim that the plaintiff had fabricated the load slips was not made out. The truck drivers who filled out the load slips did not always illustrate the finest of penmanship, but the load slips were legible and contained the necessary information.

**77**  The basis of the claim in conversion is against Mr. Wiren, who is accused of having removed or damaged critical components of the pellet mill in or around July 2011. Firstly, the defendant did not own the property in July 2011, therefore it cannot accuse the third party of having interfered with its ownership or title to the chattels. Secondly, Mr. Wiren gave evidence that copper wires were stolen from the pellet mill in May or June 2011 and that a "cyclone" was removed during 2010 by a former millwright. This was pointed out to Ms. Dizon during her initial attendance at the property on May 23, 2011: it was as a result of the theft of the copper wire that there was no electricity at the pellet mill and she was told the copper wires would need to be replaced in order for electrical service to be restored and the mill functioned better with one less cyclone. In my view, it is highly improper to accuse Mr. Wiren of conversion tantamount to theft when the defendant had no evidence nor the legal right to claim damages for the loss of these items.

**78**  Thus the defendant's claim against the third parties in fraud and conversion is dismissed.

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| **VI.** | **SPECIAL COSTS** |  |

**79**  The plaintiff and the third parties all seek special costs against the defendant, and against Ms. Dizon and Mr. Fung personally.

**80**  As the authority to award special costs involves the exercise of broad judicial discretion, and as the rationale of awarding special costs is to punish for reprehensible conduct, each case must be decided on its own unique facts. However, some important principles to keep in mind that are relevant to this case are:

1. The reprehensible conduct for which punishment is sought can be in the circumstances giving rise to the cause of action, or during the proceedings, or both: *Stiles v. B.C. (W.C. B.)* [*(1989), 38 B.C.L.R. (2d) 307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B06C-00000-00&context=) (C.A.).
2. "Reprehensible" conduct includes any misbehaviour, ranging from outrageous and scandalous conduct to milder forms that deserve reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* [*(1994), 119 D.L.R. (4th) 740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=) at para. 17 (B.C.C.A.).
3. The fact that an action "has little merit" is not in itself a reason for awarding special costs: *Young v. Young*, [*[1993] 4 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M39V-00000-00&context=) at para. 251 *per* McLachlin J. (as she then was).
4. The failure to prove allegations of fraud will not automatically result in special costs: *307527 B.C. Ltd. v. Langley*, [*2005 BCCA 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M489-00000-00&context=). However, if the allegations of fraud have been made frivolously, are without foundation, or have been made in circumstances where sufficient information was available to conclude that the claim could only be one of ***negligence*** or breach of contract, the allegations can be described as "reprehensible", warranting an order of special costs: *Hamilton v. Open Window Bakery Ltd.*, [*[2004] 1 S.C.R. 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10F-00000-00&context=) at para. 26.
5. Baseless allegations of conspiracy may be susceptible to an order for special costs: *World Wide Treasure Adventures Inc. v. Ralph*, [*[1996] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2KN-00000-00&context=) at para. 19 (S.C.).
6. Deliberate attempts to mislead the court through contrived, concocted or fabricated evidence can always form the basis for an order for special costs.

**81**  The plaintiff submits that Ms. Dizon and the defendant meet all the criteria outlined above to attract an award for special costs. The plaintiff lists innumerable examples of misconduct by Ms. Dizon and the defendant: some pertaining to allegations made in the response to civil claim and counterclaim which were unproven or disproven, some pertaining to Ms. Dizon's evidence, and some pertaining to her conduct of the case.

**82**  In my view, the most significant steps of misconduct by the defendant toward the plaintiff are the unfounded claims of conspiracy and fraud, and the refusal to disclose documents.

**83**  In the response to civil claim and the counterclaim the defendant pleaded that "... the plaintiff conspired with FMI to provide false information to the defendant". Ms. Dizon advised on the first day of trial that the defendant was abandoning this allegation, but then she proceeded to accuse the plaintiff of fraudulently misrepresenting the quality of the Logs prior to contract, or alternatively, defrauding the defendant by knowingly delivering logs of inferior quality to those for which the defendant had contracted.

**84**  I have already found that the defendant did not prove the Logs were misrepresented or of inferior quality at the time they were delivered, and that there was no reasonable basis for saying so. In fact, the defendant has utilized a portion of the Logs, but has failed or refused to disclose how many Logs have been used.

**85**  Further, the defendant pleaded that the plaintiff was a creditor of a company in which the third parties held an interest. This company became insolvent in 2011. The theory of the defendant was that Mr. Wiren induced or caused the defendant to enter into a contract for the supply of the Logs at a price which exceeded their value, to make up for the plaintiff's losses from the aforementioned insolvency.

**86**  Once again there was no evidence of any indebtedness between Mr. Wiren and the plaintiff, or of any form of undisclosed benefit received by Mr. Wiren or FMI from the plaintiff.

**87**  Finally, despite admonition from the Court and despite a subsequent court order, the defendant failed to disclose the records relating to the processing of the Logs into shavings and the profits received by the defendant therefrom.

**88**  I agree that Ms. Dizon's obvious inability to efficiently conduct the defendant's defence and claims prolonged the trial unnecessarily, resulting in increased costs to the other parties. I would not order special costs on this factor alone, nor would I order them solely on the lack of merit to the defendant's defence and counterclaim. However, when taken together with the unfounded claims of fraud and the noncompliance with court orders - not to mention the contradictory evidence led by the defendant - I see no alternative but to award the plaintiff special costs of these proceedings.

**89**  The claim of the third parties for special costs is even stronger. Mr. Wiren and Mr. Adams were joined as third parties in their individual capacities because they were accused of conversion, conspiracy and breach of fiduciary duty. The conspiracy claim was withdrawn at the beginning of trial, but then the same fraud allegations were made against them as the ones against the plaintiff.

**90**  I have dismissed all the allegations of intentional breaches by the third parties out of hand because there was never any foundation for them. I have dismissed the claims of breach of contract and ***negligence*** on a number of grounds, and found that the real cause of any losses suffered by the defendant, which were never properly put in evidence, was the defendant's inability to fund the project it had so blithely entered into without adequate financial resources and preparation.

**91**  The third parties, and particularly the individual third parties, should never have been obliged to participate in this lawsuit. The claim of the plaintiff was a simple one of debt, and any evidence relating to delivery, acceptance and quality of the Logs could have been led in a fraction of the time this trial took to complete.

**92**  Thus I order special costs to the third parties as well.

**93**  Although it is tempting to accede to counsel's argument to award costs against Ms. Dizon personally, on a closer analysis I am not satisfied that her conduct as a non-party to the litigation can support what is a very rare and special exercise of judicial discretion. The cases cited by plaintiff's counsel in support of such an order involved testimony which was proved to be knowingly fabricated. In other words, the parties therein were shown to have perjured themselves. Notwithstanding the inconsistencies and reconstructions running through Ms. Dizon's evidence that rendered her an unreliable witness, I have not gone so far as to find she knowingly lied on the witness stand and therefore would not punish her personally. She is not the only person involved in the defendant's affairs and I do not know the full extent for which she was responsible for the mistakes, errors in judgment, ill conceived positions and poor advocacy illustrated throughout the conduct of the defendant's case. Similarly, I do not know the extent to which Mr. Fung was involved in this poor outcome. Thus I decline to award costs against either of them.

**94**  The plaintiff is entitled to judgment against the defendant in the sum of $202,053.90 plus court order interest and special costs.

**95**  The counterclaim and third party claims are dismissed with special costs payable by the defendant.

**96**  The claim for special costs against Ms. Dizon and Mr. Fung is dismissed.

D. KLOEGMAN J.

**End of Document**

[***Hanslo v. Barry, 2012 BREG para. 50,642***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-JJV1-JB2B-S019-00000-00&context=)

British Columbia Real Estate Law Guide

British Columbia Supreme Court

Before: Joyce J

Decision: November 29, 2011.

Docket No. S20736

***British Columbia Real Estate Law Guide*  > *Cases* > *2010s* > *2011***

**2012 BREG para. 50,642** | [*[2011] B.C.J. No. 2278*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22M6-00000-00&context=) | [*2011 BCSC 1624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22M6-00000-00&context=)

Marc Tremayne Hanslo Plaintiff v. Douglas William Franklin Barry, James Douglas Leo Barry and Sheila Michelle Barry Defendants

**Case Summary**

**Remedies — Damages — Plaintiff purchased property from defendants without being told about nearby creek with propensity to flood and to cause water damage to property — Defendants found liable to plaintiff for breach of contract and negligent misrepresentation — Plaintiffs were entitled to damages for cost of repairing defects resulting from creek flooding, including consequential and punitive damages.**

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| **Facts:** On March 26, 2001, the defendants James and Sheila Barry (the "Barrys") entered into a rent-to-purchase agreement with David Boyes ("Boyes") relating to property in Mission, B.C. (the "Property"). A creek, located up-slope from the Property, flowed through an underground culvert running under the Property for which there was no easement registered on title. Boyes informed the Barrys of the creek and of the underground culvert. In October 2003, the creek overran the culvert entrance north of the Property and flooded into the Property, entering the basement area. In September 2004, a heavy rainstorm blocked the culvert with debris and it again overran the culvert system, causing water, rocks and gravel to flow through the Property, around the house, through the carport, and out the door. Two to six inches of water entered into the bottom floor of the residence but very quickly subsided. On November 1, 2004, the Barrys listed the property for sale.  On November 15, 2004, the plaintiff and his then wife made an offer to purchase the Property, subject to their receipt of a Property Condition Disclosure Statement (the "PDS") which, if approved by them, would form part of the contract. A PDS dated November 2, 2004, and purportedly executed by the Barrys and by James Barry's father, Douglas, was provided to the plaintiff and his wife. The Barrys, however, said nothing about the creek, the culvert, or the flooding problem to the realtor who had assisted them with the preparation of the PDS. The plaintiff and his wife took possession of the Property on December 15, 2004 and were unaware of the existence of the creek until June 2, 2006, when a sudden heavy downpour caused the creek to overrun the culvert system and flood their carport and the bottom floor of their residence to a depth of some four inches before receding and leaving a layer of mud. At that time, the plaintiff learned from a neighbour helping him clean up the mess that there had been previous similar floods. In April, 2007, the plaintiff separated from his wife and later purchased her half interest in the Property. His contention was that the June 2006 flood and the resulting stress had a major impact on his marriage. On May 11, 2009, another flood occurred due to the creek overrunning the culvert system. This time, water and mud entered the plaintiff's house to a depth of six to eight inches before receding, and also caused a retaining wall between the Property and the lot immediately to the north to collapse. Boyes's evidence was that he had never experienced flooding during the approximate 15-month period for which he owned the Property.  The plaintiff brought an action against the District of Mission for damages in ***negligence*** resulting from the 2009 flood, and the District replaced the storm sewer system in return for a right of way through the Property to service that system. In December 2009, the plaintiff commenced an action against the Barrys and James Barry's father, Douglas, in contract or ***negligence*** or both, claiming damages for the cost of remedial work, and consequential damages including damages for mental stress. His assertion was that the defendants failed to inform him of the existence of the culvert and the creek, of its propensity to flood, and of the fact that it had flooded when the Barrys owned the Property, causing damage. No fraud, however, was alleged.  HELD: The action was allowed.  The basic legal principle affecting a vendor's liability for defects in the sale of real property is *caveat emptor*, i.e., buyer beware, unless there is something in the contract that protects the purchaser, or unless there has been fraud, which was not pleaded against the Barrys (see *Fraser-Reid v. Droumtsekas* (SCC)). In the Barrys' case, while the PDS was incorporated into their contract of sale, the representations contained therein were not contractual warranties. They were simply representations as to the true state of knowledge of the vendors, although they could support a claim for breach of contract if they were untrue.  The Barrys were aware of the culvert under the Property and of the fact that it constituted an unregistered easement. Yet, in completing the PDS, they answered "no" to a question concerning their knowledge of the existence of unregistered easements. This false statement constituted a breach of contract and negligent misrepresentation giving rise to an entitlement to damages for the cost of repairing the defects resulting from the flooding, including consequential damages. However, there was nothing in the PDS that constituted a representation concerning nearby creeks, so the Barrys' failure to mention the creek in the PDS did not constitute a breach of contract. The plaintiff, therefore, was entitled to recover damages of $30,445.23, which included $19,997.76 for remediation of water damages, $6,911.23 for legal costs incurred in the proceedings against the District of Mission, $3,136.24 for inspection costs, and $400 for the cost of temporary repairs effected following the 2006 flood. The damages claimed for mental stress leading to the breakdown of the plaintiff's marriage, however, were too remote, and the Barrys' conduct was not sufficiently callous or egregious to warrant an award of aggravated or punitive damages. Also, James Barry's father, Douglas, was not liable for any of the damages sustained by the plaintiff, since there was not sufficient evidence, on a balance of probabilities, that he had signed the PDS or even knew about it or authorized his signature to be appended to it. |

**Counsel**

D. Stander for the plaintiff; V.K. Bajpai for the defendants.

**Reasons for Judgment**

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| **B.M. JOYCE J.** |

**INTRODUCTION**

**1**  In November 2004, the plaintiff, Mr. Hanslo, and his then wife, purchased a home situated in Mission, B.C. from the defendants.

**2**  Unknown to the plaintiff at the time of the purchase, but known to the defendants, there was a creek located upslope from the property. At a place near to but not on the property, the creek entered an underground culvert that ran under the surface of the property.

**3**  In 2006, during a rainstorm the creek swelled in volume and overran the entry to the culvert. Water flowed around and into Mr. Hanslo's house causing some damage. Following this flood, Mr. Hanslo cut away a portion of wall in a hallway in the basement area of the house and discovered evidence of rot in the floor plates, as well as mould.

**4**  In 2009, the creek again overran the culvert system, once again flooding Mr. Hanslo's house and causing further damage.

**5**  Following the food in 2009, Mr. Hanslo carried out further investigations and discovered more evidence of mould in the basement.

**6**  In December 2009, Mr. Hanslo commenced this action against the defendants, seeking damages. The plaintiff claims damages for the cost of remedial work and consequential damages, including damages for mental distress. The plaintiff alleges that the defendants are liable, either in contract or in ***negligence***, or both. He says they are liable for failing to inform him of the existence of the creek and culvert, the propensity for the creek to flood and the fact that it had flooded when they owned the property causing damage, including the potential for mould. The plaintiff asserts the defendants breached their duty to disclose dangerous latent defects and defects that render the property uninhabitable.

**7**  It is to be noted that the plaintiff does not allege fraud in the non-disclosure of the alleged latent defects.

**8**  The defendants deny that they breached any legal obligation to disclose the existence of the nearby creek or culvert running beneath the property. They deny that they had any knowledge of the existence of mould or rot when they sold the property to the plaintiff and his wife.

**FACTS**

**1. The Defendants' Purchase of the Property**

**9**  On March 26, 2001, the defendants James and Sheila Barry entered into a rent-to-purchase agreement with Mr. David Boyes with regard to a property that is situated at 8026 Clegg Street, Mission, B.C. (the "Property"). Clegg Street runs north-south and slopes from the north to the south in the vicinity of the Property. A two-story house is situated on the Property.

**10**  A creek, which is located up-slope from the Property, flows through a drain located at or near the north property line of a lot that is two lots north of the Property. It flows through an underground culvert that runs under the surface of the Property and the lot immediately to the south of the Property. There is no easement for the underground culvert registered against the title to the Property. Mr. Boyes informed James and Sheila Barry of the existence of the creek and of the underground culvert.

**11**  Not long after moving into the Property, James and Sheila Barry had discussions with some of their neighbours and learned that the creek had flooded in the past causing flooding in the Property.

**12**  When James and Sheila Barry decided to proceed with the purchase of the Property about a year after they moved in under the rent-to-own agreement, Mr. Douglas Barry, who is James Barry's father, assisted with financing. He was registered on the title. Douglas Barry never resided on the Property.

**2. January 2003 Flood**

**13**  On January 1, 2003, James and Sheila Barry experienced a flood at the Property when their neighbour drained a swimming pool, causing the sewer system to back up. Most of the first level of the Property was flooded with sewer water to a depth of two to three inches. The Barrys made a claim on their insurance policy and the flood damage was repaired. I am satisfied that this flood had nothing to do with the creek, that the Property was completely restored and that there was no residual damage from this flood.

**3. October 2003 Flood**

**14**  In October 2003, the creek overran the culvert north of the Property and ran onto the Property. There is a dispute as to the extent of the flooding, if any, within the residence itself. Ms. Marina Wagner, a neighbour who lived three houses up Clegg Street from the Barrys, testified that she came home one evening in October 2003 to find a group of people at the Barry residence. She testified that James Barry told her that the creek had flooded his basement.

**15**  Another neighbour, Nathan Grant recalled an occasion in the fall of 2003 when he observed a flood. He recalled seeing a group of people in front of the Barry home.

**16**  In my view, James Barry tried to minimize the effect of this incident in October 2003. In his examination in chief, he denied any flooding in 2003 other than the flood caused by draining a pool. However, at his examination for discovery James Barry admitted that the flood resulted in water in the carport but said it was minor. He did not consider it a flood, which he defined as "uncontained water entering the house". He said the house did not include the carport. James Barry also testified at his examination for discovery that no water entered the house in October 2003 because the level of the floor in the basement was two or three inches higher than the floor in the carport. At trial he admitted that the levels were the same.

**17**  I find as a fact that there was a flood in October 2003 and that some water did enter the basement area. The evidence does not enable me to say to what depth the water came to during that flood.

**4. September 2004 Flood**

**18**  On or about September 16, 2004, the Barrys experienced a flood when, during a heavy rainstorm, the opening to the culvert became blocked or partially blocked with debris and the creek overran the culvert system. It flowed down the neighbouring lots and through the Property. The water, along with rocks and gravel, flowed around the house, through the carport and out the door.

**19**  There is a dispute in the evidence as to the amount of water that entered the house on that occasion. Ms. Wagner testified that James Barry told her that "her creek" caused the flooding and that his ground floor was flooded.

**20**  Mr. Grant testified that he went into the Barry's house on that occasion and saw water, along with mud and rocks, in the carport and basement. He said the water was a few inches deep. He said the water came in then subsided, leaving a mark on the wall about four to six inches high. Mr. Grant said that he helped clean up the mess using a broom and a shop-vac. Mr. Grant also testified that after this flood he saw construction materials being taken into and out of the residence.

**21**  Mr. Roy Nicholson, an employee of the District of Mission, testified that he attended at the Property following the flood in September 2004 and unplugged the storm drain that leads into the culvert. He testified that the District of Mission did not maintain the storm drain because it was a privately owned storm sewer system. Mr. Nicholson testified that Mr. Barry was quite upset that the system was not being managed properly and was verbally abusive to him. Mr. Nicholson went into the Barry home after the flood waters had subsided and saw signs of water and debris from flooding. Mr. Nicholson testified that Mr. Barry told him he thought the water had been between two and six inches deep at the worst. Mr. Nicholson admitted that in the notes that he made at the time of his visit to the Property he wrote "some flooding to 8026 Clegg St. in the Garage and a small amount into house". However, those notes appear to reflect what Mr. Nicholson saw after the fact, not what Mr. Barry had told him.

**22**  James Barry testified that the water flowed through the carport and that very little water got into the home itself. He estimated perhaps an amount equal to an ice cream bucketful entered the house. He said he just pushed the water out with a broom. This differed from his testimony at discovery when he denied that water entered the lower floor of the house.

**23**  Sheila Barry testified that she did not see any evidence of water entering the residence itself.

**24**  With regard to the magnitude of the flood in September 2004, I prefer the evidence of the independent witnesses to that of the Barrys. The independent witnesses have no reason to exaggerate, whereas the Barrys obviously have reason to minimize. Further, James Barry resiled from his initial position that no water had entered the lower floor of the house, but continued to downplay the extent of flooding. His testimony as to the almost inconsequential effects of the flood is inconsistent with his actions and attitude at the time of the flooding when he was very upset. I am satisfied that the flood in September 2004 caused water to enter into the bottom floor of the residence to a depth of two to six inches but very quickly subsided.

**25**  At the time of the flood in September 2004, the Barrys had the property up for sale, having entered into a listing agreement with Mr. Ron Sweeney. Mr. Sweeney had been the Barrys' realtor when they purchased the property from Mr. Boyes. On November 1, 2004, Mr. Sweeney agreed, reluctantly, to cancel the listing agreement. On the same day, November 1, 2004, the Barrys entered into a listing agreement with a different agent, Mr. Rob Gill.

**26**  The plaintiff alleges that after the flood in September 2004, the Barrys undertook repairs to the property caused by the flood. The plaintiff relies on the evidence of Mr. Grant, who said he saw damaged gyproc being removed from the home. The Barrys denied that they did any repairs following the flood. James Barry testified that some renovations were done in the kitchen in the summer of 2004 and substantial repairs had been done after the January 2003 flood. I am not satisfied, on the balance of probabilities, that the Barrys did any repair work after the 2004 flood. I find that Mr. Grant must have been incorrect in his recollection of when he saw material being removed.

**5. The Plaintiff's Purchase of the Property**

**27**  Sometime during the first week of November, the Property came to the attention of Mr. Hanslo and his then wife, who were looking to buy a home in Mission. They and their realtor went to look at the Property. They met Sheila Barry but had no conversation with her other than exchanging pleasantries. The Hanslos viewed the Property for about one-half of an hour. Sheila Barry said nothing to them about a creek or flooding.

**28**  James Barry testified that he first met Mr. Hanslo when he came to the Property alone wanting to see it. James Barry testified that he told Mr. Hanslo to set it up with his realtor. James Barry testified that he met with Mr. Hanslo two or three times before an offer was made and that during one of those meetings he told Mr. Hanslo about the culvert. I do not accept that evidence. First, in my view, it is improbable that Mr. Hanslo would bypass the realtors and make a direct approach to the owner. Second, as will appear, when the owners were given the opportunity to disclose the existence of the creek and/or culvert in a disclosure statement, they did not do so. If a meeting such as that described by Mr. Hanslo took place, which I do not accept, and Mr. Barry thought the culvert was something that he should raise, he surely would have noted it in the disclosure statement.

**29**  On November 15, 2004, the Hanslos made an offer to purchase the property for $224,500.00. The Barrys countered at $230, 800.00 and the Hanslos accepted the counter-offer. The contract of purchase and sale contained the following conditions precedent:

Subject to the purchaser obtaining financing on the said property by Nov 23/04.

Subject to the purchaser receiving and approving a copy of the Property Condition Disclosure Statement by Nov 23/04. If approved, such statement will be incorporated into and form part of this contract.

Subject to the purchaser having and approving a home inspection by Nov 23/04.

Subject to the purchaser receiving and approving a copy of the title search by Nov 23/04.

**30**  The Hanslos retained a company to do a home inspection of the Property on November 18, 2004. Mr. Keith Duterte, who carried out the inspection, testified that it was not part of the inspection process to remove any wallboard. Mr. Duterte did not see any evidence of water damage or mould in the basement area of the home.

**31**  Sometime prior to November 23, 2004, the Hanslos were provided with a Property Disclosure Statement [PDS] dated November 2, 2004. The PDS was purportedly executed by all three defendants.

**32**  The PDS contained the following statement:

THE SELLER IS RESPONSIBLE for the accuracy of the answers on this disclosure statement and where uncertain should reply "Do Not Know". This disclosure statement constitutes a representation under any Contract of Purchase and Sale if so agreed, in writing, by the seller and the buyer.

**33**  The following items on the PDS were checked as "No":

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 1. H. |  | Are you aware of any encroachments, unregistered easements or unregistered rights-of-way? |  |
|  | 2. G. |  | Are you aware of any additions or alterations made in the last sixty days? |  |
|  | 2. J. |  | Are you aware of any moisture and/or water problems in the walls, basement or crawl space? |  |
|  | 2. K. |  | Are you aware of any damage due to wind, fire or water? |  |

**34**  James Barry's evidence regarding the preparation of this statement was that he received a call from a realtor, Lily Miller, who was assisting Mr. Gill. She advised him that they had to provide the disclosure statement. He testified that Ms. Miller met them at their home and completed the document as she asked them a number of questions. James Barry testified that he told Ms. Miller about the flood caused by draining the swimming pool. When he told her the damage had been repaired, she told him it need not be disclosed. James Barry also testified that Ms. Miller asked about the creek or culvert. When they told her it was at a property two properties to the north, she advised them that it did not have to be disclosed. He also told her he was not aware of any registered or unregistered easements.

**35**  Ms. Miller testified that the Barrys told her about the flooding caused by draining the pool and that it had been minor and had not damaged the house. She testified that she was not aware of the creek and that if she had been aware the house had flooded by the creek, she would have advised them to disclose that fact. She said they did not mention anything about a creek flooding or a culvert or an unregistered right-of-way.

**36**  I accept Ms. Miller's evidence that if she had been made aware of any prior flooding by the creek she would have told the Barrys to disclose that fact. I am satisfied that the Barrys did not discuss the prior flooding from the creek with her.

**37**  Douglas Barry testified that the signature on the PDS purporting to be his is not in fact his signature and that he does not know who affixed his signature. He testified that he was not aware of the disclosure statement. Neither of the other defendants, nor Ms. Miller gave evidence with regard to whether Douglas Barry was present and signed the document when it was completed. Presumably, this is because the issue arose late in the trial when those witnesses had testified. The writing of the surname "Barry" that forms part of the signature for Douglas Barry looks remarkably like the writing of the surname "Barry" that forms part of the signature of James Barry. In any event, I am not satisfied on balance that Douglas Barry signed the document or that he knew about it and authorized his signature to be affixed to it. For this reason, I find that Mr. Douglas Barry is not liable for any of the damages sustained by the plaintiff. I will address this matter in more detail when I discuss the liability of the remaining defendants.

**38**  On November 23, 2004, the Hanslos signed the PDS and an addendum to the contract of purchase and sale by which they agreed to remove the conditions precedent referred to above. Mr. Hanslo testified that the PDS was very important to him in his consideration of the purchase of the Property. The sale closed and the Hanslos took possession of the Property on December 15, 2004.

**39**  From the time they took possession of the property until June 2, 2006, the Hanslos remained unaware of the existence of the creek, culvert or the fact that the creek had previously flooded the property. They did not see any evidence of any water damage.

**6. The June 2006 Flood**

**40**  On June 2, 2006, the Hanslos experience their first flood following a heavy, sudden downpour. The creek once again overran the culvert system and flooded the carport and bottom floor of the residence to a depth of about four inches, before receding, leaving a layer of mud. Mr. Hanslo was able to capture some of this event on video.

**41**  Mr. Grant helped Mr. Hanslo clean up the mess from the flood. It was at that time that Mr. Hanslo learned from Mr. Grant that there had been previous floods.

**42**  Mr. Hanslo testified that the day after the flood he cut away a portion of a wall in a hallway in the basement area and discovered black mould and rot in the wooden plate that rested on the foundation. The wall where the plaintiff removed the piece of drywall was the dividing wall between the hallway and a downstairs bathroom. A shower stall was located in the bathroom on that wall in the area where the plaintiff removed a portion of wallboard.

**43**  The plaintiff applied bleach to the mould areas, used fans to dry it out, then replaced the drywall. Mr. Hanslo replaced some carpet in the basement with laminate flooring, but did not do any major investigation or remediation of any damage following the 2006 flood. His claim for the cost of repairs following the 2006 is only about $400.00.

**7. The Breakdown of the Hanslos' marriage**

**44**  The plaintiff testified that the June 2006 flood had a major impact on his marriage. He said that he felt guilty because it was he, more than his wife, who wanted to purchase the Property. They had made the biggest investment of their lives and ended up with a problem. The plaintiff testified that he and his wife argued about finances. He said he did not fix the house because he did not have the money to do so. He testified that they were under stress and the relationship suffered.

**45**  In April 2007, Mr. Hanslo separated from his wife. Eventually he purchased his wife's interest in the Property.

**46**  There is no evidence that after the flood in June 2006, the plaintiff took any steps to investigate the extent of the damage in the house, other than removing the one portion of drywall in the hallway. Therefore, he did not make any assessment of the extent of damage or the extent or cost of the remediation required. At some point after the 2006 flood, Mr. Hanslo did some renovations to the downstairs, including installing a commercial kitchen to be used in a business venture involving a meat concession stand.

**47**  It was not until January 11, 2010, that the plaintiff saw a psychiatrist on referral from his family doctor. The psychiatrist diagnosed depression with anxiety and unresolved grief from the breakup of his marriage. He testified that he believed that the breakup of the marriage was the cause of the depression. He was unable to say what caused the breakup. He did say that the plaintiff talked mostly about the flooding of his house.

**48**  The plaintiff's former wife, Ms. du Toit, also testified. She said that she and the plaintiff had arguments following the 2006 flood because of the fact that they were unable to make an insurance claim and they had to pay for everything themselves. Ms. du Toit testified that they had marital difficulties prior to the flooding of the Property, but that after the flood it was more difficult to resolve their issues. Ms. du Toit placed some blame of the flood for causing the breakdown of their marriage.

**49**  In cross-examination, Ms. du Toit agreed that there were no financial concerns when the commercial kitchen was installed.

**8. The May 2009 Flood**

**50**  On May 11, 2009, Mr. Hanslo experienced another flood of the Property due to the creek overrunning the culvert system. During this flood, water and mud entered Mr. Hanslo's house to a depth of six to eight inches before receding. The flood also caused the retaining wall between the Property and the lot immediately to the north to collapse. This, in turn, damaged a trailer that the plaintiff had parked near the retaining wall. The water and mud in the carport also damaged some tools that the plaintiff had left on the floor.

**51**  Following the 2009 flood, Mr. Hanslo cleared away the retaining wall that had fallen over, did some repairs to his yard, obtained an inspection with regard to the presence of mould and obtained an estimate for remediation work.

**9. Mould Investigation**

**52**  An investigation for the presence of mould was carried out by Theodor Sterling Associates on July 2, 2009. The investigation consisted of the following:

1. Visual inspection for evidence of water damage that can potentially lead to mould issues;
2. Cutting three small inspection holes to look for mould; and
3. Collecting one air sample from inside the den on the ground floor of the house and one air sample from outside the house for laboratory testing for the presence of mould spores.

**53**  The visual inspection of the basement area found remaining water lines at a height of about five inches, but no obvious water damage to the walls. As the inspection was carried out after the last flood, it is not possible to say from this report on which occasion, or occasions, the water reached the height of five inches. There was no obvious damage to the walls.

**54**  One hole was cut in the wallboard just above the baseboard near a closet in the downstairs hallway. No water damage or mould growth was found in this location. There was no evidence that the wall cavity had ever become wet.

**55**  Another hole was cut at the base of the hallway that backed onto the bathroom shower. This is the same area where the plaintiff had discovered rot and mould in 2006. The mould investigator found significant water and mould damage in this location. The area was still quite wet when viewed by the mould investigator, causing him to think that there might be a leak associated with the shower.

**56**  On one wall in the northeast bedroom in the basement of the Property, the mould investigator found a small area where paint showed signs of water damage. He cut a hole beneath this blemish and found significant mould within the wall cavity.

**57**  In addition, the mould investigator discovered some mould growth, reaching to about the apparent height of the floodwaters, located at the inside corner in a storage space beneath the main stairs.

**58**  The interior air sample taken in the downstairs den contained total spores per cubic metre of air significantly higher than the sample taken outside the residence, placing it in the high risk range.

**59**  Based upon these results, the mould investigation report included the following recommendations:

1. Once furniture is removed, all walls found to harbour mould growth (as determined by cutting inspection holes) within the home should then be abated to the height of two feet (or higher if mould extends higher). If, during this abatement, mould is observed to extend beyond the areas identified in this report, mould mitigation should continue to ensure all mould affected building materials are properly mitigated.
2. Once all mould-affected drywall is removed, the remaining building materials should be cleaned with a simple detergent solution. This includes the studs of the wall assembly and any concrete walls and flooring. If the studs appear to be too difficult to clean, they should be removed and replaced. Thoroughly rusted studs (if they are metal) should be removed if possible.
3. Since the floors within the living room and bedroom are of hardwood, it is recommended that the conditions beneath the floor be inspected for water damage and may also need to be replaced under discretion of the homeowner. In addition to properly containing and ventilating the areas found to harbour mould growth, several HEPA filtered air cleaners should be situated throughout the space to offer an extra level of air cleaning.

**60**  The plaintiff has not undertaken any further investigative work as recommended to determine the precise scope of the mould problem, nor has he carried out any remediation work. He has obtained estimates for the remediation work, which I will discuss under the heading of Damages.

**10. Remediation of the Creek/Culvert**

**61**  Mr. Hanslo entered into negotiations with the District of Mission seeking redress for the problems with the flooding creek. Eventually, he commenced an action against the District of Mission in which he sought damages in ***negligence*** as a result of the 2009 flood. Mr. Hanslo settled the action on March 3, 2011, by an agreement under which the District, without admitting any liability, agreed to replace the storm sewer system and Mr. Hanslo agreed to grant a right of way for the storm sewer system.

**11. Past History of Flooding of the Property Before the Defendants Owned It**

**62**  The defendants led evidence from a former owner of the Property and from a person who has lived on Clegg Street for many years with regard to the frequency with which the creek has flooded.

**63**  Mr. Chervenk owned the Property from the early 1980s until he sold it to Mr. Boyes in around 2000. He said that during the time he owned the property, there was one occasion when the creek flooded, ran across the yard and some water entered the house under the front door. He said the water was confined to the entranceway.

**64**  Mr. Cannon has lived on Clegg Street since 1964 and could only recall one time, September 2004, when the creek flooded.

**65**  Mr. Boyes did not experience any flooding during the approximately 15 months that he owned the Property.

**ISSUES**

**66**  Based on the pleadings and the closing submissions of counsel, the issues in this case can be distilled to the following:

1. Did the defendants breach their contract with the plaintiff by failing to disclose the existence of:
2. the creek up-slope from the property that was subject to flooding;
3. the culvert under the surface of the property;
4. the previous floods that occurred in January and October 2003 and September 2004;
5. damage to the property, including the presence of mould, caused by flooding?
6. Are the defendants liable for negligent misrepresentation for false statements made in, or omissions from, the Property Disclosure Statement?
7. Are the defendants liable in ***negligence***, apart from negligent misrepresentation?
8. If the defendants are liable for breach of contract or in ***negligence***, what damages is the plaintiff entitled to recover?

**POSITIONS OF THE PARTIES**

**1 Nature of the Plaintiff's Causes of Action**

**67**  The plaintiff does not allege fraud. He pleads that the defendants breached the contract of purchase and sale through misrepresentations in the PDS by failing to disclose latent defects. In the alternative, the plaintiff pleads negligent misrepresentation. He asserts that the defendants had a duty of care to disclose the defects. He asserts that the representations in the PDS were inaccurate, misleading and negligently made. The plaintiff pleads, in the further alternative, that the defendants owed him a duty of care to disclose latent defects known to them and breached this duty by failing to disclose latent defects known to them.

**68**  In his closing submissions, the plaintiff argued as follows:

1. the defendants had a legal obligation to disclose latent defects known by them that rendered the house unfit for human habitation or that were dangerous;
2. the flood-prone creek and previous floods were latent defects that had the potential to cause mould contamination that creates a risk and renders a house unfit for habitation;
3. the defendants are liable for breach of contract and negligent misrepresentation for failing to disclose the latent defects; and
4. the claimant is entitled to recover damages for the cost of remediation and consequential damage, including mental distress.

**2. Defendants' Position**

**69**  The defendants deny that they breached the contract of purchase and sale. They submit that the PDS does not form part of the contract, and, in any event, it was not false. The defendants say that the existence of the culvert and creek and the fact of previous floods do not constitute latent defects with regard to the property. In any case, they say they are not dangerous and are not such as to render the property unfit for human habitation. They say that they had no knowledge of any mould and that they did not misrepresent their knowledge of the condition of the property in the PDS. The defendants submit that the plaintiffs did not rely on the representations in the PDS; rather they relied on their own inspection.

**DISCUSSION AND ANALYSIS**

**1. Obligation to Disclose Latent Defects - Overview**

**70**  I will begin my analysis with a review of the law that has developed with regard to the vendor's liability for defects in the sale of real property. The basic principle is that the doctrine of *caveat emptor* - buyer beware - applies unless there is something in the contract that protects the purchaser. As was stated in *Fraser-Reid v. Droumtsekas*, [*[1980] 1 S.C.R. 720*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1TG-00000-00&context=) at 723:

... caveat emptor remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

**71**  There are exceptions to the maxim *caveat emptor*. First, it does not apply in cases of fraud. The plaintiff does not allege fraud, although he has referred to and relies on authorities dealing with the sale of real property containing latent defects in which fraud was in issue. Accordingly, I will discuss what I understand to be the governing principles.

**72**  What constitutes fraud in this context seems to be something of an elastic concept. The classic and most obvious form of fraud is where the vendor positively misstates to the purchaser facts, which he knows to be false, for the purpose of deceiving the purchaser. But the concept of fraud has been extended to apply to other situations involving the active non-disclosure or concealment of latent defects.

**73**  In *McCluskie v. Reynolds* [*(1998), 65 B.C.L.R. (3d) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2JM-00000-00&context=) (S.C.) [*McCluskie*], Bennett J. (as she then was) said at paras. 46-47:

**46** The rule that the buyer must beware is not unassailable, however. For example, it has repeatedly been noted that the doctrine of *caveat emptor* will not apply in cases of fraud or reckless disregard for the truth of representations. In *Allen v. McCutcheon* [*(1979), 9 R.P.R. 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JT99-20Y8-00000-00&context=) (B.C.S.C.) for example, the court stated:

The rule of caveat emptor does not apply where, as here, the latent defects were actively concealed by the vendors.

**47** Professor Laskin (as he then was) commented on the idea that fraud can displace the rule of *caveat emptor* in a lecture on "Defects of Title and Quality" (1960), LSUC Special Lectures 389 at 404. In his lecture, he appeared to widen the notion of fraud to include the case where the vendor, while not actually guilty of fraud, was chargeable with recklessly disregarding the truth or falsity of his representations. He stated:

Fraud can be a rather elastic conception, and there are cases which show a tendency to find fraud when there has been concealment by the vendor of latent defects. *Rowley v. Isley*, a British Columbia decision entitling a purchaser to rescind where there was a failure to disclose infestation by roaches, illustrates the proposition, and goes quite far in allowing rescission after the transaction had been closed: [*[1951] 3 D.L.R. 766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4D3-00000-00&context=) (B.C.). On the other hand, a latent defect of quality going to fitness for habitation and which is either unknown to the vendor **or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity** will not support any claim of redress by the purchaser. He must find his protection in warranty. [Emphasis in original.]

**74**  Further, at paras. 49-52 Bennett J. stated:

**49** Between innocent misrepresentation, however, and active concealment, there lie the possibilities of negligent misrepresentation, or reckless disregard for the truth. The authorities also indicate that where the vendor fails to disclose a latent defect that could prove dangerous, he will be found liable.

**50** In *McGrath v. MacLean* [*(1979), 22 O.R. (2d) 784*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DYFH-X4FM-00000-00&context=) (Ont. C.A.), Dubin J.A., speaking for the majority said:

I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation ... in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him.

**51** This passage is cited by Di Castri at para. 239 of his text, where he states:

A vendor has a duty to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to manifest the likelihood of such danger, for example, where the premises being sold are radioactive.

**52** Finally, in *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada* *(1997), 141 D.L.R. (4th) 394* at 401 (Ont. C.A.) Doherty J.A. said:

Apart entirely from any contractual obligation arising out of an agreement of purchase and sale, a vendor of real property may have a duty to warn a purchaser of dangers in or on the property which pose a risk of physical harm to persons or property.

**75**  At para. 53, Bennett J. stated:

**53** In conclusion on this point, the authorities with which I have been presented suggest that the doctrine of *caveat emptor* will not operate to deny the plaintiff's recovery in the following situations:

1. where the vendor fraudulently misrepresents or conceals;
2. where the vendor knows of a latent defect rendering the house unfit for human habitation;
3. where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
4. where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.

**76**  If one adopts the "rather elastic conception of fraud" described by Professor Laskin, then it would seem that all of the foregoing situations might be considered to be species of fraud. On the other hand, there are cases that would suggest that the ability to recover damages for non-disclosure or concealment of latent defects rendering a house unfit for human habitation or rendering the premises dangerous is founded on a common-law duty of care. The breach of a duty of care is not fraud *per se*.

**77**  In *Cardwell v. Perthen*, [*2006 BCSC 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23PX-00000-00&context=) [*Cardwell*], the plaintiffs sued the defendant for damages for a number of defects that they discovered after taking possession of a house. Having discovered the defects the plaintiffs resold the house at a loss and claimed damages equal to the amount of their loss on resale. The plaintiffs based their claim on ***negligence*** (including negligent misrepresentation), fraud and breach of contract.

**78**  The trial judge began her analysis with a discussion of the doctrine of *caveat emptor* and quoted the passage from *McCluskie* that is set out above. She then discussed the critical distinction between latent and patent defects at para. 122:

**122** The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: *44601 B.C. Ltd. v. Ashcroft (Village)*, [*[1998] B.C.J. No. 1964*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0DR-00000-00&context=) (S.C.) [*Ashcroft*]; *Bernstein v. James Dobney & Associates*, [*2003 BCSC 986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-228K-00000-00&context=) [*Bernstein*]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example *Eberts v. Aitchison* [*(2000), 4 C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22HN-00000-00&context=), [*2000 BCSC 1103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22HN-00000-00&context=).

**79**  At para. 127-130, the trial judge said:

**127** ... A vendor who is aware of and fails to disclose and/or conceals or makes non-innocent misrepresentations with regard to a latent defect may well become liable to the purchaser for damages suffered as a result of that latent defect. This principle is sound because, unlike a patent defect, a latent defect is not discoverable by a purchaser on appropriate inquiries and inspection and thus, as a matter of fairness in the commercial transaction, the obligation to disclose and to not misrepresent will rest with the party who knows about the deficiency.

**128** Every imperfection or deficiency which a reasonably careful inspection and inquiry will not reveal cannot amount to a latent defect of the kind capable of displacing the doctrine of *caveat emptor*. In order to qualify as such, the defect must carry with it a consequence of substance; that is, it must be of such a nature as to render the house uninhabitable or dangerous: *McCluskie*. Beyond that, the vendor has no obligation to disparage his own property.

**129** It is clear that subjective knowledge of an undisclosed latent defect which may be dangerous or make the property uninhabitable is sufficient to negate a vendor's defence of *caveat emptor*. In *McCluskie* at para. 54, Bennett J. suggests that something less than actual knowledge may be sufficient to ground liability:

In conclusion, I find that although the law of vendor and purchaser has long relied on the principal of *caveat emptor* to distribute losses in real estate cases, the rule is not without exception. Two major exceptions are in the case of fraud, and in cases where the vendor is aware of latent defects which he does not disclose. The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist. It is up to the plaintiff to prove this degree of knowledge or recklessness.

...

**130** It strikes me as sensible and fair that a vendor ought not to escape liability in a situation where he is reckless as to whether or not certain latent deficiencies exist that would render the property dangerous or uninhabitable.

**80**  The trial judge considered the various deficiencies and found that many of them were patent defects. She found, however, that the sub-floors of the family room, master bedroom and master ensuite bathroom had latent defects negatively affecting the habitability of the premises, including rot and mould. She found at para. 131 that the defendant "knew or was utterly reckless as to whether his sub-standard construction [of the sub-floors] would cause moisture, rot and [mould] problems rendering the home unfit for human habitation and, as to the [mould], unsafe".

**81**  The trial judge found that there was no implied warranty of fitness and the claim based on breach of contract could not succeed. Further, there were no misrepresentations upon which the plaintiffs could be said to have reasonably relied and that, accordingly, the claims of fraudulent and negligent misrepresentation could not succeed. Further, the learned judge concluded that it was unnecessary to make a finding whether the defendant owed a duty of care in ***negligence***. She had already found that the defendant knowingly, or recklessly, failed to disclose latent defects that rendered the property unfit for habitation and posed a significant health risk.

**82**  Even though the plaintiff could not establish a claim based on fraudulent or negligent misrepresentation or breach of contract, the trial judge awarded damages for the non-disclosure of the latent defects concerning the sub-floors.

**83**  The appeal was concerned largely with the question of whether the trial judge had erred in articulating and applying the legal test distinguishing patent and latent defects. The Court of Appeal held that the trial judge had applied the correct test: see *Cardwell v. Perthen*, [*2007 BCCA 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21G0-00000-00&context=).

**84**  *Cardwell* appears to support the proposition that even where a vendor is not liable on the basis of fraud, breach of contract or negligent misrepresentation, he may nonetheless be liable for failing to disclose latent defects that he knew about or was reckless as to, which render the property unsafe or unfit for human habitation. Whether the duty owed by the vendor and the legal liability for breach of the duty is to be regarded as sounding in ***negligence*** or as a result of a stand-alone principle is not apparent from *Cardwell*.

**2. Breach of Contract**

**85**  When considering the claim in contract, it is essential to consider the effect of the contractual documents. In this case, the contract of purchase and sale included a condition precedent that the purchaser receive and approve a copy of the PDS by November 23, 2004. It further provided that if the PDS was approved, it would be incorporated into and form part of this contract.

**86**  The contract of purchase and sale also included the following term:

1. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

**87**  A PDS was provided to and approved by the purchasers on or before November 23, 2004. It contains the following statement:

This disclosure statement constitutes a representation under any Contract of Purchase and Sale if so agreed, in writing, by the seller and the buyer. [Emphasis added.]

**88**  The plaintiff and his wife then executed an addendum to the contract of purchase and sale, which referenced the contract and then stated:

... The undersigned hereby agree as follows:

To remove the following subjects ...

Subject to the purchaser having and approving a home inspection by November 23, 2004.

**89**  Relying on the words in the contract of purchase and sale and in the PDS, the plaintiff submits the PDS became part of the contract. Relying on the express wording of the addendum, the defendants argue that the plaintiff "removed" the subject clause, with the result that it no longer had any effect and it was as if that condition precedent had never formed part of the contract. On this basis, the defendants submit that the PDS was not incorporated into the contract.

**90**  In my view, the defendants' position is not a reasonable interpretation of the effect of the documents. The clear intention that emerges from the contract of purchase and sale is that the sellers were to provide a disclosure statement, which if accepted by the buyers, would form part of the contract. In my view, to construe the addendum as a waiver of that requirement, rather than a fulfilment of the condition, would fly in the face of the parties' intentions. I find, therefore, that the PDS was incorporated into the contract. The question remains, with what effect?

**91**  *Ward v. Smith*, [*2001 BCSC 1366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3X0-00000-00&context=), was concerned with a situation analogous to that in the present case. In that case, the contractual documents contained the following wording at para. 3:

3 The contract contained the following provision:

THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT IN THIS CONTRACT AND THE REPRESENTATIONS CONTAINED IN THE PROPERTY CONDITION DISCLOSURE STATEMENT IF ATTACHED, ALL OF WHICH WILL SURVIVE THE COMPLETION OF THE SALE.

A property condition disclosure statement was attached. A further provision in the contract stated:

THE ATTACHED PROPERTY CONDITION DISCLOSURE STATEMENT DATED JUNE 23/97, IS INCORPORATED INTO AND FORMS PART OF THIS CONTRACT. [Emphasis in original.]

**92**  In describing the effect of incorporating the disclosure statement into the contract, Melnick J. referred to a number of authorities, including *Arsenault v. Pedersen*, [*[1996] B.C.J. No. 1026*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3R5-00000-00&context=) (S.C.), where Mr. Justice Boyle stated at para. 12:

**12** The disclosure statement does not call upon a vendor to warrant a certain state of affairs. It requires the vendor to say no more than that he or she is or is not aware of problems.

**93**  At para. 23, Mr. Justice Melnick said:

**23** In *Lind v. MacLeod*, [*[1997] B.C.J. No. 3134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YC-00000-00&context=), (20 October 1997), Smithers 8389 (B.C.S.C.), Madam Justice Loo dealt with a factual situation similar to the case at bar on an appeal from Small Claims Court. In the course of reviewing the applicable law, she discussed, at para. 22 to 30, the effect of a property condition disclosure statement as follows:

In *Malenfant v. Janzen*, [*[1994] B.C.J. No. 2373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63DD-00000-00&context=), Vancouver and New Westminster Registry No. S0-9962, October 19, 1994, the vendors told the purchasers on an inspection of an old converted barn that the septic tank and field were fine. The vendors completed a Property Condition Disclosure Statement in which they noted that they were not aware of any problems with the septic tank and plumbing system. The plaintiffs did not inspect the septic system, and did not have the property inspected by an inspection service. A week after the plaintiffs took possession, the downstairs toilet backed up and overflowed.

The purchasers' claim against the vendors was based on the Property Condition Disclosure Statement.

Harvey J. at paragraph 28:

"I was not referred to nor am I aware of authority holding that answers given to questions set out in a Property Condition Disclosure Statement are to constitute representations in the form of warranties as to the condition of the property in question. The questions and answers in the form itself are stated to form part of the contract of purchase and sale "if so agreed in writing by the vendors and purchasers: and, in this manner, may support a breach of contract if the answers provided are untrue based upon current actual knowledge. In this regard there may be afforded a basis for claiming breach of contract."

**94**  Further, at para. 25, Mr. Justice Melnick said:

**25** In *Zaenker v. Kirk* [*(1999), 30 R.P.R. (3d) 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1R7-00000-00&context=) (B.C.S.C.), Mr. Justice Lamperson also held at para. 19 that,

Although the property condition disclosure statement forms part of the agreement for a purchase and sale, it is not necessarily a warranty. Its main purpose is to put purchasers on notice with respect to known problems. The disclosure statement would have to be far more detailed if it was meant to do more. It merely indicates that the statements therein are true according to the seller's current actual knowledge.

**95**  Melnick J. concluded at para. 31:

**31** I conclude that a statement made in a property condition disclosure statement that is incorporated into a contract of purchase and sale may be a representation upon which a purchaser can rely.

**96**  Based on these authorities, it is my view that in this case, the incorporation of the PDS into the contract did not turn the representations contained in the PDS into contractual warranties. There was no warranty that the circumstances referred to in the questions, which were answered in the negative, did not exist. They are representations as to the true state of knowledge of the vendor and may support a claim in breach of contract if the statement was untrue and did not accord with the vendor's true belief at the time. It is my view that insofar as a claim is based on breach of contract, it is not necessary that the representations relate to latent defects that are dangerous or that render the premises uninhabitable. It is sufficient if there is a breach of contract which caused damage.

**97**  I will consider each of the representations in the PDS in turn.

*1. H. Are you aware of any encroachments, unregistered easements or unregistered rights of way?*

**98**  I am satisfied that the Barrys were aware of the culvert under their property and were aware that it constituted an unregistered easement. Mr. Boyes, from whom they purchased the property, made them aware of the existence of the culvert and provided them with a site plan that referred to a right-of-way. I am satisfied that this false statement constitutes a breach of contract.

**99**  I am satisfied that if the defendants had answered this question in the affirmative, as they were obliged to do, the plaintiff would have been alerted to the existence of the watercourse. He would likely have conducted further inquiries, which would have made him aware of the prior flooding and of the need for a more detailed investigation of the condition of the house than he in fact undertook.

*2. G. Are you aware of any additions or alterations made in the last sixty days?*

**100**  I am not persuaded that this representation was incorrect.

*2. J. Are you aware of any moisture and/or water problems in the walls, basement or crawl space?*

**101**  I have concluded that answering this statement in the negative does not mean that the contract contains a warranty that there were no moisture problems. It means that the defendants are not aware of the existence of any moisture problems. If the defendants ought reasonably to have been aware of or suspected moisture problems due to the prior flooding, but were not in fact aware of them, they may have been negligent in making the representation. However, in my view, they are not in breach of contract. I am not satisfied that the defendants in fact were aware of any moisture problems or mould in the basement at the time they made the representation.

*2. K. Are you aware of any damage due to wind, fire or water?*

**102**  The plaintiff's submit that this statement refers to any existing or past damage, even if the past damage has been repaired. He submits, therefore, that the defendants breached the contract when they failed to disclose the damage caused by the sewer back-up in January 2003, even though that damage was completely repaired. I cannot accept that submission. In my view, the statement means existing damage. If prior damage to a property has been completely remedied to the point where the property is in the same condition it was in before, then there is no longer any damage.

**103**  The representations in the PDS that are in issue in this case were also at issue in *Best v. Lavoie*, [*[1999] B.C.J. No. 1383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4JK-00000-00&context=) (S.C.). At para. 43, Chamberlist J. said:

**43** The particular wording of the applicable provisions of s. 2 of the disclosure statement, being H, J and K, and primarily J, are all expressed to be in the present tense. It is obvious from a reading of the disclosure statement that it would have been quite easy for the drafters of the disclosure statement to include past occurrences as well had they so wished. An example of this is found in 2 C. and D. which read:

C. To the best of your knowledge, have the premises ever contained asbestos insulation?

D. To the best of your knowledge, have the premises ever contained urea formaldehyde insulation?

This of course is quite different wording from that which is found at 2 H, J, and K.

**104**  The defendants did not breach the contract in failing to disclose the January 2003 flood damage that had been fully repaired.

**105**  Damage caused by the creek floods would also fall within representation 2K. I am not satisfied the defendants actually knew of any such damage and cannot be said to have breached the contract by honestly stating that fact.

**106**  I can see nothing in the PDS that constitutes a representation concerning nearby creeks. Consequently, I cannot see how the failure to disclose the existence of the creek or the fact that it had flooded on prior occasions can constitute a breach of contract.

**107**  As I stated previously, I accept that Mr. Douglas Barry did not complete or sign the PDS. Accordingly, he was not involved in any breach of contract arising from the false statements made by the other defendants. On this basis, I find that he is not liable to the plaintiff.

**3. Negligent Misrepresentation**

**108**  A plaintiff must establish five elements for a finding of negligent misrepresentation. They were outlined as follows by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 110 [*Queen*]:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said misrepresentation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

**109**  Here, the plaintiff's claim in negligent misrepresentation is based on the contents of the PDS. I agree that misrepresentation in a property disclosure statement is capable of giving rise to a claim for damages for negligent misrepresentation.

**110**  In his written submissions, the plaintiff refers to *413255 B.C. Ltd. v. Jesson,* [*2006 BCSC 1070*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2R7-00000-00&context=) [*Jesson*], and submits that "if a disclosure statement is explicitly incorporated into a contract of purchase and sale, it is part of the contract and may form the basis for a claim for negligent misrepresentation". In fact, in *Jesson* the court found that the disclosure statement was not incorporated into the contract and that it did not constitute a collateral contract even though the contract provided that the representations contained in the disclosure statement survived the completion of sale. The plaintiff's claim based on breach of contract, therefore, failed. However, the court held that the purchaser could recover damages based on negligent misrepresentation. The court held that the vendor owed a duty of care to the purchaser not to negligently misrepresent the condition of the property. The court found that the disclosure statement misrepresented the vendor's knowledge of water damage, roof leakage or unrepaired damage to the property and that the plaintiff relied on those misrepresentations.

**111**  *Krawchuk v. Scherbak*, [*2011 ONCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4KN-00000-00&context=), leave to appeal to SCC requested [*[2011] S.C.C.A. No. 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JBDT-B4BB-00000-00&context=) [*Krawchuk*], is a recent case in which the purchasers recovered damages on the ground of negligent misrepresentation in a disclosure document. In that case, the plaintiff discovered serious structural problems, as well as plumbing problems. She sued the vendor alleging breach of contract and fraudulent or negligent misrepresentation. The vendors had provided a disclosure statement that contained the following statement (outlined by the court at para. 13):

**13** Any person who is in receipt of and utilizes this Statement acknowledges and agrees that **the** **information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter even if attached to an Agreement of Purchase and Sale**. [Emphasis in original.]

**112**  The trial judge dismissed the claim based on breach of contract holding that in the absence of any warranties or guarantees as to the fitness of the property or home, the starting point for the analysis is the principle of *caveat emptor*. The plaintiff argued that the principle of *caveat emptor* should not apply because: "(1) the defects were latent and had been deliberately concealed by the vendors; and (2) the defects were such as to render the home uninhabitable, dangerous or potentially dangerous so that they required disclosure.": *Krawchuk,* at para. 32.

**113**  The trial judge was unable to find, on the evidence, that the defendants concealed problems for the purpose of misleading prospective purchasers. He also found that the plumbing defects did not render the home uninhabitable, dangerous or potentially dangerous. With respect to the structural problems, he was unable to conclude that the property was uninhabitable, dangerous or potentially dangerous, given that the defendants had resided there with their children for 17 years.

**114**  The trial judge also dismissed the plaintiff's fraudulent misrepresentation claim. While he concluded that the defendants knowingly or recklessly made false representations of fact in the disclosure statement with respect to the foundation and the plumbing, he was not satisfied that the statements were made for the purpose of misleading the plaintiff.

**115**  With regard to the claim of negligent misrepresentation, the trial judge found that a special relationship existed between the defendants and the plaintiff because the defendants intended that the representations made in the disclosure statement would be relied on by prospective purchasers. The information that the defendants provided in the disclosure statement was false in the sense of being incomplete and that the defendants were negligent in not making complete disclosure. The trial judge found that the plaintiffs relied on the accuracy of the statements in the disclosure document. Accordingly, liability was imposed on the basis of ***negligence***.

**116**  On appeal, the court concluded that the trial judge's conclusions concerning his decision with regard to negligent misrepresentation were supported by the evidence and that he was correct in finding that a special relationship existed. At paras. 69-75, the court said:

**69** The Scherbaks advance two arguments in support of their submission that the trial judge erred in finding a special relationship duty of care based on the statements in the SPIS. First, they submit that since the statements were not warranties, they cannot give rise to liability, absent fraudulent misrepresentation or deliberate concealment. Second, they submit that the trial judge erred by ignoring the entire agreement clause contained in the agreement of purchase and sale.

**70** As for the first argument, I agree with Killeen J.'s conclusion in *Kaufmann v. Gibson* [*(2007), 59 R.P.R. (4th) 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-JS0R-20DR-00000-00&context=) (Ont. S.C.), that even though statements made in an SPIS are not warranties, they may still be the basis of liability as representations. After citing the complete first two paragraphs in the SPIS, Killeen J. said, at para. 100:

As can be seen in the opening words of para. 1, "ANSWERS MUST BE COMPLETE AND ACCURATE". *While this paragraph goes on to say that the answers do not constitute warranties, there cannot be any doubt that they can have legal consequences as representations*, especially if they were read by the purchasers before submitting their offer, as here, and were then incorporated into the terms and conditions of the agreement.

**71** This takes me to the Scherbaks' second argument that the trial judge erred in finding a duty of care in the face of what is commonly referred to as an "entire agreement" clause, also called an "integration clause", contained in the agreement of purchase and sale.

**72** The entire agreement clause contains the following wording:

This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

**73** The clause excludes reliance on representations that are alien to "[t]his Agreement" or "any Schedule attached hereto". In this case, the SPIS was specifically referred to in Schedule "A" to the agreement through the wording: "Included with the offer is the property information statement." Thus, the representations in the SPIS are not alien to the agreement; they have been specifically incorporated into the agreement by the parties and are available to the parties for the purposes of establishing liability if they are found to be untrue, inaccurate or misleading.

**74** It follows that neither the fact that the statements in the SPIS were not warranties nor the entire agreement clause precludes a finding that the Scherbaks owed a duty of care to Ms. Krawchuk.

**75** The trial judge found that the representations made by the Scherbaks in the SPIS were meant to be disclosed to prospective buyers and that it was reasonable to expect such buyers to rely on those representations. For the reasons discussed above, I agree with his conclusion that these facts are sufficient to establish a special relationship giving rise to a duty of care. [Emphasis in original.]

**117**  Similarly, in the present case, I am satisfied that a special relationship existed between James and Sheila Barry and the plaintiff because the Barrys intended that the representations made in the PDS would be relied on by the plaintiff. James and Sheila Barry were cautioned to use care in completing the PDS. They knew that their statements constituted contractual representations if accepted by the plaintiff. They must have known that the plaintiff would rely on the representations. The plaintiff's evidence is that he did rely on the PDS. That is supported by the fact that it was expressly incorporated into the contract.

**118**  However, I find that the special relationship extends only as far as the representations made in the PDS. If it is the PDS that creates the special relationship between the parties, that relationship must, therefore, be confined to the representations made therein. If the special relationship extended further than the PDS, the result would be that all vendor/purchaser relationships would be "special relationships". This would defeat the purpose of the doctrine of *caveat emptor* entirely. *Caveat emptor* is intended to be the rule, not the exception. In my view, it would not be appropriate to extend any exceptions beyond their current state in law.

**119**  The result is that only the misrepresentation regarding the unregistered easement is subject to review in order to determine whether there has been negligent misrepresentation in this case.

**120**  I will now apply the remaining requirements for establishing negligent misrepresentation outlined in *Queen*.

**121**  I have already found that the representation regarding the culvert was inaccurate. The Barrys were aware of the culvert's existence and the fact that it was an unregistered easement. Nevertheless, they stated that they were not aware of any unregistered easements on the property.

**122**  I am also satisfied that this inaccurate representation was made negligently. The PDS contained a provision stating that the sellers were "responsible for the accuracy of the answers". I cannot imagine how a knowingly inaccurate statement made under such conditions could not be one that was made negligently.

**123**  As I stated under the previous Breach of Contract section, I am satisfied that if the Barrys had answered the question correctly, Mr. Hanslo would have investigated the culvert further. If the unregistered easement had been disclosed, Mr. Hanslo would have discovered the previous issue with flooding. It was not. Instead, Mr. Hanslo relied on the statement. As a result, he suffered damage.

**124**  The defendants submit that the fact that the plaintiff retained a professional to do a home inspection before he concluded his purchase of the Property means that he placed his reliance on his own inspector and did not rely on the PDS. The defendants refer to *Manghat v. Tchilinguirian*, [*2009 BCSC 1809*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-2505-00000-00&context=) where the court said at para. 18:

**18** The first of these significant errors was the learned trial judge's apparent failure to consider and apply the principle that, once a purchaser has obtained a home inspection, then, absent fraud or concealment, reliance shifts to the home inspector. For example, see *Gallagher v. Pettinger*, [*[2003] O.J. No. 409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JBDT-B34K-00000-00&context=) (S.C.J.) at para. 63 and *Lamontagne v. Andersen*, [*2005 BCSC 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M474-00000-00&context=) at paras. 61 and 62.

**125**  With respect, I believe the foregoing is too broad a statement of principle. The question of reliance is a question of fact that will depend on the particular circumstances of the case. In *Lamontagne*, the purchaser retained an inspector who discovered potential problems with the foundation and structure. The inspector found wood boring insects and recommended that the purchaser retain a structural engineer to conduct a comprehensive examination of the foundation and the structural components, as well as consult a certified pest control officer. The purchaser chose to do neither and completed the purchase. In those circumstances, it was held that there was no reliance on the vendor.

**126**  In the present case, the nature of the inspection, which related to the home not the land, would not have discovered the culvert or the past history of flooding.

**127**  I am not satisfied that the plaintiff ceased to place reliance on the PDS once he had obtained the building inspection. He was entitled to rely on both. Accordingly, the plaintiff is entitled to recover damages on the grounds of negligent misrepresentation.

**128**  However, as I have stated repeatedly, Mr. Douglas Barry is not liable for the plaintiff's damages as, once again, the damages have arisen out of a misrepresentation in the PDS.

**4. The Claim Based on the Duty to Disclose Latent Defects that are Dangerous or that Render the Premises Unfit for Human Habitation (*Cardwell*)**

**129**  Having found that James and Sheila Barry are liable for breach of contract and negligent misrepresentation, it is not necessary for the plaintiff to rely on the proposition that a vendor is liable to disclose latent defects, of which he is aware, that render the property dangerous or unfit for human habitation, in accordance with *Cardwell*.

**130**  Much of the parties' submissions were concerned with whether the existence of the creek and culvert and the past history of flooding constitute latent defects that are dangerous or that render property uninhabitable. I am inclined to the view that these factors, on their own, would not constitute latent defects of the Property. However, it is not necessary for me to decide those questions. I am of the opinion that it is not essential in claims that are based on breach of contract and negligent misrepresentation that the plaintiff establish the existence of latent defects falling within those categories: see *Krawchuk*.

**5. Damages**

**131**  The plaintiff testified that if he had been told about the existence of the creek and culvert and that the creek had overflowed in the past and flooded the property he would not have purchased the property. I accept that evidence.

**132**  In my view, in these circumstances the plaintiff is entitled to recover damages for the cost of repairing the defects resulting from the flooding, including consequential damages that were caused by the breach of contract and negligent misrepresentation: *Nash v. McMillan* [*(1997), 222 A.R. 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JNY7-X356-00000-00&context=) (Alta. Q.B.), at paras. 39-45; *see also Jesson*, at paras. 52-53.

***(a) Cost of Remediation and Mitigation***

*(i) Mould investigation, abatement and ground floor repair costs*

**133**  I am satisfied that the plaintiff is entitled to recover the cost of investigating and repairing the damage caused by the flooding of his home by the overflowing creek to the extent that he can prove the amount of that damage and the extent of the repairs that are required to remedy that damage.

**134**  The defendants submit that they are not liable for any water damage that occurred after the plaintiff purchased the property and that, in any event, the plaintiff failed to take reasonable steps to mitigate his loss following the flood in 2006. In my view, the plaintiff's claim is not limited to damage that was, in fact, present when he purchased the property. His damages result from the defendants' breach of contract and negligent misrepresentation as to matters that created the potential for causing damage and that did, in fact, cause damage. Furthermore, I do not consider that the plaintiff acted unreasonably following the 2006 flood in not determining, at that time, the extent of water damage or repairing that damage when the potential for further flooding continued unabated. In my view, it was necessary for the plaintiff to take all reasonable steps to first deal with the root cause of the problem, namely the inadequate system for dealing with the creek flooding. He did that by entering into negotiations with the District of Mission, commencing a law suit and eventually settling the suit by way of an agreement that rectified the problem.

**135**  However, the onus is on the plaintiff to prove that the damages complained of resulted from the creek flooding and not some other problem, such as leaking plumbing, of which the defendants had no knowledge and no reason to suspect.

**136**  In my view, the plaintiff is entitled to recover the $1,050.00 that he spent to retain Theodor Sterling Associates to investigate the mould problem.

**137**  With regard to the issue of the cost of repairs, the plaintiff provided estimates from Belfor Restoration Services. These estimates were entered by consent and no one from the restoration company was called to give evidence or be cross-examined regarding the estimates. One repair estimate, in the amount of $10,781.68, is titled "Mould Remediation" and is stated to be for the following work:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Labour | $5,082.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Materials/safety supplies | 232.32 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Containment | 3,048.20 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Equipment rentals | 1,905.75 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Sub Total | 10,268.27 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Add 5% GST | 513.41 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | total | $10,781.68 |  |

**138**  The scope of work for the "Mould Remediation" for all areas, other than the bathroom, involves setting up a containment system, removing and disposing of all baseboards, removing and disposing of all flooring, removing drywall to a height of four feet, HEPA-vacuuming wall cavities and applying biocide to affected areas.

**139**  The scope of work for the bathroom includes the foregoing as well as removing and disposing of the shower stall and vanity and removing the toilet and sink.

**140**  The other estimate, in the amount of $32,424.40, is titled "Interior" and is stated to be for the following work:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Insulation/vapour barrier | $1,210.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Drywall | 9,982.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Painting | 3,236.75 |  |
|  | Plumbing | 5,203.00 |  |
|  | Carpentry | 3,478.75 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Content manipulation & storage | 2,780.58 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Flooring | 4,172.08 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Electrical | 816.72 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Add 5% GST | 1,544.02 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $32,424.40 |  |

**141**  The scope of the work for the basement, living room and bedroom apparently included the cost of installing new insulation, drywall, baseboards and all flooring.

**142**  The scope of work for the bathroom includes the foregoing, as well as supplying and installing a new shower and vanity, re-installing the toilet and sink and removing and resetting the washer and dryer.

**143**  The estimates contemplate the removal and replacement of all drywall to a height of four feet, even though the mould investigation report recommended removal to a height of two feet where mould was found as a result of further investigation and higher only where mould was found at a higher level. The mould investigation report does not support the conclusion that the whole of the basement is contaminated by mould or suffers from rot due to moisture. One of the areas where the drywall was cut away showed no evidence of mould or moisture damage. Only three areas in total were investigated by opening up exploratory holes.

**144**  The estimates also contemplate the replacement of all floors, even though the mould investigation report recommended further investigation to see if the floors were contaminated. The evidence does not support the conclusion that the floors have to be replaced.

**145**  The estimates also contemplate the replacement of the shower stall and vanity, even though there is no evidence that they are contaminated with mould and, if so, cannot be cleaned. Further, there is no evidence that any mould contamination of the shower and or vanity was caused by the flooding of the creek.

**146**  I am satisfied that further exploration work is required to determine the extent of the damage and that some remediation is likely necessary. However, I am not satisfied on the evidence put forward that remediation to the extent reflected in these repair estimates is required. The plaintiff has the onus to prove not only that the defendants are liable to pay damages but also the quantum of damages. The quality of the evidence is deficient in establishing damages in the amount claimed.

**147**  I will allow three-quarters of the estimate for mould remediation. One-half of the estimate for repairs will be allowed, not including the estimated costs associated with plumbing, flooring and electrical.

**148**  Accordingly, I find that the plaintiff is entitled to damages of $19,997.76 for remediation of water damage.

*(ii) Legal fees incurred in obtaining new drainage system from District of Mission*

**149**  The plaintiff incurred legal fees and disbursements totalling $6,911.23, in respect of his claim against the District of Mission. I am satisfied that these expenditures were properly and reasonably incurred in the plaintiff's efforts to mitigate his loss and are recoverable from James and Sheila Barry.

***(b) Consequential Damages***

1. *Retaining wall*

**150**  The 2009 flood caused the retaining wall between the Property and the upslope neighbour's property, which had already been leaning, to topple over. I am satisfied that the plaintiff is entitled to damages for the cost of remediating the retaining wall.

**151**  The plaintiff claims damages under this head totalling $3,532.55, broken down as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Inspection of retaining wall | $792.62 |  |
|  | and house foundation |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Survey | 775.31 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Tool rentals | 106.40 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Contractor | 1,795.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Soil | 62.72 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $3,532.55 |  |

**152**  There is no evidence that the floods caused any damage to the foundations, so not all of the inspection costs are recoverable from the defendants. I would allow one-half of the cost of the inspection. I therefore allow $3,136.24 under this head of damage.

*(ii) Repair to driveway*

**153**  The plaintiff claims that the driveway on the property sunk following the 2009 flood and that it will cost $1,500.00 to effect repairs to it. As I understand it, that work has not actually been carried out. The evidence does not persuade me that water flowing over the yard in 2009 caused any sinking or damage to the driveway. Accordingly, I do not allow this claim

*(iii) Cost of temporary repairs effected in 2006*

**154**  The plaintiff claims $400.00 under this head, which I accept was the cost of effecting repairs for which James and Sheila Barry are liable.

*(iv) Damages for destroyed tools and damage to trailer*

**155**  The plaintiff claims damages for the loss of, or damage to, a number of tools that he left on the floor of the carport where they were damaged by water and mud during the 2009 flood. He claims $1,000.00 on this account without providing any evidence of the age of the tools, the extent of damage or their actual value. In any event, it is my view that this loss was a result of the plaintiff's failure properly to store his tools and that the defendants are not liable for this loss.

**156**  The plaintiff also claims $1,200.00 as the estimated cost of repairing his concession trailer that was damaged when the retaining wall was knocked over by the flood. He says the axle needs to be re-aligned and the siding fixed and suggests that the cost of materials would be about $1,200.00. He has not produced evidence of precisely what materials are required or any evidence of the cost of materials beyond his bald statement. I am not satisfied he has proven this head of damage.

1. *Special damages - photographs*

**157**  The cost of photographs used to document the plaintiff's claim should be dealt with as an item of costs.

***(c) Damages for Mental Distress***

**158**  In connection with his claim for damages for mental distress, the plaintiff referred to *Cotton v. Monahan*, [*2010 ONSC 1644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFB1-F81W-21JK-00000-00&context=) [*Cotton*]. In *Cotton*, the court discussed the law with regard to damages for mental distress in the context of the non-disclosure of latent defects in the purchase of a home. At paras. 67-68, the court said:

**67** Plaintiffs' counsel correctly states that the leading authority on mental distress for breach of contract situations is *Honda v. Keays* [*[2008] S.C.J. No. 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M089-00000-00&context=). The court states that we must begin any analysis on damages for breach of contract by asking what was contemplated by the parties at the time of the formation of the contract.

**68** The Supreme Court has stated in *Fidler v. Sun Life Assurance Co. of Canada*, [*2006 SCC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B175-00000-00&context=), [*[2006] 2 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B175-00000-00&context=) that it is no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract. Instead such damages may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. In order to be successful, a plaintiff must prove his or her loss and the court must be satisfied that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

**159**  The mental distress in this case is said to be the stress suffered by the plaintiff that resulted in, or contributed to, the failure of his marriage.

**160**  In my view, the plaintiff cannot succeed in this aspect of the claim for two reasons. First, the only mental distress suffered by the plaintiff that is supported by medical evidence is his depression, which resulted from the breakdown of his marriage, not the other way around. The evidence does not persuade me that the marriage breakdown was caused by the defendants' breach of contract or negligent misrepresentation. The plaintiff testified that there were arguments about finances and the cost of remedying the damage. However, the damage of which the plaintiff was aware following the 2006 and before his separation was minimal. The plaintiff's wife admitted that there were no disagreements about finances when the plaintiff spent money renovating the house to install the kitchen. The plaintiff and his wife were having marital difficulties before they bought the house. I am not satisfied that the flooding in 2006 or the damage that it caused was a significant cause of the breakdown of the marriage.

**161**  Further, even if the defendants' breach of contract was a cause of the plaintiff's distress, I am not persuaded that such mental distress was within the reasonable contemplation of the parties at the time the contract was made. In my view, it is not reasonable to suppose that the parties would have realized that the failure to inform the plaintiff about the existence of, and prior flooding of, the creek would cause a married couple to divorce, thereby causing mental distress to the plaintiff.

**162**  Likewise, insofar as the claim based on negligent misrepresentation is concerned, I consider that the claim for damages for mental distress is simply too remote.

***(d) Aggravated/Punitive Damages***

**163**  While I have concluded that James and Sheila Barry are liable to pay damages for breach of contract and negligent misrepresentation, I can find nothing in their conduct of a high-handed, callous or egregious nature that would justify an award of aggravated or punitive damages.

**CONCLUSION**

**164**  In summary, I find that James and Sheila Barry, but not Mr. Douglas Barry, are liable in both breach of contract and negligent misrepresentation. The plaintiff is entitled to recover damages totalling $30,445.23.

**165**  Subject to any other relevant considerations being raised, the plaintiff is entitled to his costs under scale B from James and Sheila Barry.

**166**  While I have found that Mr. Douglas Barry is not liable because I found that he did not sign or authorize his signature to be placed on the PDS, I am of the view that he is not entitled to his costs because he failed to raise that issue in his pleadings.

B.M. JOYCE J.

**End of Document**

[***Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc., [2007] B.C.J. No. 64***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61RR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Gray J.

Heard: October 20, 2006.

Judgment: January 10, 2007.

Vancouver Registry No. L032558

**[2007] B.C.J. No. 64** | 2007 BCSC 28 | 64 B.C.L.R. (4th) 347 | 58 C.L.R. (3d) 251 | 154 A.C.W.S. (3d) 581 | 2007 CarswellBC 59

Between The Board of School Trustees of School District No. 48 (Howe Sound), Plaintiff, and Killick Metz Bowen Rose Architects and Planners Inc., Zagreb Construction Ltd., Bollman Roofing & Sheet Metal Ltd., D.H.S. Building Products Inc., Inland Glass & Aluminium Limited, Winwood Construction Ltd. and Inter-Coast Consultants Ltd., Defendants, and Robert Tischer doing business as Bob's Plastering & Stucco and the said Robert Tischer and Killick Metz Bowen Rose Architects and Planners Inc., Third Parties

(98 paras.)

**Case Summary**

**Construction law — Building contracts — Terms — Limitation on damages or exculpatory clause — Application by the defendant architect for an order that the plaintiff's claim was barred allowed — In 1996, the parties entered a renovation contract — The project was completed that year, and the school received notification thereof — The contract provided for extinguishment of all claims within six years of the earlier of substantial performance, or commencement of the statutory period — The plaintiff's claim was commenced in 2003 — The court found that the claim was barred, as the plain wording of the contract did not contemplate application of the discoverability principle.**

**Contracts — Formation — Express terms — Exemption and exclusionary clauses — Application by the defendant architect for an order that the plaintiff's claim was barred allowed — In 1996, the parties entered a renovation contract — The project was completed that year, and the school received notification thereof — The contract provided for extinguishment of all claims within six years of the earlier of substantial performance, or commencement of the statutory period — The plaintiff's claim was commenced in 2003 — The court found that the claim was barred, as the plain wording of the contract did not contemplate application of the discoverability principle.**

**Limitation of actions — Topics — Construction law — Application by the defendant architect for an order that the plaintiff's claim was barred allowed — In 1996, the parties entered a renovation contract — The project was completed that year, and the school received notification thereof — The contract provided for extinguishment of all claims within six years of the earlier of substantial performance, or commencement of the statutory period — The plaintiff's claim was commenced in 2003 — The court found that the claim was barred, as the plain wording of the contract did not contemplate application of the discoverability principle.**

**Civil procedure — Trials — Summary trials — Simplified procedure actions — When available or required — Application by the defendant architect for an order that the plaintiff's claim was barred by a contractual time limitation clause allowed — The plaintiff contended that the issue was unsuitable for determination by summary trial — The court held that the matter was one of contractual interpretation that did not involve factual issues — Resolution of the applicant's liability to the plaintiff would shorten the trial and assist in settlement of the claim amongst the other parties — British Columbia Supreme Court Rules, Rule 18A.**

|  |
| --- |
| Application by the defendant, Killick Metz Bowen Rose Architects and Planners, for summary determination of whether the claim of the plaintiff, the Board of School Trustees of School District No. 48 (Howe Sound), was barred by a contractual time limitation clause -- The plaintiff sued the applicant, among others, for ***negligence*** and breach of contract related to the design, inspection, supervision and renovation of its school -- The project was undertaken pursuant to a standard form consulting contract -- The contract limited the applicant's liability to the earlier of six years from the date of substantial performance of the work, or the commencement of the statutory limitation period -- The project was substantially completed in August, 1996 -- Upon use that autumn, a groundwater leak was discovered -- Repairs were undertaken in 1996 and 2001 -- In 2003, the plaintiff submitted a notification of a water ingress problem to a provincial agency -- The same year, the plaintiff notified the applicant of its potential claim and commenced legal proceedings -- The writ was not served until 2005 when the assessment of the damage and required repairs was completed by the agency -- The applicant relied on the contractual limitation -- The school contended that the issue was unsuitable for determination by summary trial, and alternatively, that the contractual limitation did not bar its claim -- HELD: Application allowed -- The matter was suitable for determination by summary trial -- The matter was one of contractual interpretation that did not involve factual issues -- Resolution of the applicant's liability to the plaintiff would shorten the trial and assist in settlement of the claim amongst the other parties -- The contract provided that the applicant's liability expired six years following the date of substantial performance, which clearly occurred -- Therefore, the discoverability principle was not applicable to the wording of the contract -- The limitation clause included both contractual and tort claims -- The wording was unambiguous, and the limitation period had expired -- Thus, the plaintiff's action against the applicant was barred by the contractual limitation period. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A

Builders' Lien Act, R.S.B.C. 1997, c. 45, s. 1

Limitation Act, R.S.B.C. 1996, c. 266, s. 6

**Counsel**

Counsel for the Plaintiff: Allyson L. Baker

Counsel for the Defendant and Third Party: Killick Metz Bowen Rose Architects and Planners Inc.: Kerry A. Short, Douglas Morrison

No other appearances

[Editor's Note: A Corrigendum was released by the Court January 12, 2007. The correction has been made to the text and the Corrigendum is appended to this document.]

|  |
| --- |
| **GRAY J.** |

**INTRODUCTION**

**1**  The plaintiff ("School Board") is a school board which owns Howe Sound Secondary School ("School"). The plaintiff has sued a number of parties, alleging that the School's building envelope leaks. The School Board alleges that the defendant Killick Metz Bowen Rose Architects and Planners Inc., which I refer to as the "Architect", acted negligently or in breach of contract in its design, inspection and supervision of the addition to and renovation of the School, which was completed on or about June 1996.

**2**  The Architect applied under Rule 18A for a summary trial of the issue of whether the School Board's claim is barred by the time limitation in the contract between the School Board and the Architect. The School Board applied for an order dismissing the Architect's Rule 18A application. The School Board's position is that this question should not be determined under Rule 18A and, if the question is decided under Rule 18A, that the contractual limitation does not bar its claim.

**3**  The two applications were heard at a one-day hearing on the basis of affidavit evidence. The only parties represented at the hearing were the School Board and the Architect. Two other defendants filed outlines in which they did not oppose the Architect's application. The remaining defendants and third party presumably took no position on the applications.

**FACTS**

**4**  The School Board owns the School, which was originally constructed in the late 1960s.

**5**  The School Board entered into a written contract with the Architect dated July 6, 1988 ("Consulting Contract"), for the design and construction of renovations and additions to the School. The renovations and additions consisted of a new gymnasium, new brick cladding on the south wing of the existing building, and new cladding and windows on the north and south walls of the existing building (the "Addition").

**6**  The Consulting Contract was essentially in a standard form known as the "Canadian Standard Form of Agreement Between Client and Architect" ("CSFACA"), 1987 edition. This document was developed by a partnership between the ten provincial associations of architecture and the Royal Architectural Institute of Canada. The CSFACA was subsequently revised, and new editions were published in 1997 and 2002.

**7**  The parties filled in the blank portions of the standard form to create the Consulting Contract. The only change to the standard form was an alteration regarding the liability of the Architect. The standard form would have limited the liability to the extent of available insurance or indemnity, but that passage was deleted from the executed Consulting Contract. The Consulting Contract provided for compensation for basic services at a rate being a percentage of the construction contract, with hourly rates for additional services.

**8**  The material clauses were the following, with "Client" referring to the School Board:

|  |  |  |  |
| --- | --- | --- | --- |
| 1.5 |  | The Contract Documents consist of the executed agreement between the Client and the contractor, the general conditions of the Contract, the plans, sketches, drawings, graphic representations, specifications and such other documents as are identified in the agreement and the general conditions as constituting part of the Contract Documents. |  |
| 1.6 |  | The Contractor is the person, firm, or corporation contracting with the Client to provide labour, materials and equipment for the execution of the Work. |  |
| 1.8 |  | Substantial Performance of the Work is as defined in the lien legislation applicable to the place of the project. If such legislation is not in force or does not contain such definition, Substantial Performance shall have been reached when the Work is ready for use or is being used for the purpose intended and is so certified by the Architect. |  |
| 1.9 |  | The Work means the total construction and related services required by the Contract Documents. |  |
| 1.10 |  | The Place of the Work is the designated site or location of the project of which the Work may be the whole or a part. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2.1.24 |  | The Architect shall determine the date of |  |
|  |  | Substantial Performance ... |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2.1.26 |  | Before the end of the period of one year following the date of Substantial Performance, the Architect shall review any defects or deficiencies which have been reported by the Client during that period, and the Architect shall notify the Contractor of those items requiring attention by the Contractor to complete the Work in accordance with the Contract. |  |
| 2.4.1 |  | The Architect is able to provide additional services to the Client as listed below. Additional services are not included in the basic services, and shall only be provided if authorized by the Client and shall be paid for by the Client as provided in this agreement. |  |
| 2.4.20 |  | Providing services after expiry of the period of one year following the date of Substantial Performance. |  |
| 3.5.1 |  | Unless otherwise stated in this agreement, the Architect's services terminate one year after certification of Substantial Performance. For services required following expiry of the period of one year after certification of Substantial Performance, the Client shall arrange with the Architect for services as provided under paragraph 2.4.20. |  |
| 3.9.1 |  | In consideration of the premises and of provision of the services by the Architect to the Client under this agreement, the Client agrees that any and all claims which he has or hereafter may have against the Architect in any way arising out of or related to the Architect's duties and responsibilities pursuant to this agreement (hereinafter referred to in this Article 3.9 as "claims" or "claim"), whether such claims sound in contract or in tort, shall be limited to the amount of $250,000.00 each claim and $500,000.00 for all claims during each period of coverage as provided by the Architect's professional liability insurance or indemnity against errors and omissions in effect at the date of execution of this agreement, including the deductible portion thereof. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 3.9.3 |  | It is agreed that: |  |

1. the Client will not assert a claim against the Architect unless the Client has asserted such a claim within any required time limitation against all persons who might reasonably be liable therefore and
2. any waiver by the Client with respect to a claim in favour of any of such persons shall constitute a waiver by the Client in favour of the Architect with respect to any claim against the Architect.

In this paragraph, "waiver by the Client" includes any agreement by the Client to a limitation, exclusion or release whether in whole or in part of the liability of another to the Client but does not include a fair agreement of settlement.

|  |  |  |  |
| --- | --- | --- | --- |
| 3.9.6 |  | The Architect's liability for all claims of the Client arising out of this agreement shall absolutely cease to exist after a period of six (6) years from the date of: |  |

1. Substantial Performance of the Work, ... or
2. commencement of the limitation period for claims prescribed by any statute of the province or territory of the Place of the Work. (sic)

whichever shall first occur, and following the expiration of such period, the Client shall have no claim whatsoever against the Architect. The Architect's liability with respect to any claims arising out of this agreement shall be absolutely limited to direct damages arising out of the Architect's services rendered under this agreement, and the Architect shall bear no liability whatsoever for any consequential loss, injury or damage incurred by the Client, including but not limited to claims for loss of profits and loss of markets.

|  |  |  |  |
| --- | --- | --- | --- |
| 5.7 |  | Re: Article 3.9.1. The amount of the Architect's Professional Liability Insurance in effect at the date of the execution of the agreement $1,000,000.00. |  |

**9**  The School Board pleaded in the amended statement of claim that the Addition was substantially completed on August 21, 1996, the date on which the Architect prepared a "Notice of Substantial Completion". This notice describes the project, owner, contractor, and Architect, and then states "[t]he Contract of the above-mentioned project has been declared substantially performed as of August 21, 1996, in accordance with the ***Builders' Lien Act*** of British Columbia".

**10**  Counsel advised that there was no dispute that use of the Addition began in the Fall of 1996.

**11**  In or about the Fall of 1996, following substantial completion, groundwater was leaking into the crawlspace. The Architect and the general contractor reviewed the problem and made recommendations for repair including the installation of a sump pump into the crawlspace. Repairs to the crawlspace were carried out in 1996 and again in 2001.

**12**  In or about the fall of 1996, water ingress was reported in the drama room. The School Board was advised that there was flashing missing at the brick wall-to-roof interface. The Architect and the general contractor repaired the flashing and no further water ingress was reported in the drama room.

**13**  In or about October 1997, the Architect and general contractor investigated skylight leaks in the multipurpose room. They concluded that the leaks had been caused by a fire on the roof of the Addition during construction. The Architect and the general contractor resolved this problem and it did not re-occur.

**14**  In October 2001, the crawlspace flooded again. The School Board carried out repairs which included removing damaged drywall and installing an additional sump pump. The addition of the second sump pump has resolved the problem of groundwater in the crawlspace.

**15**  During the late 1990s, an unusual number of schools throughout British Columbia were experiencing water ingress-related problems. As a result, in 2003 the Province of British Columbia, as represented by the Ministry of Finance, established the Building Envelope Program ("BEP").

**16**  The BEP was established to identify schools which were dealing with water ingress and building envelope failures, and to remediate the problems. Due to the large number of schools which required assessment, B.C. Housing took over the coordination of the assessments. The School Board's position is that prior to the establishment of the BEP, it did not have the resources or expertise to determine the nature of the water ingress problems, and addressed such problems on a case-by-case basis.

**17**  The School Board submitted a "Notification of Potential Water Ingress" ("Notification") to BEP on August 5, 2003. This document refers to water puddles on the floor at the base of a wall, and says that two exterior walls have signs of mold and mildew growth. Shortly afterwards, a BEP representative expressed concern to the School Board about the condition of the School. However, no assessments of the School were conducted until February 2005, about 18 months after the Notification.

**18**  By letter dated September 10, 2003 from the School Board's counsel to the Architect, the School Board advised the Architect that the School Board intended to advance a claim against the Architect for negligent design and negligent field reviews with respect to the original construction of the School. The letter referred to construction which was completed on or about June 1996. The letter said that if the Architect failed to respond to the letter, the School Board would have no alternative but to commence legal proceedings against the Architect without further notice.

**19**  The School Board's writ of summons was issued on the day of the demand letter, September 10, 2003. At that time, the only defendants were the Architect and Zagreb Construction Ltd. ("Zagreb"). The writ alleges that there were "various dangerous construction deficiencies (including deficiencies in design, inspection, workmanship and materials) (the "Deficiencies") at [the School], and resultant damage arising therefrom, in the building and other assets of the [School Board]".

**20**  The School Board claimed

against the [Architect] as the architects of record responsible for the design, inspection and supervision of the addition to and renovation of [the School] completed on or about June 1996 for breach of their contract and breach of their duty of care to the [School Board] in the said design, inspection and supervision and breach of their duty to warn the [School Board] of the Deficiencies which said breach of contract and ***negligence*** caused or contributed to the Deficiencies and damages suffered by the [School Board].

The School Board also claimed against Zagreb, as the general contractor, for breach of contract and breach of duty of care.

**21**  A legal assistant with counsel for the School Board deposed that at the time of filing the writ of summons, and still in August 2004, the School Board was not aware of the full extent of the damage to the School.

**22**  In August 2004, the School Board applied to extend the time for serving the writ of summons for a further 12 months. The School Board wished to monitor the performance of the building envelope renovations at the School to determine the extent of the construction deficiencies before making a decision whether to pursue the claim.

**23**  On August 30, 2004, the court renewed the writ of summons for a further 12 months.

**24**  In January 2005, B.C. Housing retained Morrison Hershfield Limited ("MH"), an engineering firm, to conduct investigations at various school facilities throughout British Columbia including the School.

**25**  In February and March 2005, MH performed various moisture probe tests and investigations at the School. In the opinion of Mr. Lawton, a professional engineer with MH, there are various design and construction-related deficiencies in the School, including but not limited to the following:

1. faulty design and installation of a face sealed wall assembly;
2. lack of overhangs at highly exposed elevations;
3. no end dams were provided at the window flashing assemblies;
4. failed sealant applied between the corners of the glazing and the frame;
5. failure of the joints in the stucco and at the window-to-stucco interface;
6. failure of the window jamb and sill interface;
7. failure of the glass block assembly jamb and sill interface;
8. failed sealant at the edge flashing of the sloped roof where it interfaces the brick cladding;
9. nails through the cap flashing and underlying membrane; and
10. penetrations through the flat roof which did not have appropriate sleeves nor sealant.

**26**  Assuming that the Architect fulfilled the typical role of an architect on a construction project, the Architect would have been involved in the design and review of some or all of the aspects of the building envelope noted above.

**27**  Mr. Lawton recommended repairs to the School including the following:

1. re-cladding of the stucco walls that are exposed to the elements, including the north and south elevations of the North wing;
2. replacement of decayed sheathing and framing components;
3. removal and reinstallation of windows in a properly waterproofed rough opening in the wall areas that are to be re-clad;
4. addressing the scupper and roof edge detail; and
5. cleaning and resealing the perimeter of the skylight glazing.

**28**  Mr. Lawton's opinion in May 2005 was that it would cost about $676,600 to repair the deficiencies, based on construction costs at that time. In his opinion, the parties potentially responsible for the deficiencies included the architect, general contractor, the installers of stucco, roofing, flashing, windows, and sealant, and the window supplier.

**29**  By order dated August 18, 2005, five additional parties were added as defendants. The School Board filed an amended writ of summons on August 22, 2005. The defendants were served with the order and amended writ of summons by letter also dated August 22, 2005. The School Board asked each defendant to hold the matter in abeyance until the School Board had made further plans with respect to the assessment and remediation of the Addition.

**30**  In September 2005, the Architect demanded that the School Board produce a statement of claim. The statement of claim was filed on November 2, 2005.

**31**  By letter dated January 18, 2006, counsel for the Architect served the application material relating to the Architect's application for a summary trial under Rule 18A.

**32**  The School Board's counsel responded by asking the Architect's counsel to hold the application in abeyance until a decision had been reached on the Rule 18A application in another lawsuit involving another school. The Architect's counsel agreed, but then in June 2006 sought to schedule the hearing in September 2006. The claim against the Architect involving the other school settled in July 2006.

**33**  In August 2006, counsel for the Architect scheduled the Rule 18A application for October 11, 2006.

**34**  On October 3, 2006, Zagreb filed a third party notice against the Architect.

**35**  The School Board filed an amended statement of claim on September 8, 2006. The School Board refers to the Consulting Contract, and also alleges that the Architect owed the School Board an independent duty of care. The School Board alleged that the Architect breached the Consulting Contract and was negligent and in breach of its independent duties to the School Board, including an alleged duty to warn the School Board about defects and deficiencies. The School Board also alleged that the Architect fundamentally breached the Consulting Contract. During the hearing of the application, counsel advised that the School Board was withdrawing the allegations of fundamental breach and breach of a duty to warn.

**36**  The School Board does not allege in the amended statement of claim that the Architect was engaged to perform services not covered by the Consulting Contract.

**37**  Three of the named defendants have not filed appearances to the writ of summons. Zagreb has filed an appearance but not a statement of defence. Three defendants, being the Architect, Bollman Roofing & Sheet Metal Ltd., and Winwood Construction Ltd., have filed statements of defence. Winwood filed a third party notice naming Robert Tischer, doing business as Bob's Plastering & Stucco and Robert Tischer, as a third party. That third party has filed an appearance but not a defence.

**38**  Neither the School Board nor the Architect has delivered a list of documents. None of the parties have conducted examinations for discovery. The parties have not scheduled a trial date.

**39**  B.C. Housing has budgeted the remediation of the School at approximately $900,000. Mr. Lawton did not provide an update to his May 2005 estimate of $676,000, but deposed that construction costs have risen significantly since he made that estimate. There is no specific date for commencement of the remediation process, but B.C. Housing anticipates that the project will commence in the spring of 2007.

**40**  The Rule 18A applications proceeded at a one-day hearing on October 20, 2006. As I understand it, a judge was not available on October 11, 2006, and as a result, the hearing was rescheduled to October 20, 2006.

**ISSUES**

**41**  There are two issues:

1. Would it be unjust to decide the issues on the Rule 18A application; and if not,
2. Is the School Board's claim barred by the terms of the Consulting Contract?

**POSITION OF THE PARTIES**

**42**  The position of the Architect is that the court should decide the issues on the Rule 18A application for the following reasons:

1. it will save time and money for the parties in this action and others, whatever the outcome on the merits;
2. the only question which the court must decide to resolve the Architect's application involves interpretation of the Consulting Contract; and
3. the question does not depend on any factual determinations, and is a question of interpretation of a contract and applying it in the circumstances of the facts about which there cannot be any dispute.

**43**  The School Board argues that the question is not suitable for determination under Rule 18A because it would be unjust and it will not result in an efficient resolution of the lawsuit.

**ANALYSIS**

1. **Suitability for Rule 18A**

**44**  The jurisdiction of the court under Rule 18A and the issues relating to whether the court ought to grant judgment on an issue were well summarized by Groberman J. in ***Coast Foundation Society (1974) v. John Currie Architect Inc.***, [*[2003] B.C.J. No. 2749*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TS-00000-00&context=), [*2003 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TS-00000-00&context=), at paras. 11-18, as follows:

[11] Rule 18A allows a party to apply to the court for judgment, "either on an issue or generally". Rule 18A(8) and (11) set out the circumstances in which judgment may be given:

1. On an application heard before or at the same time as the hearing of an application under subrule (1), the court may

...

1. dismiss the application under subrule (1) on the ground that
2. the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or
3. the application under subrule (1) will not assist the efficient resolution of the proceeding.

...

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

[12] A summary trial can serve as an efficient manner of disposing of issues or claims in appropriate circumstances. Where the court has the entire claim before it on a summary trial application, it will generally endeavour to grant judgment unless credibility issues preclude the fair adjudication of matters on affidavit evidence. There are, of course, exceptions. Discoveries, for example, may not have progressed to the point where the court is satisfied that each side has had an opportunity to uncover all of the evidence that might be important to its case. In such a case, it might be unjust to grant judgment: *Bank of British Columbia v. Anglo-American Cedar Products Ltd*. [*(1984), 57 B.C.L.R. 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2GK-00000-00&context=) (S.C.). The court will also decline to grant judgment where the complexity of the issues is such that the court is unable to absorb all of the evidence and legal argument in the compressed time available within the Rule 18A procedure: *Chen v. Chen*, [*2002 BCSC 906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=), [*22 C.P.C. (5th) 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=).

[13] The question of when the court ought to give judgment on an issue, as opposed to on the claim generally, is more complex. The court is justifiably reluctant to decide cases in a piecemeal fashion. In addition to all of the concerns that arise when the entire claim is before the court, there is a multitude of others. The result is that the court must exercise considerable caution before coming to the conclusion that it should grant judgment on an issue in a summary trial.

[14] Where a Rule 18A application requires determination of a difficult issue of law that might not need to be resolved in order to decide the claim at trial, for example, the court may conclude that the appropriate development of the common law demands restraint: *Bacchus Agents (1981) Ltd. v. Phillipe Dandurand Wines Ltd*., [*2002 BCCA 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=), [*164 B.C.A.C. 300*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=).

[15] The court must also be wary of making determinations on particular issues on a Rule 18A application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: *Prevost v. Vetter*, *2002 BCCA 202*, *210 D.L.R. (4th) 649*; inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A: *B.M.P. Global et al v. Bank of Nova Scotia,* [*2003 BCCA 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0BG-00000-00&context=), [*[2003] B.C.J. No. 2383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0BG-00000-00&context=).

[16] It must be borne in mind that the primary purpose of Rule 18A is the efficient resolution of disputes. Where the court does not consider that the determination of an issue under Rule 18A will assist in the efficient resolution of the dispute, it ought not to make the determination.

[17] There are at least two aspects to be considered in gauging the efficiency of the summary trial process. First, this court must be concerned about the allocation of its own resources: *North Vancouver (District) v. Lunde* [*(1998), 60 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2F7-00000-00&context=) at 212 (C.A.) (paragraph 33). Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.

[18] Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.

**45**  The School Board relies on two other cases in which the court declined to determine under Rule 18A whether a claim was time-barred. The two cases were ***Strata Plan VR 2771 v. Cressey Development Corp and others***, [*[2002] B.C.J. No. 2584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X39P-00000-00&context=), [*2002 BCSC 1585*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X39P-00000-00&context=), and ***Strata Plan LMS 2262 v. Stoneman Developments Ltd.***, [*[2005] B.C.J. No. 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4C4-00000-00&context=), [*2005 BCSC 410*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4C4-00000-00&context=).

**46**  In both those cases, the claim was allegedly barred by the requirements of s. 286 of the ***Local Government Act***, *R.S.B.C. 1996, c. 323* (***"LGA"***). That section provides as follows:

286(1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.

(2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action.

(3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes

1. there was reasonable excuse, and
2. the defendant has not been prejudiced in its defence by the failure or insufficiency.

**47**  The question of whether a claim is barred by s. 286 of the ***LGA*** raises issues of when the damage was sustained, whether there was a reasonable excuse for failing to give a sufficient note, and whether the defendant has been prejudiced in its defence. Determination of those questions may overlap with issues involving other parties.

**48**  The two cases relating to s. 286 of the ***LGA*** are of no assistance in resolving the application at bar. The facts relevant to determining the question in this case, as discussed below, are simply when Substantial Performance occurred, and whether the School Board commenced the lawsuit within the following six years. That is because, as set out below, the "discoverability" principle does not apply to the event in clause 3.9.6(a). Concerns about overlapping factual findings do not arise.

**49**  If I am wrong in concluding that the "discoverability" principle does not apply to the fixed event term in clause 3.9.6(a), in my view, it would be necessary to have a trial to determine issues of when the School Board's claim was discoverable. Those facts could well overlap with other findings of fact at issue in the lawsuit. For example, the timing and extent of any observed damage would likely be relevant both to the question of discoverability and to issues of liability. Those issues, like the application of the limitation period under the ***LGA*** considered in ***Stoneman, supra,*** and ***Cressey, supra***, in my view, would require a full trial.

**50**  In this case, the Rule 18A application took one day. The underlying litigation is at preliminary stages. If the Architect is held not to be liable to the School Board, fewer issues must proceed to trial. Even though the Architect may be the subject of third party proceedings, it will not be facing potential liability to the School Board. As a result, its exposure to liability may be reduced. In addition, if the Architect is not liable to the School Board, that finding may result in the Architect avoiding liability to the defendant which issued the third party notice against it: see ***Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.***, [*[1997] 3 S.C.R. 1210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WX-00000-00&context=) at para. 123, [*153 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WX-00000-00&context=).

**51**  There are similarities between this case and the decision in ***Coast Foundation, supra***. In both cases, the defendant architect sought a determination under Rule 18A regarding an identically-worded contractual term, clause 3.9.6. In ***Coast Foundation*** it was from the 1988 edition of the CSFACA, while in the case at bar it was from the 1987 edition.

**52**  However, in ***Coast Foundation***, resolution of the contractual limitation issue was likely to result in the trial either being postponed, or proceeding under an awkward uncertainty as to what issues would ultimately need to be decided. Here, the litigation is in early stages. The trial date has not been scheduled. It is likely that any appeals could be resolved before the trial date.

**53**  Another important difference relates to the breadth of the allegations. In the case at bar, the School Board's allegations relate entirely to the Architect's work under the Consulting Contract. In ***Coast Foundation***, there were allegations relating to pre-contractual ***negligence*** and a warranty inspection which was outside the scope of the contract. There were also two plaintiffs, one of which made allegations in tort that were independent of any contractual obligations of the architect.

**54**  In ***Coast Foundation***, it was disputed whether determination of the limitation issue would reduce the total amount of trial time needed to resolve the dispute. There, the architect argued that it would result in a significant shortening of the trial, while the school board argued that it would not.

**55**  Resolution of the contractual limitation question may reduce the trial time in this case. That is because it may resolve the issue of the Architect's liability not only to the School Board but also to the defendants who pursue third party proceedings against the Architects. While the trial may still address the question of the Architect's responsibility, if any, in order to allocate fault among tortfeasors, if the Architect ceases to be a party, it would not have the right to examine witnesses or make argument. As a result, resolution of the issue may reduce the length of the trial.

**56**  In addition, resolution of the Architect's liability to the School Board may assist in settlement of the claim, primarily by reducing the remaining parties' expectations of contribution by the Architect.

**57**  In all these circumstances, it would be just to determine the questions arising from the contractual time limitation in clause 3.9.6 on a summary trial.

1. **Consulting Contract**

**58**  Clause 3.9.6 of the Consulting Contract provides that

[t]he Architect's liability for all claims of the [School Board] arising out of this agreement shall absolutely cease to exist after a period of six (6) years from the date of:

1. Substantial Performance of the Work ...; or
2. commencement of the limitation period for claims prescribed by any statute of the province or territory of the Place of the Work,

whichever shall first occur, and following the expiration of such period, the [School Board] shall have no claim whatsoever against the Architect ...

**59**  In other words, Clause 3.9.6 provides that the School Board's claims arising out of the Consulting Contract shall cease six years from the earlier of several events. In this case, only two events apply, being Substantial Performance of the Work or the commencement of the limitation period prescribed by the ***Limitation Act***, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=).

**60**  The ***Limitation Act*** provides in s. 6 that the limitation period for damage to property does not begin to run until the identity of the defendant is known to the plaintiff and the facts within the plaintiff's knowledge would suggest, with appropriate advice, that the School Board had a reasonable prospect of succeeding in a lawsuit.

**61**  There are three issues which potentially arise concerning interpretation and application of the Consulting Contract. First, does the "discoverability" principle apply? Second, does the time limitation apply to claims in tort? Third, how does the properly interpreted contractual term apply in the facts of this case?

1. **Discoverability**

**62**  The School Board argued that the time limitation in the Consulting Contract should not commence until the potential claim against the Architect was "discoverable". A number of cases have considered situations in which a court concluded that a cause of action did not arise until it was "discoverable", meaning when the plaintiff discovered, or ought reasonably to have discovered, the facts which gave rise to the claim. The plaintiff argued that the claim was not discoverable until the BEP report in 2003, because that is when it recognized the extent and likely cause of the damage.

**63**  This question potentially raises two issues. First, as a matter of interpretation of the Consulting Contract, does the question of discoverability arise? Second, if the question of discoverability arises, when ought the School Board reasonably to have discovered the necessary facts?

**64**  The question of whether the "discoverability" principle applies to contractual time limitations, as distinct from statutory time limitations, is not settled. However, even with respect to statutes, the question of discoverability is a matter of interpretation.

**65**  This issue was discussed by Bastarache J., writing for the court in ***Ryan v. Moore***, [*[2005] 2 S.C.R. 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B14C-00000-00&context=), [*2005 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B14C-00000-00&context=), at paras. 22-24, as follows:

22 The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.

23 While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224, *Peixeiro v. Haberman,* [*[1997] 3 S.C.R. 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3V2-00000-00&context=) (S.C.C.), at para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Piexeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

*(Fehr v. Jacob* [*(1993), 14 C.C.L.T. (2d) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-JCRC-B4WD-00000-00&context=) (Man. C.A.), at p. 206). See also *Peixeiro*, at para. 37; *Snow (Guardian ad litem of) v. Kashyap* [*(1995), 125 Nfld. & P.E.I.R. 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F1H1-2292-00000-00&context=) (Nfld. C.A.).

24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55).

**66**  The policy concern motivating the "discoverability" doctrine is the injustice of a law which bars a claim before the plaintiff is even aware of its existence. The policy concerns against applying the "discoverability" principle are the same policy concerns which led to limitation periods. The three rationales for limitation periods can be summarized as rationales of certainty, evidence and diligence.

**67**  The first rationale is that there comes a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations, and in that sense a statute of limitation is sometimes called a statute of repose. The second rationale is to avoid claims based on stale and potentially incomplete evidence. The third rationale is that plaintiffs should act diligently, and so statutes of limitations provide an incentive for plaintiffs to sue in a timely fashion.

**68**  In construing a contract, other principles arise. These concerns were referred to by La Forest and McLachlin JJ. in ***BG Checo International Ltd. v. British Columbia Hydro & Power Authority***, [*[1993] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=) at paras. 26-27, [*99 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=), as follows:

[15] ... it is always open to parties to limit or waive the duties which the common law would impose on them for ***negligence***. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. ... if two business firms agree that a particular risk should lie on a party who would not ordinarily bear that risk at common law, they may do so ...

[16] Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering - the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort.

**69**  In ***Gray v. Canada Life Assurance Co.***, [*184 Man.R. (2d) 224*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JK4W-M3B6-00000-00&context=), [*2004 MBCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JK4W-M3B6-00000-00&context=), the Manitoba Court of Appeal applied the discoverability principle in claims under a disability insurance policy. However, at para. 15, Twaddle J.A. said as follows:

I would not myself have construed the limitation provision of the policy as introducing the discoverability rule to claims under the policy. The parties have agreed, however, that the provision is to be so construed. The defendant takes issue not with the use of the rule but with its application.

**70**  In light of the agreement by the parties, this decision does not establish that the "discoverability" principle is applicable in construing a contract, or that it was applicable to the wording of the contract in question.

**71**  In ***Reed v. Garbutt*** [*(2003), 28 C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-F1H1-21VV-00000-00&context=), [*[2003] O.J. No. 4201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-F1H1-21VV-00000-00&context=) (Ont. Sup. Ct.), the court considered whether a time limitation arising in a contract should apply to bar the plaintiff's claim. In that case, the contract provided that the owner expressly waived and released the contractor from all claims against the contractor including, without limitation, those that might arise from the ***negligence*** or breach of contract by the contractor except those made in writing within a period of six years from the date of Substantial Performance of the Work. The court held at para. 152 that the contractual limitation period was dependent on the delivery of a formal certificate of total completion of the work, a step that was never taken. The court also commented in *obiter dicta* that the contractual limitation period in the contract was dependent on discoverability principles.

**72**  In ***Vine Hotels Inc. v. Frumcor Investments Ltd.*** [*(2004), 73 O.R. (3d) 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WG-00000-00&context=), [*29 R.P.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WG-00000-00&context=), the Divisional Court of the Ontario Superior Court of Justice concluded that whether a lease should be interpreted to be subject to the discoverability rule was a genuine issue that required a trial, and the question of when the plaintiff ought reasonably to have discovered the breach was a question that could only be resolved at trial.

**73**  Himel J., giving the judgment of the court, wrote at paras. 27 and 28 as follows:

[27] The case at bar differs from those discussed above. The action is based solely in contract, not concurrently in contract and tort. The limitation period at issue is not statutorily imposed, but rather a contractual term. The application of the discoverability rule to a limitation period agreed to by the parties to a contract has yet to be judicially considered. The case at bar deals not with a contract of indemnity, but with a simple contract. This lack of authority was addressed by Graeme Mew in the Law of Limitations, 2nd ed. (Toronto: Butterworths, 2000) at p. 174:

... in the absence of a definitive Supreme Court of Canada decision that is not centered on the question of a breach of duty of care, the question of whether a breach of contract simpliciter (not being a contract of indemnity) is subject to the judge-made discoverability rule remains unsolved.

[28] I conclude the injustice of a law that bars a claim before the plaintiff is even aware of its existence is arguably the same whether it deals with a statutory limitation period or a limitation period agreed to by the parties to a private contract. Consideration of this question should not be disposed of in a motion for summary judgment, but rather at trial. There, an evidentiary base can be established to address any policy issues which favour or disfavour the application of the discoverability rule to simple contracts.

**74**  In my opinion, the principle of discoverability ought to be considered in construing a contract. However, as distinct from construing statutes, the court must take into account the principle of primacy of private ordering and the fact that parties to a contract allocate certain risks between them. In this case, clause 3.9.3 provides that the Architect's liability to the School Board arising out of the contract "shall absolutely cease to exist" six years after the earlier of several dates. One of those dates requires application of the ***Limitation Act***, which includes a principle of discoverability in the postponement terms of s. 6. However, the parties agreed that the Architect's liability would end earlier if the date which was six years following other events, including Substantial Performance of the Work, occurred first.

**75**  The parties entered into a contract which required time to run from a fixed event, being Substantial Performance, which clearly occurs without regard to the School Board's knowledge. In cases where the wording of a time limitation permits time to run for example from when the "damages were sustained", as in ***Peixeiro v. Haberman***, [*[1997] 3 S.C.R. 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3V2-00000-00&context=), [*151 D.L.R. (4th) 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3V2-00000-00&context=), or after "the date on which the right to do so arose", as in ***Nielsen v. Kamloops (City)***, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=), [*10 D.L.R. (4th) 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=), the court must consider if enough has occurred to cause "damage" or give rise to a cause of action. In contrast, the pivotal event in the Consulting Contract is the date of Substantial Performance of the Work as set out in clauses 3.9.6 and 1.8.

**76**  The reasons the parties would choose to enter into such a term are easy to understand. The parties allocated risks between them under the terms of the Consulting Contract, with each party agreeing to accept a particular risk. They could order their affairs accordingly, such as by securing appropriate insurance.

**77**  In this case, the facts necessary to determine the question of interpretation of the Consulting Contract requires only an examination of the contract.

1. ***Negligence***

**78**  The School Board relied on ***BG Checo, supra,*** for the proposition that it ought to be free to pursue a claim in ***negligence***. The School Board referred to the passages in ***BG Checo*** to the effect that actions in contract and tort may be concurrently pursued unless the parties by valid contractual provision indicate that they intended otherwise.

**79**  The difficulty with this argument is in the wording of clauses 3.9.1 and 3.9.6. Clause 3.9.6 provides that the Architect's liability "for all claims of the [School Board] arising out of this agreement shall absolutely cease to exist ...". Clause 3.9.1 refers to "all claims which [the School Board] has or hereafter may have against the Architect in any way arising out of or related to the Architect's duties and responsibilities pursuant to this agreement (hereinafter referred to in this Article 3.9 as "claims" or "claim)." That is a broad description that includes ***negligence*** claims arising out of the Consulting Contract.

**80**  The words "whether such claims sound in contract or tort" appear in clause 3.9.1 after the parenthetical definition of "claims" and "claim". In my view, those extra words do not alter the interpretation of the term "claim". It was already broad enough to include both contractual and tort claims, so the extra words were unnecessary.

**81**  The School Board argued that the monetary limitation on claims in clause 3.9.1 applied to claims in both contract and tort, but the time limitation to claims in clause 3.9.6 applied to contract claims only. In my view, that is not the ordinary meaning of the words as set out in the Consulting Contract.

**82**  Alleging ***negligence*** cannot be used to avoid the clause. Where the particulars of a contractual breach are the same as those of a tort allegation, the court will not permit the plaintiff to avoid the contractual limitation by suing in tort: see ***Central & Eastern 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 206, [*31 D.L.R. (4th) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=).

**83**  Kaufman J. came to the same conclusion in ***Seven Oaks School Division No. 10 v. GBR Architects Ltd.*** [*(2002), 169 Man.R. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-FGY5-M1R9-00000-00&context=), [*2002 MBQB 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-FGY5-M1R9-00000-00&context=). He considered the same clause, from the 1987 edition of the CSFACA.

**84**  Kaufman J. concluded, at para. 43, that "the limitation clause is clear and all-inclusive and would be a complete bar to the action". As a result, he refused leave to commence a lawsuit. Leave was required by the terms of ***The Limitation of Actions Act***, R.S.M. 1987, c. L150.

**85**  The School Board also sought to contrast the wording of the Consulting Contract with the wording of the later 1997 edition of the CSFACA.

**86**  Interpretation of a contract is an exercise in determining the intention of the parties in an objective sense. Ordinarily, that is done by examining the words of the contract. In some situations, such as when the words are ambiguous, extrinsic evidence may be admissible: see ***R. v. Horse***, [*[1988] 1 S.C.R. 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23H1-00000-00&context=) at 201, [*47 D.L.R. (4th) 526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23H1-00000-00&context=), and ***Sullivan v. Graydon***, [*[2000] B.C.J. No. 1281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-229P-00000-00&context=), [*2000 BCSC 999*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-229P-00000-00&context=) at para. 8.

**87**  In this case, there is nothing ambiguous about the wording of the Consulting Contract, and evidence about the later standard form of contract is therefore inadmissible.

1. **Application to Facts**

**88**  The Architect argued that in this case, the School Board's claim ceased to exist on August 21, 2002, being 6 years following "Substantial Performance".

**89**  As stated above, the Consulting Contract defines "Substantial Performance" at clause 1. 8 as follows:

Substantial Performance of the Work is as defined in the lien legislation applicable to the place of the project. If such legislation is not in force or does not contain such definition, Substantial Performance shall have been reached when the Work is ready for use or is being used for the purpose intended and is so certified by the Architect.

**90**  The School Board alleged at paragraph 10 of the amended statement of claim that the Addition was substantially "completed" on August 21, 1996. However, that allegation does not use the contractually defined term "Substantial Performance", and therefore is not a specific admission that the date referred to in Clause 3.9.6 was reached on August 21, 1996.

**91**  There is no definition of "Substantial Performance" in the ***Builders Lien Act***, R.S.B.C. 1997, c. 45. The ***Builders Lien Act*** uses the term "completed" and defines that term in s. 1 as follows:

[I]f used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed.

**92**  The Architect relies on the notice of August 21, 1996. That notice states that the project "has been declared substantially performed as of August 21, 1996, in accordance with the ***Builders' Lien Act*** of British Columbia." The notice is entitled "Notice of Substantial Completion", but the body of the notice says that the project has been declared "substantially performed".

**93**  The notice does not certify that the Work is ready for use or is being used for the purpose intended. However, it declares that Substantial Performance has been reached. It was not disputed that use of the Addition began the fall of 1996.

**94**  The School Board argued that the August 21, 1996 notice did not satisfy the requirements of clause 1.8 that "Substantial Performance shall have been reached when the Work is ready for use or is being used for the purpose intended and is so certified by the Architect".

**95**  The Architect's notice is a certificate that Substantial Performance was reached. The fact that the Architect used the term "substantial completion" in the title of the notice rather than the term "substantially performed" used in the body of the notice, and the fact that the notice refers to the ***Builders Lien Act***, do not disqualify the notice from being a notice of "Substantial Performance." The Consulting Contract provided at clause 2.1.24 that the Architect shall determine the date of Substantial Performance, but did not specify a form of notice. The actual notice in this case, in the context of actual use of the Addition for the intended purpose, meets the applicable definition of "Substantial Performance".

**96**  This lawsuit was not commenced until September 10, 2003. That was over a year after August 21, 2002, the date six years following Substantial Performance. By then, pursuant to clause 3.9.6, the Architect's liability to the School Board for all claims arising out of the Consulting Contract had ceased to exist. "Claims" were defined in clause 3.9.1 to include any and all claims against the Architect "in any way arising out of or related to the Architect's duties and responsibilities pursuant to" the Consulting Contract.

**SUMMARY**

**97**  The School Board's claims against the Architect in the amended statement of claim arise out of or are related to the Architect's duties and responsibilities pursuant to the Consulting Contract. Pursuant to clause 3.9.6, and the Architect's August 21, 1996 notice, the Architect's liability for such claims ceased to exist before this lawsuit was commenced. As a result, the School Board's claim against the Architect must be dismissed.

**98**  The Architect is entitled to its costs against the School Board on Scale B.

GRAY J.

\* \* \* \* \*

CORRIGENDUM

Released: January 12, 2007.

Corrigendum to the Reasons for Judgment issued advising that paragraph 98 should read as follows:

The Architect is entitled to its costs against the School Board on Scale B.

**End of Document**

[***Western Express Air Lines Inc. (Re), [2006] B.C.J. No. 1906***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3M3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Brenner C.J.S.C.

Heard: July 4, 2006.

Judgment: August 21, 2006.

Vancouver Registry No. L041526

**[2006] B.C.J. No. 1906** | 2006 BCSC 1267 | [2006] 12 W.W.R. 358 | 58 B.C.L.R. (4th) 188 | 21 B.L.R. (4th) 84 | 24 C.B.R. (5th) 307 | 151 A.C.W.S. (3d) 1149 | 2006 CarswellBC 2073

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 AND IN THE MATTER OF The Canada Business Corporations Act, R.S.C. 1985, c. C-44 AND IN THE MATTER OF The Business Corporations Act, R.S.A. 2000, c. B-9 AND IN THE MATTER OF Western Express Air Lines Inc. and Western Express Air Lines (Alberta) Inc., Petitioners

(31 paras.)

**Case Summary**

**Corporations and associations law — Corporations — Directors — Liabilities — For employee wages — Where Canada Labour Code contained provision imposing liability for employee wages on directors following bankruptcy, and Canada Business Corporations Act contained similar provision with added requirement that claims be filed within six months of bankruptcy, provisions were not in conflict — Presumption of overlap applied, both provisions were operative, and employees were required to file claims within six-month period — Directors were entitled to protection under Directors' Charge because inadvertent failures to ensure all liabilities were being funded did not amount to failure to act honestly and in good faith.**

**Statutory interpretation — Statutes — Construction — Presumption of validity — Where Canada Labour Code contained provision imposing liability for employee wages on directors following bankruptcy, and Canada Business Corporations Act contained similar provision with added requirement that claims be filed within six months of bankruptcy, provisions were not in conflict — Presumption of overlap applied, both provisions were operative, and employees were required to file claims within six-month period — Directors were entitled to protection under Directors' Charge because inadvertent failures to ensure all liabilities were being funded did not amount to failure to act honestly and in good faith.**

**Insolvency law — Claims — Priorities — Wages — Where Canada Labour Code contained provision imposing liability for employee wages on directors following bankruptcy, and Canada Business Corporations Act contained similar provision with added requirement that claims be filed within six months of bankruptcy, provisions were not in conflict — Presumption of overlap applied, both provisions were operative, and employees were required to file claims within six-month period — Directors were entitled to protection under Directors' Charge because inadvertent failures to ensure all liabilities were being funded did not amount to failure to act honestly and in good faith.**

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| Motion by CitiCapital for declaration that claims advanced by Human Resources and Skills Development Canada (HRSDC) on behalf of former employees and contractors were statute barred pursuant to s. 119(2) of Canada Business Corporations Act, except for claims filed within allowable six-month period -- Motion by former directors of Westex for order requiring payment to be made by receiver pursuant to terms of Directors' Charge -- Following bankruptcy of Westex, HRSDC issued payment orders against its former directors, Steeles and Remedios, in respect of amounts owed to former Westex contractors and employees -- Before being assigned into bankruptcy, Westex was granted creditor protection under Companies' Creditors Arrangement Act -- Pursuant to that order, a Directors' Charge was created, which was a charge protecting Westex's directors from liabilities for wages, provided directors had acted honestly and in good faith -- CBCA created statutory liability for directors where claim was made within six months of bankruptcy -- However, some employees or contractors failed to prove claims within required six months -- HRSDC argued Canada Labour Code also contained statutory liability for directors, but did not limit time period for claims to six months, and that Code contained a paramountcy provision which stated that it applied notwithstanding any other law -- Accordingly, HRSDC argued claims of former employees or contractors were not lost because they failed to claim within six-month period referred to in CBCA -- At issue was whether provisions of Code and CBCA were in conflict, and whether former directors were entitled to protection of Directors' Charge -- HELD: Motions allowed -- There was a presumption of overlap in statutory interpretation, which provided that where two provisions were applicable to same facts, court would attempt to apply both -- If provisions were not in conflict, it was presumed both provisions were meant to apply -- Code imposed liability on directors for wages up to maximum of six months, provided recovery from corporation was impossible or unlikely -- CBCA contained similar provisions with added proviso that claims must be proved within six months -- Both statutes could operate in tandem to provide employees with all benefits afforded to them under Code, and still provide directors with certainty and protection afforded them under CBCA -- There was no conflict, and legislative objectives of both statutes could be fostered by requiring employees to file claims in timely manner -- Therefore, only those claims filed within six-month period following bankruptcy could be advanced -- Although directors unintentionally failed to ensure that Code liabilities were being funded and overtime was being paid, directors did not lose entitlement to indemnity provision of Directors' Charge as a result -- Standard of perfection was neither realistic, nor achievable -- Indemnity covered liabilities incurred before date of Directors' Charge as well as liabilities going forward from that date. |

**Statutes, Regulations and Rules Cited:**

Canada Business Corporations Act, s. 119(2)

Canada Labour Code, s. 168(1), s. 251.18

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| **BRENNER C.J.S.C.** |

**1**   This matter relates to payment orders issued by Human Resources and Skills Development Canada ("HRSDC") against Donald Steele ("Steele") and Julian Remedios ("Remedios"), former directors of Western Express Airlines Inc. ("Westex"). CitiCapital Limited ("CitiCapital") seeks a declaration that the claims advanced by HRSDC are statute barred pursuant to s. 119(2) of the except for those employees who filed their Proofs of Claim in the Westex Bankruptcy on or before May 24, 2005. Remedios and Steele seek orders for the payment by the receiver of any monies due and payable under the HRSDC payment orders. CitiCapital says that Steele and Remedios should be denied the benefit of those payments under the Director's Charge because they failed to take all reasonable steps to attempt to minimize the liability to former Westex contractors and employees.

**2**  On June 18, 2004 Westex and Western Express Airlines Alberta Inc. were granted protection from their creditors by an Order of this court issued pursuant to the ***Companies Creditors Arrangement Act (****the "Order")*. Westex is incorporated under the ***CBCA.***The Order contained provisions barring "any application or proceeding pursuant to the ***Code*** [***Canada Labour Code***] against Western Express and staying "all suit, action or other proceeding against any current or former director" of the company. The Order also created a number of super priority charges related to various potential liabilities arising out of Westex's attempted restructuring including a charge protecting Westex's directors and officers from certain liabilities (the "Directors' Charge"). The relevant provisions of the Order with respect to the Directors' Charge are as follows:

1. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, ... and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, vacation pay, severance pay and other monies to or in respect of its contract pilots, contract engineers, employees or consultants (hereinafter collectively referred to as "Wages") provided that such Wages are payable after the Filing Date.

...

1. THIS COURT FURTHER ORDERS that the Petitioner is permitted to indemnify its present and future directors and officers and each of them with respect to any personal liability they might incur as directors and officers of the Petitioner for the current payroll obligations, if any, of the Petitioners to their employees for Wages as calculated under the ***Employment Standards Act*** *R.S.B.C. 1996, c. 113* and similar statutes in other jurisdictions and remittances in connection therewith ... as those amounts are earned from time to time, including the outstanding statutory vacation pay, banked overtime, severance pay or home equity purchase program entitlement owed to its employees, amounts owing in respect of federal or provincial sales or excise tax (including GST), and amounts owing in respect of any workers' compensation authority whether its premiums or assessments or any other legislation under which they might occur personal liability provided further that:
2. such indemnity shall apply only to the extent that the directors and officers have acted honestly and in good faith with the view to the best interests of the Petitioner, have not committed wilful misconduct or ***negligence***, and have not authorized actions or conduct inconsistent with the terms of the [sic] this Order or any other order subsequently pronounced in these proceedings;
3. the current and former directors and officers shall be entitled to the benefit of, and are hereby granted, a charge and security interest (the "Directors' Charge") over all of the Assets in priority to all other creditors of the Petitioner, including the DIP Charge and any other encumbrances, security or security interest now outstanding to secure such indemnification, subject in priority only to the security interest in respect of the HSBC Charge and the Administrative Charge created by this Order, to secure the indemnity obligations of the Petitioner to the current and former directors and officers.
4. THIS COURT FURTHER ORDERS that the Petitioner be permitted to indemnify its former directors and officers and each of them with respect to any personal liability they might incur as directors or officers of the Petitioner under any legislation including but not limited to, the statutes noted in the preceding paragraph this Order, provided that no payment may be made by the Petitioner under such indemnity without further court order.

**3**  Steele was a director of Westex from September 1, 2003 until August 18, 2004. Remedios was a director from February 19, 2004 until August 18, 2004; he also served as the Company's Chief Financial Officer until his resignation.

**4**  Westex's restructuring was unsuccessful. On November 1, 2004 an interim receiver was appointed over the assets and undertaking of Westex; on November 24, 2004 the interim receiver assigned the companies into bankruptcy under the ***Bankruptcy and Insolvency Act*** *("****BIA****").*

**5**  Between July 27, 2004 and November 25, 2005, six Westex employees made complaints to HRSDC concerning alleged entitlements under Part 3 of the ***Code***. Between September 15, 2004 and December 10, 2004 HRSDC received complaints from six other individuals who said that they were employees of Westex.

**6**  On December 15, 2004 the interim receiver provided a Proof of Claim package in Westex's bankruptcy proceeding to HRSDC; on January 5, 2005 the interim receiver repeated this step. On May 26, 2005, on the six month anniversary date of the Westex bankruptcy filing, HRSDC issued preliminary determinations under the ***Code*** as against Remedios and Steele in the amounts of $49,764.32 and $73,272.34 respectively.

**7**  By the six month anniversary date on May 26, 2005, twenty-four former Westex employees and contractors had filed Proofs of Claim in the Westex bankruptcy. HRSDC determined those claims to be $30,845.48 as against Remedios and $42,042.26 as against Steele. HRSDC did not file a Proof of Claim in the Westex bankruptcy on its own behalf or on behalf of any employee.

**8**  On May 23, 2006, HRSDC issued payment orders of $78,298.73 against Steele and $55,804.81 against Remedios. These orders included determinations with respect to eighty-four former employees and contractors. ***CCRA*** is also advancing a claim of $5,584.41 for taxes owing from the 2003 and 2004 tax years.

**9**  The following issues are to be determined:

1. Are Remedios and Steele under any liability in respect of the portions of the payment orders issued by HRSDC that relate to Proofs of Claim filed after May 24, 2005?
2. To the extent that Remedios and Steele are under a liability in respect of the payment orders, are they entitled to be indemnified pursuant to the provisions of the Directors' Charge?

**10**  At common law directors were not liable for the debts of a corporation. However s. 119(1) of the ***CBCA*** creates a statutory liability for directors and s. 119(2) sets out three conditions, any one of which, if met, will trigger this liability.

These provisions state:

119.(1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

1. A director is not liable under subsection (1) unless
2. the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;
3. the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or
4. the corporation has made an assignment or a receiving order has been made against it under the ***Bankruptcy and Insolvency Act*** and a claim for the debt has been proved within six months after the date of the assignment or receiving order.

**11**  The ***Code*** also creates a statutory liability for corporate directors. S. 251.18 provides:

251.18 Civil liability of directors - directors of a corporation are jointly and severally liable for wages and other amounts to which an employee is entitled under this Part, to a maximum amount equivalent to six months' wages, to the extent that

1. the entitlement arose during the particular director's incumbency; and
2. recovery of the amount from the corporation is impossible or not likely.

**12**  The ***Code*** also contains a paramountcy provision in s. 168 which provides:

168.(1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of any employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

**13**  HRSDC says that the ***Code*** takes precedence over the provisions of the ***CBCA*** by reason of s. 168. It argues that none of the claims of the former employees or contractors of Westex were lost because they failed to prove their claims within the six month period referred to in s. 119 of the ***CBCA***.

**14**  The question is whether the provisions of the ***Code*** and the ***CBCA*** are in conflict, are contradictory or are inconsistent with each other.

**15**  A conflict only occurs between two statutes if the conflict is genuine; that is to say, that the two pieces of legislation cannot stand together. A conflict does not occur simply because the application of one Act deals somewhat differently with the same subject matter of another Act. (See ***Toronto Railway Co. v. Paget*** [*(1909), 42 S.C.R. 488*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-K0BB-S0VK-00000-00&context=) at 499.)

**16**  It is also presumed that the body of legislation enacted by Parliament does not contain contradictions or inconsistencies and that each provision is capable of operating without coming into conflict with any other. As stated by McLachlin J. (as she then was) in ***MacKeigan (J.A.) v. Royal Commission (Marshall Inquiry)*** [*(1989), 61 D.L.R. (4th) 688*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-651W-00000-00&context=) (S.C.C.):

I start from the fundamental principle of construction that provisions of a statute dealing with the same subject should be read together, where possible, so as to avoid conflict ... In this way, the true intention of the Legislature is more likely to be ascertained.

**17**  According to Ruth Sullivan in Sullivan and Driedger on the *Construction of Statutes*:

The presumption of coherence is virtually irrebuttable. Since disputes must be resolved by the courts in a definitive fashion in accordance with "the" law, contradiction of inconsistency cannot be tolerated; some method of reconciliation must be found. The courts have a number of strategies to ensure this result.

When two provisions are applicable to the same facts, the courts attempt to apply both. If the provisions are not in conflict (and conflict for this purpose is narrowly defined), then it is presumed that both provisions are meant to apply in accordance with their terms. This is the presumption of overlap. The presumption of overlap is rebutted by evidence that one of the provisions offers an exhaustive account of the applicable law.

If the provisions cannot both apply without conflict, the courts resort to one of the conflict avoidance or conflict resolution techniques at their disposal. These include (1) interpretation to avoid conflict; (2) the paramountcy of some categories of legislation over others; (3) implied exception (*generalia specialibus non derogant)*; and (4) implied repeal. Of course, these interpretative strategies are subject to any express solutions provided by the legislature.

**18**  In my view this is a case in which the presumption of overlap applies. S. 251.18 of the ***Code*** imposes a general liability on directors of corporations. It creates for directors a joint and several civil liability for wages and other amounts up to a maximum of six months wages, provided that the entitlement arose during the director's incumbency and also provided that recovery of the amount from the corporation is impossible or unlikely. While the potential liability of a director is capped at an amount equal to six months wages for an employee, the ***Code*** contains no specific limitation on the time within which such a claim must be brought.

**19**  S. 119 of the ***CBCA*** similarly creates a liability for directors of corporations by providing that they are jointly and severally liable to each employee for all debts not exceeding six months wages. However s. 119 also contains particular claim provisions. The limitation that is relevant here is contained in s. 119(2)(c) which states that a director is not liable for the obligation set out in s. 119 unless:

The corporation has made an assignment or a receiving order has been made against it under the ***Bankruptcy and Insolvency Act*** and a claim for the debt has been proved within six months after the date of the assignment or receiving order.

**20**  In my view both of these statutes can operate in tandem in order to provide the employees all of the benefits afforded to them under the ***Code*** and yet at the same time provide directors with the certainty and protection afforded them under the ***CBCA***. There is no conflict in the two statutes; unlike the ***CBCA*** the ***Code*** contains no express limitation period. The legislative objectives of both the ***CBCA*** and the ***Code*** sections can be fostered by requiring employees to timely file Proofs of Claim as against a bankrupt corporation in the midst of parallel ***Code*** proceeding. In that fashion employees would have protection of the mechanisms provided for them by the ***Code*** while the ***CBCA*** policy of requiring employees to expeditiously proceed with the claims and exhaust their remedies as against a bankrupt company before pursuing directors would also be fostered.

**21**  The Attorney General submits that the court is without jurisdiction to make the declaration sought. It is argued that Part III of the ***Code*** is a complete code and that final jurisdiction is granted to a referee who may be appointed to hear any appeals from a payment order. It is also submitted that by asking this court to exercise its bankruptcy jurisdiction, CitiCapital is seeking to bar HRSDC from completing its statutory administrative action against the directors under the ***Code***. However, while HRSDC has the clear statutory authority to determine the amounts owed, the liability for those amounts must rest not only on the provisions of the **Code** but also on the provisions of any other applicable legislation not in conflict with the **Code**.

**22**  In my view s. 251.18 of the ***Code*** constitutes a basic statement of the extent to which directors may come under a liability to employees for various amounts. It contains no time period for giving notice of a claim. By contrast s. 119 of **CBCA** includes within it a number of rights and protections available to directors that are not contained in the ***Code.*** It places on employees of ***CBCA*** corporations the relatively minor obligation to file Proofs of Claim within six months, a requirement on which the ***Code*** is silent.

**23**  In my view the statutory provisions are overlapping and not contradictory and hence the six month limitation period in the ***CBCA*** applies. Only those claims for former employees and contactors of Westex on whose behalf Proofs of Claim were filed within the six month period can be advanced.

**24**  The next issue is whether Steele and Remedios are entitled to be indemnified pursuant to the provisions of the Directors' Charge. To enjoy that benefit the indemnity provisions of the Order provide that the directors must have acted "honestly and in good faith" with the view to the "best interests of Westex, and to the extent that they have not committed wilful misconduct, ***negligence*** and have not authorized actions or conduct inconsistent with the terms of the Order".

**25**  The purpose of a Directors' Charge is to provide the directors with a measure of protection to encourage them to continue in office during the course of an attempted reorganization of a troubled enterprise.

**26**  CitiCapital contends that Remedios and Steele failed to act as "reasonable and prudent directors" because they failed to ensure that the ***Code*** liabilities were being funded and that over-time was being paid. CitiCapital also says that they should have challenged the preliminary determinations issued by HRSDC and taken steps to advance the s. 119 defence undertaken by CitiCapital. They also allege ***negligence*** in their failure to maintain directors and officers insurance coverage as well as their failure to aggressively pursue a claim against the broker and underwriter.

**27**  With respect to the failure to comply with the ***Code*** provisions and overtime payments, it is my view that the directors have not lost the entitlement to the indemnity provisions of the Order. The reorganization of an enterprise such as Westex is a challenging exercise at best and from time to time matters can be overlooked. A standard of perfection is neither realistic nor likely achievable. The unintentional failure of Remedios and Steele to ensure that the ***Code*** liabilities were being funded illustrates the type of error which, while regrettable, does not disentitle a director to indemnification under the provisions of the director's charge.

**28**  The existence of directors and officers insurance coverage is in dispute. However a writ has been issued and served on the underwriter and broker. Since this claim can be pursued they have not lost the right to indemnity for this reason.

**29**  CitiCapital also submits that Remedios and Steele should not be indemnified for any amounts that include overtime or for any other liabilities pre-dating the Order.

**30**  Paragraph 15 of the Order permits Westex to indemnify its present and future directors and officers with respect to any personal liability that they might incur as directors and officers of Westex for the "current payroll obligations, if any", of Westex to its employees. However the Order also provides indemnity for "outstanding statutory vacation pay, severance pay or home equity purchase program entitlement owed to its employees, amounts owing in respect of federal or provincial sales or excise tax (including GST) and amounts owing in respect of any workers' compensation authority ... "The Order also proves that the indemnity shall "... secure the indemnity obligations of the Petitioner to the current and former directors and officers." On its face the language of the indemnity includes obligations pre-dating the Order. If the indemnity was prospective only as argued by CitiCapital, then presumably "former directors and officers" would not have been included. Accordingly the indemnity provided by the Directors' Charge is not limited to liabilities going forward from the date of the Order.

**31**  Accordingly, the receiver will be directed to pay to HRSDC the claims of only the former employees and contractors of Westex who filed Proofs of Claim in Westex's bankruptcy prior to May 24, 2005. The receiver is also authorized to pay the CCRA claim.

BRENNER C.J.S.C.

**End of Document**

[***Johel v. John Doe, [2012] B.C.J. No. 209***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1S0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.W. Bernard J.

Heard: November 4, 2011.

Judgment: February 1, 2012.

Docket: M103768

Registry: Vancouver

**[2012] B.C.J. No. 209** | 2012 BCSC 166 | 7 C.C.L.I. (5th) 155 | 211 A.C.W.S. (3d) 738 | 2012 CarswellBC 367

Between Sonia Kaur Johel, Plaintiff, and John Doe #1, John Doe #2, and Insurance Corporation of British Columbia, Defendants

(41 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Motor vehicles — Rules of the road — Application by plaintiff for summary judgment in action for damages for personal injuries allowed — Plaintiff stopped at stop sign intending to turn left — Vehicle approaching from her left slowed and signalled for her to proceed — As plaintiff was turning, she was struck by another vehicle approaching from the left — That vehicle did not stop or return to the scene — Plaintiff was dominant driver and unknown defendant failed to yield — Collision was not one that plaintiff ought to have foreseen and taken reasonable steps to avoid — Unknown defendant solely at fault.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Intersections — Meeting, overtaking and passing — *Negligence* — Turns — Left turn at intersection — Yielding — Right of way — Liability — Civil actions — Breach of rules of the road — *Negligence* — Application by plaintiff for summary judgment in action for damages for personal injuries allowed — Plaintiff stopped at stop sign intending to turn left — Vehicle approaching from her left slowed and signalled for her to proceed — As plaintiff was turning, she was struck by another vehicle approaching from the left — That vehicle did not stop or return to the scene — Plaintiff was dominant driver and unknown defendant failed to yield — Collision was not one that plaintiff ought to have foreseen and taken reasonable steps to avoid — Unknown defendant solely at fault.**

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| Application by motorist for summary judgment action in for damages for personal injuries sustained in a motor vehicle accident. The plaintiff was struck by an unknown vehicle on the driver's side as she made a left-hand turn at a T-intersection. Just prior to the collision, the plaintiff had stopped at the intersection and saw only her neighbour's vehicle approaching the intersection from her left, which was slowing down and signalling its intention to turn right. The plaintiff entered the intersection to execute her turn and was struck by the unknown vehicle, which had been travelling behind the plaintiff's neighbour's vehicle and overtook that vehicle when it turned. The unknown vehicle continued without stopping or returning to the scene of the collision. The parties sought a determination of liability for the accident and agreed that the issue was suitable for resolution by summary trial.  HELD: Application allowed.  Defendants were solely liable for the collision. At the time of the collision the plaintiff was the dominant driver and the defendants failed to yield to her as required by s. 175(2) of the Motor Vehicle Act. The collision was not one that the plaintiff ought to have foreseen and taken reasonable steps to avoid. The plaintiff was attentive and observant while stopped, she proceeded with caution into the intersection at which time the unknown vehicle was hidden from her view, and at the time of the collision the unknown vehicle was straddling the centre line and the plaintiff's car was crossing it and turning. When the defendant driver overtook the plaintiff's neighbour he did so in breach of ss. 159 and 160 of the Act and failed to meet the requisite standard of care. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 155*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GG-00000-00&context=)(1)(c), s. 157(1), s. 159, s. 160, s. 165(2), s. 175(1), s. 175(2), s. 186

**Counsel**

Appearing for the Plaintiff: Robyn K. Kullar, Articled Student.

Counsel for the Defendant Insurance Corporation of British Columbia: M. Richard Parkes.

**Reasons for Judgment**

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| **L.W. BERNARD J.** |

**A. Overview**

**1**  The parties seek a determination of liability in relation to a motor vehicle collision for which the plaintiff claims damages for personal injury. The parties agree that the issue is suitable for resolution by summary trial.

**2**  The collision occurred on August 13, 2008, at the "t" intersection of Kartner Road and Westminster Highway, in Richmond, B.C. Kartner Road intersects Westminster Highway on the north side, and there is a stop sign for southbound Kartner Road traffic. The plaintiff, Sonja Johel, was driving a Volkswagen Jetta. The unknown defendants were in a white car, make and model unknown.

**3**  Just prior to the collision, the plaintiff had stopped on Kartner Road at Westminster Highway, to check for traffic before turning left to travel east on Westminster Highway. There was no traffic approaching to her right, and to her left Ms Johel saw one approaching vehicle. She recognized this vehicle as that of her neighbour Mr. Lam and saw that he was slowing and signalling his intention to turn right onto Kartner Road. Based upon these observations Ms Johel entered onto Westminster Highway to execute her turn; however, when she did so her vehicle was struck on the driver's side by the front of a white westbound car she did not see until the instant before the collision. The white car continued westbound without stopping or returning to the scene of the collision. Ms Johel later learned that the white car had been travelling behind Mr. Lam and had entered the eastbound lane to overtake Mr. Lam when Mr. Lam slowed and activated his turn signal.

**4**  The essence of the plaintiff's position is that she entered the intersection when it was safe to do so; that at the point of collision she was the dominant driver *vis-à-vis* the white car; that the white car was obliged to yield the right of way to her; that there was nothing she could do to avoid the collision; and, that the driver of the white car is, thus, entirely at fault for the collision.

**5**  The essence of the defendants' position is that at the point in time that Ms Johel entered the intersection, the white car had overtaken Mr. Lam's vehicle and returned to the westbound lane east of Kartner Road; that through lack of proper attention Ms Johel failed to observe the white car and yield to it as westbound traffic so near to the intersection that it posed an immediate hazard; that Ms Johel was the servient driver *vis-à-vis* the defendants; that given the white car's proximity and speed there was nothing the white car could reasonably do to avoid colliding with Ms Johel's car; and, that Ms Johel is, thus, entirely at fault for the collision.

**B. Evidentiary Synopsis**

**6**  At Kartner Road, Westminster Highway is a two-lane highway divided by a single solid yellow line for east/west travel. The roads are flat and straight. A crosswalk crosses Westminster Highway on the east side of Kartner Road. The collision occurred at approximately 6:15 p.m. on a clear summer's day. At the time of the collision the road conditions were good and the roads were obstruction-free. It is common ground that Ms Johel had a valid driver's licence; that neither her attention nor perception was compromised by drugs, alcohol, or the use of a handheld communications device; and, that Ms Johel had come to a full stop at the stop sign on Kartner Road prior to entering onto Westminster Highway.

**7**  In her affidavit, Ms Johel said she checked to her right and left while stopped at the intersection. She said she saw no cars to her right, and one car to her left, travelling westbound on Westminster Highway. She said she recognized this lone car as that of a neighbour, Harvey Lam. The car had its right-turn signal on and was slowing down. She believed the driver intended to turn at Kartner Road. Ms Johel said Mr. Lam's car was "between the second and third house on the north side of Westminster Highway" when she decided it was safe to make her left turn onto Westminster Highway. She said she did not see the defendants' white car until just prior to the collision, when it was too late to take any evasive action.

**8**  Ms Johel said that she was partially into the eastbound lane (that more than half of her car had crossed the centre line) and had almost completed her turn at the time of impact; that the white car was straddling the centre line at the time of impact; that the front of the white car struck the left side of her car behind the driver's door "in a t-bone fashion"; and that the white car was travelling "quite fast" at the time.

**9**  Harvey Lam saw the collision from his car. Just prior to the collision he had been driving westbound on Westminster Highway and had signalled his intention to turn right onto Kartner Road. In his affidavit, Mr. Lam said he began slowing down when he was approximately four houses from the intersection. He said when he saw Ms Johel's car at Kartner Road he "slowed down further" to allow Ms Johel to make her turn onto Westminster Highway. He said he checked his rear-view mirror when he was approximately "one house" away from Kartner Road. In it he said he saw a white car approximately one car-length behind him. When he saw, in his side-view mirror, the white car pull out to the left in order to pass him, he said he noted that Ms Johel was beginning to make her turn onto Westminster Highway. He said the white car accelerated past him "at a fast speed" and then swerved back into his lane just prior to hitting Ms Johel's car. He said the white car took no evasive action, and Ms Johel made a hard turn to the left to try to avoid the white car. He said the white car struck the Jetta behind the driver's door and carried on down Westminster Highway without stopping.

**10**  Ms Johel had three passengers in her car at the time of the collision. Her adult brother, Justin Johel, was in the rear centre seat at the time of the collision. In his affidavit, Mr. Johel said he saw his sister check for traffic along Westminster Highway. He said that he, too, checked for traffic and saw only one car on Westminster Highway while Ms Johel was at the stop sign: Mr. Lam's vehicle which was traveling westward towards Kartner Road. He saw this car with its right turn signal activated and noted that it had slowed down. He said Ms Johel began her left turn when Mr. Lam's car was between the second and third house from the intersection. He said Ms Johel was "into her left-hand turn" when the white car struck her car. He surmised that the white car "must have been behind [Mr. Lam's] car" and said that it was speeding as it overtook Mr. Lam's car.

**11**  Photographs depicting the collision damage to the Jetta show dents and scrapes along the two doors on the driver's side. The damage suggests a glancing blow rather than a direct "t-bone" hit as described by Ms Johel. The photographs reveal that the initial contact from the white car was to the area below the handle of the driver's door of the Jetta and that the contact continued in a scraping motion along the rear door to the left rear fender as the white car continued westbound.

**C. The Law**

**12**  The *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* (the "*Act*"), sets forth the "rules of the road" for drivers. These rules are regarded as guidelines for assessing fault in motor vehicle collisions. In *Salaam v. Abramovic*, [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=), the Court said:

[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.

**13**  In the circumstances of the case at bar, the obligations of the plaintiff under the *Act* are found in ss. 165(2), 186, and 175(1).

**14**  Section 165(2) applies to drivers making left turns at intersections where traffic is permitted to move in both directions on each highway entering the intersection. The provision sets out the obligations of a driver in such a situation. Section 186 obliges a driver approaching a stop sign to stop at the marked stop line. There is no evidence or suggestion that Ms Johel failed to comply with these rules of the road.

**15**  Section 175(1) sets forth the obligations of a driver entering a through highway from a stop sign. The defendants say the plaintiff failed to yield, as required by this provision. Section 175(1) reads as follows:

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.

**16**  The statutory obligations of the defendants are found in ss. 155(1)(c), 157(1), 159, 160, and 175(2) of the *Act*.

**17**  Section 155(1)(c) obliges a driver to drive to the right of a single line, broken or solid, except only when passing an overtaken vehicle. There is no evidence or suggestion that the defendant driver drove to the left of the solid yellow line except for the purpose of overtaking Mr. Lam.

**18**  Section 157(1) sets forth the obligations of the overtaking vehicle *vis-à-vis* the overtaken vehicle. There is, again, no evidence or suggestion that the defendant driver did not comply with this rule.

**19**  Sections 159 and 160 set forth the obligations of drivers passing on the left. They state as follows:

1. 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.
2. 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.

**20**  Section 175(2) obliges a driver on a through highway to yield to a vehicle which has entered the highway in compliance with s. 175(1). The plaintiff says the defendant driver of the white car failed to yield, as required by this provision. Section 175(2) states as follows:

175(2). 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.

**D. Discussion**

**21**  I will begin with those matters which are not contentious. When Ms Johel approached the intersection she faced a stop sign and she was, thus, in the servient position *vis-à-vis* vehicles travelling along Westminster Highway. Ms Johel was obliged to stop at the sign and did, in fact, do so. There is no suggestion that Ms Johel saw the defendants' white car at any time prior to the instant before the cars collided.

**22**  Section 175(1) of the *Act* required Ms Johel to yield the right of way to traffic that had entered the intersection on the through highway or that was approaching so closely on it that it constituted an immediate hazard. If no such traffic existed, then Ms Johel was permitted to proceed into the intersection with caution and traffic travelling along Westminster Highway was obliged to yield to her as the dominant driver, pursuant to s. 175(2) of the *Act*.

**23**  The common law imposes a corollary duty on dominant drivers not to exercise their right of way if the result will be a collision which was reasonably foreseeable and reasonably avoidable (see *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.)).

**24**  The issue, as defined by the parties, is relatively narrow. It is: Who was the dominant driver at the time of the collision? The answer to this question turns on where the parties were, in relation to one another, at the time Ms Johel proceeded into the intersection, and at the time of the collision.

**25**  The defendants' position is that when Ms Johel proceeded into the intersection the white car had completed its pass of Mr. Lam, and was in the westbound lane of Westminster Highway in front of Mr. Lam and just east of the intersection. At the time of collision, Ms Johel was traversing the westbound lane and blocking the defendants' right of way.

**26**  In support of this position the defendants rely principally upon some aspects of the evidence of Mr. Lam and Ms Johel; in particular: (a) Mr. Lam's evidence that the white car had swerved back into the westbound lane prior to the collision; and, (b) Ms Johel's evidence that her car was "t-boned" by the white car.

**27**  The plaintiff's position is that when Ms Johel proceeded into the intersection the white car was overtaking Mr. Lam to his left and, thus, was not visible to Ms Johel. When the white car struck Ms Johel's car, it was straddling the centre line and Ms Johel was crossing it and her car was facing slightly eastward in the direction of her intended travel.

**28**  In support of this position, the plaintiff relies upon the evidence of Ms Johel, Mr. Johel, and Mr. Lam; in particular: (a) Ms Johel's and Mr. Johel's evidence that when Ms Johel proceeded into the intersection the only westbound traffic they saw was Mr. Lam's car; and, (b) that when the collision occurred the white car was straddling the centre line and Ms Johel's car was crossing it.

**29**  Having regard to all the evidence and the positions of the parties, I find: (a) that Ms Johel was attentive and observant while stopped at the stop sign; (b) that Ms Johel proceeded with caution into the intersection and, at the time, the only traffic in her view was the car of Mr. Lam; (c) that the defendants' white car was, at the time, to the left of Mr. Lam and, thus, hidden from Ms Johel's view; and, (d) that at the time of collision, the white car was straddling the centre line and Ms Johel's car was crossing it and heading slightly eastward.

**30**  In making these findings, I take into account that Ms Johel's observations of Mr. Lam's vehicle and her evidence of her cautious entry into the intersection are supported by the evidence of other witnesses. It is clear that Ms Johel correctly identified the westbound vehicle as that of Mr. Lam, and correctly observed that it was slowing and signalling a right turn. Ms Johel correctly assessed that Mr. Lam's vehicle did not pose an immediate hazard to her. Given these accurate observations, I am satisfied that if the white car had overtaken Mr. Lam and returned to the westbound lane prior to reaching the intersection, then Ms Johel would have seen it and yielded to it.

**31**  I also take into account the evidence of Mr. Lam in relation to where the white car was when he saw Ms Johel proceed into the intersection. Mr. Lam said the white car was in his left side-view mirror; thus the car was slightly behind and to the left of him. The significance of this evidence is twofold: (a) it explains why Ms Johel would not have seen the white car; and, (b) it suggests that it is most unlikely that the white car had completed its pass and returned to the westbound lane while Ms Johel was still crossing the westbound lane.

**32**  I conclude that Mr. Lam misperceived that the white car had "swerved back" into and fully re-entered his lane prior to the collision. I consider it significant that this was a rapidly transpiring event involving moving vehicles and that this observation does not accord with other evidence. I am satisfied it is more likely than not that Mr. Lam saw the white car moving back to the westbound lane at the time of the collision. This is consistent with the evidence of Ms Johel, Mr. Johel, and with Mr. Lam's own observations of the position of the white vehicle when Ms Johel commenced her turn.

**33**  Finally, I find that the evidence of damage to Ms Johel's car is consistent with the plaintiff's version of events, albeit not with Ms Johel's statement that she was "t-boned". Ms Johel's statement is an understandable misapprehension of the precise angle of impact, given that her car was struck on the left side and that the collision took her completely by surprise. The dents and scrapes suggest that Ms Johel's car was facing slightly eastward when it was struck. The photographs depict damage caused by a rearwards scraping motion, and it is common ground that the white car continued westbound after the collision without stopping. These are not the hallmarks of a t-bone collision; particularly, one at a relatively high speed.

**34**  In summary, I am satisfied the evidence establishes the following facts:

1. that when Ms Johel first observed Mr. Lam's car approaching Kartner Road from the east, the white car was travelling very closely behind Mr. Lam's car and was, from Ms Johel's perspective, obscured by it;
2. that when Mr. Lam slowed and signalled his intention to turn right at Kartner Road, his vehicle posed no immediate hazard to Ms Johel;
3. that when the driver of the white car saw that Mr. Lam had slowed and signalled a right turn, he or she decided to overtake Mr. Lam by entering the eastbound lane, rather than to slow down and wait for Mr. Lam to turn and clear the path of travel;
4. that when Ms Johel commenced her turn, the white car had just started to move into the eastbound lane to pass Mr. Lam;
5. that when the white car was passing to the left of Mr. Lam, the Lam vehicle obscured Ms Johel's view of the white car;
6. that the white car accelerated as it overtook Mr. Lam;
7. that Ms Johel did not see the white car until the instant before the collision and, thus, could not take reasonable steps to avoid the collision;
8. that at the time of impact the front of Ms Johel's vehicle had crossed the centre line and was heading in a south-easterly direction;
9. that at the time of impact, the white car had overtaken Mr. Lam's vehicle and was in the process of crossing the centre line to return to the westbound lane of travel; and,
10. that Ms Johel's vehicle suffered a glancing blow that caused dents and scrapes along the driver's side and permitted the white car to continue westbound on Westminster Highway without stopping.

**35**  Based upon the foregoing findings, I conclude that at the time of the collision: (a) Ms Johel was the dominant driver and the defendants failed to yield to her, as required by s. 175(2) of the *Act*; and, (b) the collision was not one that Ms Johel ought to have foreseen and taken reasonable steps to prevent.

**36**  In relation to the latter conclusion, Ms Johel neither saw the defendants' car nor should she have foreseen it; in other words, it was not reasonably foreseeable that there would be a car overtaking Mr. Lam to the left of his vehicle and hidden by it. Ms Johel had the right of way in the eastbound lane, and the obligation was on the defendant driver, as the driver who has entered the left side of the roadway to overtake another vehicle, to do so only when it was safe, as determined by a clear view (see ss. 159 and 160 of the *Act*).

**37**  When the white car initiated its pass of Mr. Lam, it entered the left side of the roadway and accelerated past Mr. Lam when it was not safe to do so. This was a clear failure to meet the standard of care arising from the defendants' duties to other users of the road, including Ms Johel. The circumstances known to the defendant driver at the time included two salient facts: the vehicle ahead was slowing, and it was signalling an intention to turn right. An overtaking driver entering the left side of the roadway in such circumstances must do so only with the utmost caution, preceded by a careful assessment of what lies ahead. Such caution is particularly important when one is approaching an intersection. Mr. Lam's right turn signal and slowing speed were two clear indications to the defendant driver that an intersection may lie ahead. An appropriately cautious overtaking driver must also consider that the vehicle ahead may be slowing for reasons other than, or in addition to, preparation for a turn. Here, the need for caution by the overtaking driver was accentuated by the fact that the intersection is marked with a crossing for pedestrians.

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

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

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

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

**39**  Having regard to all the foregoing, I conclude: (a) that when the defendant driver overtook Mr. Lam he or she did so in breach of ss. 159 and 160 of the *Act;* (b) that the defendant driver failed to meet the requisite standard of care; and (c) that the defendants are solely at fault for the collision.

**E. Disposition**

**40**  The plaintiff's application for summary judgment in her favour is granted.

**41**  If the parties are unable to agree upon costs, then they may address this issue by written submissions.

L.W. BERNARD J.

**End of Document**

[***J.R.I.G. v. Tyhurst, [2001] B.C.J. No. 441***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1KV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Vickers J.

Heard: November 20 - 24, 27 - 30, December 1, 4 - 8, 2000,

January 2 - 5, 8, 10, 11 and 15 - 19, 2001.

Judgment: March 9, 2001.

Vancouver Registry No. C903855

**[2001] B.C.J. No. 441** | 2001 BCSC 369 | 103 A.C.W.S. (3d) 635

Between J.R.I.G., plaintiff, and James Stewart Tyhurst, defendant

(137 paras.)

**Case Summary**

**Damages — Aggravation — Aggravated damages, sexual abuse — Assault and battery — Exemplary or punitive damages — Breach of confidence or fiduciary duty — Torts — *Negligence* — Standard of care, particular persons and relationships — Medical doctors and medical personnel — Psychiatrists.**

|  |
| --- |
| Action by JRIG against Tyhurst for damages for breach of fiduciary duty, assault, ***negligence*** and breach of contract. Tyhurst was JRIG's psychiatrist for eleven years. JRIG suffered from depression and borderline personality disorder. She alleged that while being treated by Tyhurst, he required her to enter into an abusive therapy regime which included a master/slave relationship, whippings, and sexual abuse. She was forced to take her clothes off during their sessions and to call him master. She handed over all of her money to Tyhurst, who gave it to her as he saw fit. Two draft letters written by JRIG to Tyhurst were entered into evidence. The letters indicated that JRIG was committed to being a slave and to take punishment quietly. Two other witnesses testified that they had entered into a similar form of therapy by Tyhurst. Tyhurst denied the allegations. Although he acknowledged seeing the letters, he indicated that they were a misinterpretation of his words. He testified that the letters had not greatly concerned him and there was no indication he discussed them with JRIG. JRIG left University and became a drifter. Expert evidence on behalf of JRIG indicated that her disorder could have been effectively treated and she could have completed her education and obtained employment. The effect of Tyhurst's therapy was to cause her condition to worsen over time such that more intense and extensive therapy was required.  HELD: Action allowed.  JRIG was awarded damages of $556,790 including damages for past and future loss of earnings, aggravated and punitive damages. JRIG and the other two witnesses were credible and their evidence was accepted over Tyhurst's. Tyhurst's evidence was rejected largely as a result of his failure to express the expected alarm at the letters written by JRIG, and his failure to try to clear up the alleged misinterpretations concerning the nature of their relationship. Tyhurst's actions worsened JRIG's disorder. With proper treatment she would likely have commenced earning an income by the early 1990s. Tyhurst's conduct was deplorable and defied all norms of civilized conduct. |

**Counsel**

L. Cruickshank and T. McPherson, for the plaintiff. C.E. Hinkson, Q.C., and A.C.F. Turner, for the defendant.

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| **VICKERS J.** |

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**1**  This is an action by the plaintiff arising out of the defendant's care and treatment of her when she was his patient. The statement of claim seeks special, general, punitive, aggravated and exemplary damages for breach of fiduciary duty, assault, ***negligence*** and breach of contract.

**2**  The defendant attended McGill University and received his degree in medicine on October 6, 1944. He was licensed to practice medicine in British Columbia on October 23, 1945 and received his certificate as a specialist in psychiatry on December 8, 1950. He has enjoyed a distinguished career in his profession. From October 1979 until sometime in late 1988, he was the plaintiff's psychiatrist. The plaintiff, who was born on October 1, 1958, was a student at the University of British Columbia ("UBC") when she became his patient.

**3**  Reduced to their minimum, there are two issues: Did the defendant take part in the bizarre and wholly inappropriate conduct the plaintiff alleges was a regular feature of the treatment regimen he imposed? If he did, what are the damages sustained by the plaintiff?

I Burden of Proof

**4**  I repeat what I said on an earlier application in these proceedings. In J.R.I.G. v. Tyhurst [*2000 BCSC 1739*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3N5-00000-00&context=), paragraph 4, I said the following:

The allegations made by the plaintiff are that certain actions of the defendant, who was a treating psychiatric physician, were criminal acts constituting physical and sexual assaults. This is a civil action where the burden of proof is on a balance of probabilities. But in cases of this nature, where criminal acts are alleged that would, if proved, have a profound impact on the reputation and the career of a professional person, it is incumbent for the plaintiff to prove the allegations on a high degree of probability. The civil standard of proof is a flexible standard and it requires a higher degree of probability or persuasion in cases of this nature: V. (J.L.) v. H. (P.) [*(1997), 31 B.C.L.R. (3rd) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21JV-00000-00&context=) B.C.S.C.; affirmed, J.L.M. v. P.H., [*[1998] B.C.J. No. 1546*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2DJ-00000-00&context=) B.C.C.A.

II The Plaintiff's Background

**5**  The plaintiff was the youngest daughter in a family of five children. She has three older sisters and a younger brother who is developmentally delayed. He is a person with Down Syndrome who is currently living in a group home. Two of the plaintiff's older sisters live in Vancouver. The eldest was described as a person with learning disabilities. She currently lives in a group home that serves people with a history of mental illness. Another sister is married and she lives with her husband and children in Victoria, B.C.

**6**  There can be no doubt that all five children were raised in a very dysfunctional family. Their home was described as a house full of garbage. There were rooms that could not be used because they were full of garbage. Food was left to rot on the hardwood floors, producing maggots. The children's mother was a chain-smoker and the windows of the home were described as being so dirty that a person could not see outside. In a similar manner, the outside of the home was not kept up.

**7**  The plaintiff's mother taught all of her children that family was important. She told them never to discuss their family with outsiders. If they did, they would be taken away from their home. As a consequence, the children lived in fear that if they spoke they would lose their mother and family. The children could not bring their friends home and any outsider who might have inquired was told that all was fine within the family. The plaintiff's mother was described as a dominant and controlling person who raised her children to be "blindly obedient" and not to ask questions.

**8**  Violence was also a regular component of the children's lives. The plaintiff's father was an alcoholic who physically abused his wife. The plaintiff could recall being struck only once by her father, but she said she was frequently assaulted by her mother.

**9**  She described a childhood marked by physical and emotional abuse. Her parents separated when she was in grade 5. There can be no doubt she endured appalling conditions in her home during her formative years, conditions that in today's society would warrant permanent apprehension by public authorities.

**10**  It is significant that, despite her home life, the plaintiff did manage to succeed outside her home. Perhaps this is because she was living in an affluent neighbourhood of Vancouver and was served by good schools and teachers.

**11**  She did well in her academic studies at high school. In addition to achieving high grades, she took part in many sporting activities and was particularly active in basketball and field hockey. On graduation she went to live with her father and completed her first year at UBC, taking general science courses. She continued to be actively involved in basketball and field hockey.

**12**  In the fall of l977 she did not return to UBC as she decided, along with two of her sisters, to try to clean up her mother's home and get her brother into a group home. She said her mother was having difficulty letting go of her son who continued to live at home with his mother in appalling conditions.

**13**  Thus, in 1977-78 the plaintiff worked at a few jobs on an irregular basis and struggled to resolve the situation at home. In the late spring and early summer of 1978 she traveled in Europe with friends for three months. It was upon her return that she became depressed. She worked a short period in Banff and then went to work on a pheasant farm outside Nanaimo. While in Nanaimo her depression had become so severe that she was experiencing suicidal ideation.

**14**  Eventually, she returned to Vancouver and enrolled in her second year at UBC in September 1979, shortly before she began attending the defendant for professional care. She discontinued her studies six weeks into this second term.

III The Plaintiff's Mental Health

**15**  The first record of depression appears in the fall of 1978. On November 20, 1978 she attended at Day House, UBC Health Sciences Centre. Clinical notes reveal she had become increasingly depressed over the past year and a half, with vague thoughts of suicide. She reported having difficulty sleeping and being worried about the family situation. She had apparently gained 40 lbs. in the past three months and was not exercising. She was described as a "timid, shy girl who is overweight." The diagnosis at this time was, inter alia, "situational reaction to adolescence" and "eating disorder with resultant obesity."

**16**  The plaintiff was referred to the defendant by her general practitioner, Dr. M. Glanzberg, on September 28, 1979. She attended the defendant for the first time on either October 1 or 3, 1979. His notes record that she was "puzzled, perplexed, tense and tearful(?)." It appears he saw her again on two other occasions that month. He did not see her during the month of November 1979. There is a "note to file" dated December 13, 1979 in which he reports difficulty in locating his patient over the past several weeks. It was during this period the plaintiff began to run away from Vancouver, to points in the interior of British Columbia or in the United States.

**17**  On December 14, 1979 she appeared at the office of the defendant. He walked her down the hall and admitted her to the UBC Health Sciences Centre Hospital, Psychiatry Unit, ("HSCH"). She discharged herself the next day. The records indicate the following hospital admissions at HSCH for mental health reasons, over the next five-year period.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | \* | December 21, 1979. | She left the next day and |  |
|  |  | refused to return. | The diagnosis on admission was |  |
|  |  | "anxiety state." |  |  |

1. May 22, 1981 until she discharged herself on August 11, 1981. During this admission there were problems with alcohol consumption and being absent for short periods, without leave. On admission she was diagnosed with "depressive reaction." Her final diagnosis on discharge was "Axis # I-Major Depression, Axis # II-Obsessive and compulsive personality traits, no personality disorder, Axis # III-Obesity, Axis # IV-Pathological home situation, poor social skills."
2. August 24, 1981 to September 29, 1981. This was an admission into the Day Care Program to assist in her transition following the lengthy hospitalization. Her discharge diagnosis was "Dysthymic Disorder" and "Personality Disorder-with features of avoidant personality disorder and of borderline personality disorder."
3. October 31, 1981 to November 2, 1981 when she discharged herself. She was admitted with a "depression" but complained of an inability to sleep and was noted to be overweight. On leaving, she was to "follow up" her care with the defendant.
4. February 26, 1982 to March 1, 1982. Her diagnosis on admission was "depression". The final diagnosis was, in part, major depression; normal personality with obsessive and dependent traits.
5. April 30, 1982. She walked into the hospital alone on this day and there was no available bed. She was diagnosed with "Depression - Major Affective Disorder."
6. May 22, 1982. Again she walked in alone. A physician was unable to make a full assessment and the plaintiff apparently gave no information leading up to her presentation at the hospital.
7. May 24, 1982. The hospital record of this event was lost but a note dated February 4, 1983 by the attending physician records his recollection of an interview with the plaintiff as being quite tense. The admitting diagnosis was "Depressive episode suicidal."
8. May 25, 1982. The plaintiff was transferred from the Vancouver General Hospital to HSCH and her diagnosis on admission was "major depression." She was discharged on July 26, 1982. Her diagnosis on discharge included major depression, obsessive personality traits and obesity.
9. July 26, 1982 to September 21, 1982. This was an admission into the day program, once again to assist in her transition from the lengthy period of hospitalization. On discharge the note on her chart said "the preferred diagnosis on Axis I is dysthymia, and on Axis II a borderline personality organization. Her obsessive ruminations and continuing conflict over dependency needs remain unchanged."
10. October 30, 1982. This was an emergency presentation as the plaintiff was brought to the hospital by police officers. The diagnosis was "depressed with suicidal ideation" and "probably in Borderline Personality." She was discharged the same day.
11. November 15, 1982. She was brought into the hospital once again by police officers because she was engaged in some destructive activity in the student union building on the UBC campus. She remained until December 10, 1982. During this time she was absent without leave for short periods on three occasions. Again, the diagnosis appears as "depression with suicidal ideation" and "Borderline Personality".
12. November 17, 1984. This was a one-day emergency admission. The diagnosis was "adjustment disorder with depressed mood... mild suicide risk... strong personality component, dependent, some obsessive traits."
13. December 20, 1984. The plaintiff walked into the emergency ward having "overslept" and missed her appointment with the defendant.

**18**  On the whole of the evidence, there can be no doubt the plaintiff's medical condition, at all material times, was a Borderline Personality Disorder. There was no difference of opinion with respect to that diagnosis expressed at trial. A person with this disorder presents a particular challenge to a treating physician. They are considered to be very difficult patients, presenting with a constellation of symptoms. It is difficult for physicians to maintain a therapeutic relationship with such a patient.

**19**  The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th Edition) at p. 650 records the "essential feature" of the condition as "a pervasive pattern of instability of interpersonal relationships, self-image, and marked impulsivity that begins by early adulthood and is present in a variety of contexts." I found Dr. Roy O'Shaughnessy's discussion of the disorder particularly helpful in gaining an insight into the plaintiff's condition. He said:

It's a confusing condition, to say the least. It has a lengthy history in different nomenclature in the last twenty, twenty-five years, but it basically summarizes the clinical observation and research of a constellation of symptoms that are fairly stable in their instabilities is one of the ways you can describe it. Individuals with this type of disorder generally start showing symptoms in their teens to early twenties. And we really see dysfunction in a number of areas that may vary greatly depending on the severity of the condition.

Some of the core features of the disorder are to do with basic development of a sense of self or identity. They are often fluid and disjointed. As opposed to normal development, individuals of borderline personality often adapt different personality traits depending on circumstances or on who they're with. There's no core set of established identity. They may change depending on circumstances and stress, et cetera.

Another core feature of the disorder is what we term affective instability, meaning that they have difficulties in modulating or coping with different moods or affects. They often experience periods of depression, irritability, difficulty in tolerating any kind of stress or frustration, they tend to be extremely reactive emotionally. Things that would upset the average individual will send them into a frenzy.

In addition, there are major difficulties in interpersonal relationships. They tend to be very chaotic. They are marked by a tendency of the individual to become overly intimate very quickly. Often meeting somebody and idealizing that person based on very minimal information. When that person then - they find has got feet of clay, they tend to devalue that person and they - what we call all or nothing kind of phenomenon. You're either all good or a wonderful person or a terrible person. They have no capacity to deal with grays. Everything is black and white, extreme in its presentation.

In addition most individuals have significant difficulties in acquiring a stable lifestyle. Again, related to the same degree of disturbance in self and affective instability. So they often lead chaotic lives.

Their behavior is usually marked by impulsivity. They get an idea and they do it without thinking of the consequences. They can flitter here and there depending on circumstances. They're really quite chaotic and unstable. They have high comorbidity or co-occurring disorders. The two most common would be mood disorders and eating disorders. The disorder basically tends to improve by the fourth decade, with increased interpersonal stability and maturity coming sometime in the 40s.

**20**  In the treatment and care of persons with a Borderline Personality Disorder it is critically important to maintain an appropriate professional and patient boundary. Patients are very vulnerable and it is important to understand the need for, and respect, clear boundaries between physician and patient. In the course of his testimony, Dr. O'Shaughnessy said:

Patients with borderline condition are very hungry for relationships. They are dependent. They seek attachments. They want to be your best friend. Live with you if you would let them. And any breach in keeping that distance can cause them a great deal of damage. They are seeking more intimacy. They will ask you personal questions about yourself. They will try and seek to have personal nontherapeutic time with you. And you've got to keep that boundary very crystal clear, that you're there for a fixed period of time to help them with a specific problem.

If it becomes blurred, things such as loaning them money, giving them money, spending extra time with them, doing it at odd times, making them feel in some way that they are special. This, in turn, has a backfire effect. It can in fact cause them worse difficulties because they have difficulties themselves in normal relationship boundaries. It's a very big problem for borderline patients.

As I say, they have this intense object hunger for relationships with others. This intense dependency, a tendency to idealize people. If you feed into that by giving them special favors, by going out of your way to do things over and above the doctor-patient relationship, you in fact do them harm.

That's what we talk about with boundary violations in borderlines.

**21**  I accept Dr. O'Shaughnessy's prognosis with respect to the disorder and find that in general terms, with proper treatment, 50% of persons with Borderline Personality Disorder will get better and there will be some improvement. It is rare for such a person to experience serious difficulties after age 40.

**22**  Given the number of psychiatrists, including the defendant, who attended upon the plaintiff it is surprising the plaintiff was not diagnosed with the condition at an earlier date. Dr. O'Shaughnessy expressed the opinion, which I accept, that it was unusual not to pick up the diagnosis "right away". It appears the focus was on her depression rather than the underlying personality disorder.

IV 1979-1988: Summary of Plaintiff's Recollections

**23**  The plaintiff testified she began to attend the defendant in September 1979 at his office in the HSCH complex. She was no longer active in sports and had gained considerable weight. It was not long before her appointments were routinely made by the defendant for a period in the late afternoon or early evening. She recalled that at one of her early appointments with the defendant he had her stand and turn around slowly. She said he stared at her body and she felt uncomfortable.

**24**  She testified that as time progressed her anxieties increased and she began to "run away" to destinations in the interior of the province and south of the border. She said she developed an eating disorder. At one appointment she was required to strip naked and put on a terrycloth robe. She was then required to remove the robe in his presence. The defendant told her she was the victim of a "disease." After this incident of removing all her clothing she said he would regularly require her to remove her blouse.

**25**  She testified that with her blouse removed, the defendant performed relaxation therapy on her. In the summer of 1981 he told her to remove her bra. During the "relaxation therapy" the defendant engaged in hypnosis but the plaintiff does not believe she was ever fully hypnotized. Under "hypnosis" she was required to repeat his orders. She had to say she would be humble, obedient, deferential and not look at him. He showed her how to kneel and bow. He told her that when he snapped his fingers she would wake up, be his slave and feel refreshed. She said that he kept touching her body during the relaxation exercises. She complained that he continually checked out her body and would often leer at her or grab a fold of her skin and say how fat she was.

**26**  She said he required her to sit on the floor or stand. He told her that slaves had to sit on the floor and she was to call him master. She was required to do and say things that demonstrated she understood she was his slave and he, her master. She testified the defendant would snap his fingers and she would be required to sit, stand or kneel in a position he had instructed her to take.

**27**  In about the same period of time the plaintiff said she was told to buy a blue budget book and attend the Weight Watchers program. The defendant began to assist her in budgeting and assumed the management of her money. Any funds she received from employment, her mother, student loans, or Welfare were paid to the defendant who, in turn, returned the money to her in smaller amounts as required for her day to day living.

**28**  Upon leaving HSCH in 1981 she commenced living in shared accommodations. She testified that after this lengthy hospitalization she resumed her therapy with the defendant who continued to have her remove her blouse and bra and treat her like a slave.

**29**  She said that in the fall of 1981, the defendant began whipping her. He told her she needed some discipline in her life. If she failed to stand, kneel, sit or crawl to his satisfaction he would punish her by whipping. The whipping was performed by the defendant in his office. She was required to stand against the west wall of the office in a particular position and he applied the whip to her bare back. She estimated that in the entire period in which she was in the care of the defendant he administered a whipping on her about 300 to 400 times. She said that it was usual for the welts left by whipping to remain for three or four days. She does not recall that any whipping caused her to bleed.

**30**  She said she would be whipped if she had not met goals he set for her weight and budgeting. At times the defendant would whip her if she had done nothing wrong. She was not allowed to cry and if she did, he would whip her more. Once, in the course of whipping her he merely dragged the whip across her back. She said she was terrified by that incident.

**31**  By 1984 the whippings had become quite regular, as often as once or twice a week, unless she had an appointment during the day when no whipping took place. She said that from 1981 to 1986 she was told she could not have a boyfriend or engage in sexual intercourse. She acknowledged not following these directions as she had several relationships during these years, none of which lasted for more than a few weeks.

**32**  She said that by mid-1982 a typical appointment would begin with her taking off her coat and dropping it on the floor because a slave could not hang up her coat. She would then remove her top and bra. She was then required to produce her budget book and Weight Watchers card. She had to hand them to him with her head bowed and she was required to call him master. If she did not get it right she had to do it again. At times she was required to crawl over and put her forehead on his foot, or kiss his hand. He always referred to her as slave, not by her name. He also called her "misery" with regularity.

**33**  The plaintiff testified she was required to write out slave contracts which were in fact, words dictated to her by the defendant. Two such "contracts" were marked as exhibits in these proceedings, and they read as follows:

I am willing to submit as a slave obeying all orders + accounting all that I do gratefully. Submissively doing everything without argument to learn to make it work.

This includes taking any punishment without question, carrying on or quitting.

I want to learn some better + regain the little previous pride + satisfaction + enjoyment of a conservative lifestyle.

I want to learn the basics to hold a decent job + do some serious sports training + get some further job training + eventually have a good long term relationship with someone.

The basics including self discipline, better concentration, dealing better with frustration + loneliness, better social skills + the confidence to use them, general confidence, relaxing + organization.

\*\*\*\*

July 30, '84

I am willing to commit myself to being a slave, which includes total obedience, accountability, a submissive attitude & taking punishment quietly.

I realize I need to be made to submit to orders so that I don't avoid or procrastinate commitments. Until I learn more self discipline I need to have external discipline.

I believe that I will learn more productive habits + become satisfied with more productive work + activities + learn more pleasant, ordinary social skills.

Sincerely, J.R.I.G.

**34**  When the defendant retired from his position at UBC and HSCH he practiced psychiatry from his home and the plaintiff attended on him at that location. She testified that the same bizarre treatment continued, including the use of a whip.

**35**  The plaintiff said that when she was being whipped she concluded that the defendant engaged in masturbation. She did not see this take place, she was not allowed to turn her head from the wall during the whipping. She saw no evidence of ejaculation by the defendant.

**36**  He said such things as "if you have no pride in yourself, have pride in your master" and, if she could be a slave maybe she could be a mistress or concubine. Once he said he wanted her to go to his family home on Gabriola Island where he would "whip her into shape." He made reference to "lashing" her and "marking" her. She recalled the defendant commenting on her breasts having stretch marks and that if she lost weight he would arrange to send her to a plastic surgeon. He referred to her as "misery."

**37**  She testified there was a period in which the defendant required her to phone in to him between appointments, using the master/slave rhetoric. She was told not to discuss her therapy with anyone.

V The Similar Fact Evidence

**38**  In the course of the trial I ruled that certain similar fact evidence was admissible. I propose to summarize the evidence of these two witnesses at this point.

1. WJWB

**39**  WJWB is a 42 year old woman who lives with her husband and three children in another Canadian province. She is a graduate nurse and is currently the head nurse of a Health Care Centre. Before leaving Vancouver she was employed at the Vancouver General Hospital and Children's Hospital.

**40**  In late 1977 or early 1978 she was referred by her general practitioner to the defendant. At the time she was suffering from insomnia and was generally confused and unhappy. Her insomnia had reached a point where she could not function properly. She continued to see the defendant until sometime in 1990, after the birth of her first child.

**41**  She attended him approximately once a week throughout this lengthy period of time. She saw him at his UBC office and, after his retirement, at the office in his home on Angus Drive. The majority of these appointments, arranged by the defendant, were in the early evening when no other persons were around. She said that in the early years she enjoyed seeing him and was assisted by the therapy offered to overcome her insomnia. She then developed bulimia and the therapy was continued.

**42**  At first, the therapy was a form of hypnosis. She was to relax under hypnosis. This phase continued for about one year. When the bulimia did not improve, he told her it was because she was too controlling. She would have to learn to give up control. While she did not see herself as a controlling person she accepted the advice he gave her and entered into a new phase of the therapy.

**43**  This next phase involved the development of a master/slave relationship with the defendant. He told her that to learn to give up control she should, while in the relaxed state, visualize being a slave. A slave had no will of her own she was told and she was to call him master at all times. He would snap his fingers and she would, as his slave, be required to lower her head and close her eyes and if she did not, he became angry with her.

**44**  This routine then moved to another stage involving the removal of her clothes. First, she was required to remove her top, then her pants until eventually she stood naked before him. He told her that her clothes were a barrier between them and she had to learn how to relax in a naked position. She had to stand with her head lowered, her feet slightly apart. During periods of nudity he would at times stroke her back or arm and touch her breasts or buttocks.

**45**  She overcame her bulimia only to become the victim of serious panic attacks. The visualization periods continued but he had her visualize that she was being whipped, as a slave. He began to control her life, requiring her to consult him on all serious issues in her life. He had her sever a relationship she was in with a young man. She testified this kind of control was all a part of her being submissive to the defendant.

**46**  On one appointment in his office at UBC, during a master/slave visualization, the defendant suddenly produced a whip. She was against the wall, a position he required her to take during most visits. He told her she had to agree to a whipping because the therapy was on the verge of a breakthrough. She asked if she could get a second opinion and the defendant said no. He told her he would discuss matters with his wife who was also a psychiatrist.

**47**  WJWB considered his proposal before her next visit. While she thought whipping to be wrong, she felt she had no option but to consent. On her return, the defendant told her his wife said she must make the commitment to be whipped and give up control. She consented to the whipping.

**48**  She testified the defendant required her to stand against the west wall of the office, next to the door leading to the secretarial area, with her hands up against the wall, her head lowered while she was whipped. She had to call him master and acknowledge she was his slave. Whipping became a routine part of the "therapy" she received. She estimated she was whipped about 50% of her visits with him. She was stripped to the waist and was whipped three to five times at each session she was required to endure this punishment. The whipping left welts, which remained until the next day. No other person ever saw these welts. There was no bleeding.

**49**  She was also required to kneel before him, at his feet. Once she was required to kiss his hand. While she was kneeling before him he would touch her head like a dog.

**50**  When the defendant moved his office to Angus Drive the whippings continued. Once he had her crawl on her hands and knees and present him with a cup of coffee. Then he had her crawl back over with cream and sugar.

**51**  She said when the whipping took place there were times she would hear a noise and it crossed her mind that the defendant was masturbating. She cannot say this happened and she saw no signs of ejaculation. The defendant told her she was a very worthy and marketable slave. He said he wanted to whip her and "mark" her as his slave.

**52**  She testified he told her he would like her to visit with him at his home on Gabriola Island where he could be a 24 hour reminder to her that he was the master and she the slave. He constantly called her slave and did not use her name. He also referred to her as a miserable slave, concubine and "misery."

**53**  WJWB was married in 1988. The whippings continued until she became pregnant in early 1989. She denied discussing her experiences with the plaintiff or any other patient of the defendant. She did admit to reading a newspaper report of an earlier criminal trial in which some evidence of the complainant was reported.

1. SJEL

**54**  SJEL was born on December 10, 1949. She is a graduate nurse and has held a number of responsible nursing positions in the course of her career.

**55**  In 1977, when SJEL was 28 years of age, she entered a period of her life where she had just completed university and was experiencing the loss of friends. She was also experiencing difficulty in functioning at her work in the burn unit of a large hospital. The diagnosis was depression and she attended the defendant as a patient at his UBC office. These appointments were approximately once a week for about three months. Normally her appointments, set by the defendant, were in the late afternoon or early evening.

**56**  She testified the initial treatment included the use of hypnosis. Once the defendant asked her to disrobe and put on a terrycloth robe. She was required to take the robe off to be weighed and at that time the defendant performed a visual inspection of her body.

**57**  As time passed, the defendant told her she was a severe case who needed a lot of care. He held out little hope for her future and told her she needed severe, intensive treatment. He told her she needed to be in a relationship where she could be controlled to correct the flaws. To that end, he said she needed to enter into a master and slave relationship. She said he told her that if she agreed he would provide this intensive training, so intensive it would not be paid by the B.C. Medical Plan. The treatment would be outside his office at her home.

**58**  She attended another psychiatrist to seek a second opinion. In seeking this second opinion, she did not tell the physician the defendant proposed to whip her and make her into a slave. Whatever she did say to the physician resulted in him telling her the therapy proposed was not a good idea, but he failed to offer any alternative. Consequently, she agreed to the defendant's proposals.

**59**  She said the defendant came to her home and told her how to assume the posture of a slave, commanding her to bow her head with her eyes closed. She was required to kneel prostrate on the floor, arms extended. He told her that her clothing had to reflect that she was a slave. He was her master and her superior and she had no rights.

**60**  He brought slave costumes to her home and she was commanded to wear them. She was expected to meet him at the door in costume. Eventually, he said there must be a severe form of punishment if she disobeyed. A whipping would be necessary. He brought a whip and told her she should keep it in her apartment. Upon his arrival she would be in the slave costume he had ordered, standing or kneeling in the slave position, hands extended with the whip. This was used on her when he felt she needed punishment.

**61**  Upon his instructions, she went to Weight Watchers and was required to produce the Weight Watchers card. She had to lose weight and would be punished if she did not. He directed her on budget, diet and on the issue of who she could see on a social basis.

**62**  He attended her home about once a week. She was whipped in the living room and the dining room, usually kneeling on the floor, arms extended over her head. Later, he tied her wrists together with a leather thong and whipped her. She visited him once at his home on Angus Drive where she said she was tied to a pole in the rumpus room and whipped for an extended period. She was unable to say how often she was whipped but testified the defendant almost always found some reason to whip her. Each time she was whipped it would be four to five times. She acknowledged there were periods of no visits, as long as a couple of weeks or longer.

**63**  She testified she signed at least three contracts with the defendant. The first was in his office. Within a year there was another one signed in her home. She believes that was the document marked as an exhibit at trial. This document reads as follows:

Friday March 10/78

Dear Dr. Tyhurst -

I am writing this to request that you act as my master & overseer for a period of 12 months, or longer as deemed necessary by you.

My reasons for this request are that I realize that the problem of depression, for which I first saw you 8 months ago, is now under control and no longer a medical problem. I realize that to avoid recurrence of this condition I must learn to deal with constraints and authority as well as deal with co-existing problems of impulsiveness, ambivalent attitudes & excepting discipline. These problems I must learn to overcome whether or not I see persons, situations or circumstances as reasonable or unreasonable.

In order that the above mentioned problems be overcome, I realize that I need structure and firm direction. On this basis I am requesting that you provide this learning experience as my master, not as my doctor. I ask that you take me as your slave on this basis. I commit myself to your orders and directions for the above mentioned period. I will carry out whatever orders and/or directions that are given immediately, without condition with the understanding that if you are not satisfied at any time that you will apply whatever discipline that you feel appropriate.

This request extends from this day written and for the following 12 months, as mentioned with an option of an additional 12 months if deemed necessary by you.

I write this voluntarily, of my own free will.

**64**  She testified that all of the contracts she signed were the defendant's words, dictated by him.

**65**  A typical visit involved him calling ahead of time and telling her that her master required his slave at a particular time and date and dressed in a particular costume. She would greet him at the door, neck bent, hands at her side or outstretched with the whip offered, if he had told her to produce it on his arrival. Typically, he would then say "kneel, slave" and she would go down on one knee; then "rise, slave" and he would inspect her; then "I think I'll have a drink now, slave." He kept brandy at her home that she was required to serve.

**66**  She kept the whip in a drawer in her room and threw it away in the garbage when she left his treatment. She testified he had other whips he brought with him on his visits.

**67**  He would drink and watch television in her home and she would kneel beside him. Sometimes he would ask to see her diary and question her on the entries. He would ask her if she had been drinking because at some period before she saw the defendant there had been an issue around drinking.

**68**  He told her that going to Alcoholics Anonymous was not appropriate. He asked about her relationships with men and whether she was pregnant. She broke up with a boyfriend and had an abortion on his instructions. The abortion was arranged by the defendant.

**69**  She would greet him in costume wearing nothing underneath the costume. There was a long rope-like necklace around the waist which she wore all the time. At times she was required to wear an ankle bracelet, earrings and a necklace with a single pearl which he had given to her. She threw all of these things away when the relationship ended. On occasion he would have her take off her garment because he wanted to inspect his slave. Sometimes he would touch her, flick her breasts and tell her that one of his other slaves had wonderful pear-shaped breasts. There were occasions he commanded her to kiss and lick his feet.

**70**  She testified the defendant took her away with him for weekends in Victoria, Nanaimo and to his property on Gabriola Island.

**71**  The visits at home varied in length, usually two to three hours. He was always derogatory, never positive and called her slave, concubine and misery.

**72**  At his home on Gabriola Island she was his slave. She said she washed his back, got his drinks and worked in his garden. He commanded her to fellate him while he whipped her with a riding crop. The same thing happened in different hotels in Victoria and Nanaimo, as well as at her home. Once he raped her on Gabriola Island. She and he slept in separate bedrooms in a log cabin on the property, and he commanded her to make his breakfast in the morning.

**73**  He took a polaroid picture of her, naked on Gabriola Island. He showed her pictures of other naked women and pictures of naked women from a magazine.

**74**  SJEL had back surgery in February 1982. The therapy ended after that. She called to say she would see him no more, and she did not. However, she did call him on the telephone many times thereafter.

**75**  At trial, and in his closing argument, counsel for the defendant argued the evidence of WJWB and SJEL was inadmissible. In his submission, the evidence of the witnesses was not strikingly similar and the test for admission is not met by acts which are merely similar. In addition, he argued that the court could not be certain the evidence of the witnesses was free of collaboration, including in that term the process of infection from publicity or the discussions the witnesses have had over the years with various counsel: R. v. H., [1995] 2 All ER 865 at 872 (H.L.).

**76**  In my earlier ruling on admissibility, J.R.I.G. v. Tyhurst, supra, I concluded the similar fact evidence bore directly on "the issue of whether or not the defendant required the plaintiff to enter into an abusive therapy regimen, which included a master/slave relationship and whipping." In addition, I said the evidence was relevant to the issue of the plaintiff's credibility. I repeat what I said earlier at paragraph 24:

I acknowledge there are numerous points of dissimilarity in the evidence of these three women. However their evidence was strikingly similar, distinct and unique on the central question of whether a master/slave relationship played a part in their therapy, the demeaning and submissive nature of that relationship and the fact of whipping by the defendant in the course of therapy. It is similar fact evidence, not identical fact evidence.

**77**  I remain of the opinion that this evidence "does provide a sufficient nexus or signature to make it admissible. The conduct is unusual, outside the boundaries of normal human relationships, unique and distinct. If the evidence is believed, the similarities cannot be attributed to coincidence." The issue of whether the evidence is free of collaboration is a matter for the trier of fact to consider in the analysis of whether the evidence will be accepted in whole, in part or not at all, at the conclusion of the trial: 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=). (Ont. C.A.).

VI Summary of Defendant's Evidence

**78**  The defendant denied any wrongdoing with the plaintiff, WJWB and SJEL. If his evidence is accepted, the action must be dismissed.

**79**  He testified that SJEL was discharged as his patient in 1977. He acknowledged receiving correspondence from her after her discharge and said any such correspondence would have been put on a "crank" file that he maintained in his office. Her clinical file was destroyed seven years after her discharge. He said that after discharge, SJEL pursued him with letters, cards, Valentines, etc. She wanted to resume a relationship with him, but not a doctor/patient relationship. While her pursuit was vigorous and he had a sense she was pursuing him, he took no steps to restrain her conduct, a matter he now regrets.

**80**  He testified that SJEL was a person who did not tell the truth and he was not engaged in an active treatment program with her. He denied taking a picture of SJEL naked. He said that in addition to a Borderline Personality Disorder, SJEL also had a drinking problem. He acknowledged speaking to her about a treatment contract and used the word "slave" as a metaphor only in the course of those discussions. Following consultation with another physician, he told her he would no longer see her. It was after this rejection that her pursuit of him began.

**81**  He said she showed up twice at his home on Gabriola Island. He acknowledged inviting her into his home, saying she stayed perhaps an hour to an hour and a half. She might have made coffee and put some food together. He says he did not express pleasure at seeing her and he left her with the clear impression that her visits were not appropriate. He was not rude and did not reject her or chase her off. As well, she showed up many times at his office, leaving baked goods on his secretary's desk.

**82**  He denied buying a chain for her ankle or any other jewellery and said that with all three women he suggested they do something, like tie a string on their finger or wear an ankle chain to remind them of the goals they were trying to achieve.

**83**  The defendant specifically denied each detail of the conduct testified to by SJEL. In particular, he denied any sexual contact or whipping. In short, the things she alleged in her evidence relating to sexual activities and a master/slave relationship did not take place.

**84**  During the period he was treating her, he acknowledged visiting her apartment on one occasion. He found such visits helpful in learning about his patient's living situation.

**85**  After her discharge, he said she appeared once in the lobby of an office in Victoria where he had been attending a meeting. On another occasion when he was staying at a hotel in Victoria she phoned him. He met her in the lobby of the hotel and they had coffee together.

**86**  He recalled that once she phoned him on Gabriola Island. She told him she had car problems and he gave her a lift to Duncan on his way to Victoria. He explained she was aware of his movements because the meetings he attended were advertised in advance. At an earlier trial, he acknowledged giving her a ride south on Vancouver Island on at least two occasions. He was only able to recall one such trip at this trial.

**87**  He acknowledged using the word "slave" with SJEL because that was the metaphor he was using at the time. He said the use of the word "slave" was not a form of address but a characterization of her situation. He also admitted saying "Hello slave" but only facetiously and not often. He did use the term "misery" but not in a pejorative sense. He explained that he had a book called Misery. This book contained cartoons depicting the reaction of children to life's disappointments. Because of this book, which he enjoyed, he used the term "misery" when people exaggerated their woes and it became a part of his vocabulary.

**88**  He testified he no longer had any file relating to his former patient, WJWB. She was also a person who had been diagnosed with a Borderline Personality Disorder and he saw her for a period of four to five years up to 1987. She was a nurse and the defendant said with her access to drugs she had developed a problem of over-medication. As he had an interest in writing about Borderline Personality Disorder, he retained a log she maintained during part of the treatment period. This log contains no references to any improper conduct by the defendant. During the treatment period, he acknowledged one visit to her apartment.

**89**  He specifically denied each of the allegations of impropriety made by WJWB. In particular, there was no whipping, no sexual conduct and no master and slave relationship.

**90**  When the defendant first saw the plaintiff in October 1979 she appeared disconnected from reality and was overweight. He said her poverty of thoughts, emotions and speech lead him to conclude, at first, that her condition was schizophrenic. In November 1980, he met with the plaintiff and her family in their home. It was following this visit that the plaintiff moved from her home and the defendant assisted her in obtaining social welfare. He said her suicide threats were ongoing and frequent and he took them seriously. Alcohol abuse, inappropriate sexual contacts and gorging were features of her condition. He last saw her sometime in 1988. During the nine year period, 1979-1988, she was away for periods of time and she was hospitalized for varying periods. He said other psychiatrists saw her as much as he did in this nine year period.

**91**  He testified the plaintiff's clinical records, marked as an exhibit at trial, are not a complete set of her records. In 1989 this file was seized, along with other documents, by the R.C.M.P. He says what remains today is incomplete.

**92**  He acknowledged using relaxation techniques on the plaintiff, including hypnosis. He did not put her into a trance. The techniques he used were to assist her in relaxing and involved stroking her forehead and the outside of her arms. It was she who wanted plastic surgery to modify her breasts and he recommended this not be undertaken until her condition improved.

**93**  He denied ever having a terrycloth robe in his office and denied ever requiring her to strip naked or to the waist, as she alleged. He denied dictating contracts to her. He acknowledged he did discuss what a contract would include, a statement of the problem, the goals to be achieved and the consequences of not achieving these goals but not in the sense of punishment. He said she produced more than one attempt at a written contract and they were not appropriate and thus, never implemented. Most of these writings were thrown away. He said he did not ask her to sign a master/slave contract.

**94**  He did use the word slave to have her follow the prescribed program. He explained that typically this type of patient does not do well in treatment and there is a need to focus on "the here and now" and not dwell on the past. It is important to set a controlling and directive environment and he did that.

**95**  Thought stoppage was used as a technique. He would use the word "slave" in the sense of her being a slave to her passions and impulses. Instead of being a slave to her passions and impulses, she was directed to stop these thoughts. He denied he required her to call him "master" and he denied whipping her at any time. He acknowledged she might have used the word "master" but not frequently.

**96**  He said it was her mother who complained of the plaintiff's use of money and asked him to look after money for the plaintiff. He reluctantly agreed to administer her funds. He would allocate money to her on a regular basis and get a receipt from her. The only money he administered came from her mother and the plaintiff did not ever give him her welfare funds or money she may have got from student loans. Once, when she was threatened with eviction from her premises, he gave her rent money for a month. He gave her $15 on another occasion so that she could fill a prescription.

**97**  He did take her picture with her clothes on, in his home. He said he frequently took pictures of his patients, placing them in their files. He denied ever taking a picture of a naked person. He said that like others, the plaintiff used the coat rack.

**98**  He denied each of the plaintiff's assertions relating to improper conduct. Specifically, he said there was no whipping, she did not call him "master" and there were no master/slave contracts.

**99**  With respect to the two letters marked as exhibits in this trial, he said he did not ask her to write either document. He did not recall getting the letter dated July 30, 1984 and did not make much of the undated letter as it did not fulfil the items they discussed. He denied instructing her to write anything like these two documents.

**100**  In summary, the defendant denied he entered into a master and slave arrangement with the plaintiff, denied whipping her and denied any improper conduct with her.

VII Liability-Findings and Conclusions

**101**  Counsel for the defendant argues that the plaintiff's story is outlandish, bizarre and simply not true. Given the locations and duration of the events, he asks how could any person not become aware of these activities? The alleged whippings took place in a small office, in a space that was not soundproof and in a public building. Angus Drive was a family home, the space used for an office was not soundproof and people were coming and going at all times, without notice. The plaintiff was attending other physicians. She had male friends and took part in public swimming programs. In his submission, the story is so outrageous it cannot be accepted. He argues that the plaintiff demonstrated a clear propensity to exaggerate, if not prevaricate. She should not be believed. It is far more reasonable to accept the defendant's denial than to accept that the plaintiff blindly submitted to acts of master/slave abuse and whipping.

**102**  Dr. William Friend, Dr. Stanley Semrau and Dr. Roy O'Shaughnessy, all qualified psychiatrists, testified in this case. While some of the evidence of Drs. Semrau and Friend was helpful, portions of their evidence bordered on advocacy. For that reason, I preferred the evidence of Dr. O'Shaughnessy and have relied upon it in reaching my conclusions.

**103**  I accept what Dr. O'Shaughnessy said when he testified that the plaintiff was never psychotic or influenced by delusions. She was never out of touch with reality. Thus, if the events she relates did not take place they are either conscious lies or the normal variations in memory experienced by all people, which in her case are aggravated further by her psychopathology. For the plaintiff, it is a reworking of perceptions and not fabrication. She is rethinking and recalling things differently. In so doing, she is putting greater emphasis on the negative aspects of the relationship, rather than the positive aspects of the relationship.

**104**  I do not believe the plaintiff is consciously lying. I conclude she believes each of the details to which she testified. However, her perceptions of what took place are exaggerated. For example, she said she was whipped from 300 to 400 times by the defendant, and this is an exaggeration. Her memories of events cannot be relied upon by themselves to establish liability in this case.

**105**  Other features in the evidence which required careful consideration include the following:

1. No whips have ever been found in the plaintiff's possession despite a thorough search by the police. No persons other than the plaintiff, WJWB and SJEL testified they saw a whip in his office or home;
2. There is no evidence of other persons, including her general practitioner, seeing welts on the plaintiff. While her general practitioner's opportunities to exam her back were limited, she made no complaint to him of her treatment by the defendant. During a brief part of the period the whippings are alleged to have taken place, in 1983, she was swimming on a sporadic basis. She did engage in sexual relationships with men;
3. There is no evidence that anyone heard cries of pain or cries of any sort from the defendant's office or in his home;
4. No person testified to being told by the plaintiff, at anytime during the period she was attending the defendant, of the abuse she was enduring;
5. There is evidence of a 4 cm. long lineal scar, approximately 2-3 mm. in width that runs obliquely along the plaintiff's low back on the right side at about waist level. A general practitioner said this scar could be consistent with the plaintiff's allegations of repeated whippings on her back. I do not find this opinion persuasive and, consequently, I am not able to say this scar resulted from the plaintiff being whipped;
6. No photographs of naked women were ever located in the possession of the defendant.

**106**  I mean no disrespect to the defendant when I say he is an experienced witness. He was very perceptive, mentally agile and able. There were differences in his evidence given at earlier trials and the evidence he gave at this trial. Some of those differences were entirely capable of explanation by the passage of time and the limitations of memory. But not all differences were capable of explanation, and during his cross-examination he appeared to be defensive and evasive.

**107**  The copies of the plaintiff's clinical notes produced at trial can only be described as meagre, given the lengthy period of therapy. The defendant says they are incomplete. As I understand his evidence, the entire file, seized by the R.C.M.P., was far more substantial. However, when confronted with the same meagre file at an earlier trial, he did not offer an explanation that the file was incomplete. That explanation is a recent response given in these proceedings. I do not accept his explanation for the paucity of his clinical notes, nor the reason why he failed to send periodic reports to the plaintiff's general practitioner. While the defendant might have expected and relied on the hospital to send copies of their records to the patient's general practitioner, that does not explain the absence of a report from him for a six-year period following her last lengthy hospitalization in 1982. I believe the documents marked as an exhibit in this trial are a complete copy of the plaintiff's clinical records seized by the R.C.M.P.

**108**  Throughout his cross-examination, the defendant was extremely defensive. There were times when his answers were evasive. When matters under discussion are precisely the matters that were discussed at an earlier trial and he is asked to explain why there are differences or why he failed to give a particular explanation at the earlier trial, it is no answer to say that he was not asked at that time.

**109**  I am satisfied neither WJWB or SJEL discussed any part of their evidence with the plaintiff. I am equally satisfied that the strikingly similar aspects of their evidence cannot be explained by their reading of events in the media or their conversations with counsel. Both these women were intelligent and articulate.

**110**  The defendant was described as a gruff and, at times, an angry person. There is no doubt he has a forceful personality. It is not a personality in which he would suffer the constant imposition of what he described was a "crank". It is not clear when SEJL wrote her letter to him. At an earlier trial it appears his evidence was that it was written during the period of her therapy and he saw it as an attempt by her to manipulate him. In this trial, it was a letter written after therapy was terminated which he put into a "crank" file. If this woman was a "crank", the forceful and decisive personality of the defendant would have sent her away in no uncertain terms. Instead, he invited her into his home where she prepared some food. She called him and he drove her from Nanaimo south on Vancouver Island at least twice on his own admission. He acknowledges she showed up in the lobby of his hotel. He said he did not send her away but sat with her and had coffee. While the fact of his meeting may have been the subject of public notice, the name of his hotel would not have been published.

**111**  I reject his denials and accept the evidence of SJEL. I have carefully considered what she said and the manner in which she testified. I accept her evidence and conclude the events she described did take place. One discrepancy in her evidence requires some comment. She said she was tied to a pole in a rumpus room at the Angus Drive home. There is no evidence of a pole in a rumpus room. There is evidence of a post in the basement in the laundry room near the furnace. No doubt, the memory of SJEL is also shaped and shaded with the passage of time. However, on the issue of whether she was whipped by the defendant and entered into a master/slave relationship with him, I accept her evidence.

**112**  Similarly, I accept the evidence of WJWB. Her initial support of the defendant and delayed reporting of her own abuse is understandable, and I accept her explanation in that regard. She was an entirely believable witness. I accept her evidence when she says she was whipped by the defendant and entered into a master/slave relationship with him.

**113**  One of the most significant factors that has led me to reject the evidence of the defendant is the letters written to him by the plaintiff, two of which were marked as exhibits in this trial. Dr. O'Shaughnessy testified that these letters were "probably the subject of a great deal of discussion" between doctor and patient. Given the contents of these letters, one would expect them to be a focal point of their discussions if for no other reason than to clear up any misinterpretations there might be concerning the nature of their relationship.

**114**  Again, I accept what Dr. O'Shaughnessy said that in a psychiatric practice there is a place, with certain patients, to enter into what is referred to as a contract. The letters written by the plaintiff do not qualify for such a description and, because they were so bizarre, they would have been the subject of an ongoing discussion. I accept what was said by Dr. O'Shaughnessy as follows;

... it is so bizarre that if it were not, any other psychiatrist receiving a letter of this type from a patient, it would in fact - be at great pains to discuss this issue in great detail over a number of subsequent sessions. There would be ample discourse in the notes on that. It is such a red flag if it were not a part of their discussion that any psychiatrist at any time would be of - particularly seeing this - of great import.

**115**  The defendant did not say that these letters were a "red flag" or significant to him. There is no evidence in his clinical notes that the letters formed the subject of any discussion. On the contrary, as I understood his evidence, he made no fuss of the letters and probably said words to the effect that "this will not work." He was not alarmed by their content explaining that "patients write all sorts of things." He explained it was not helpful to discuss the contents of the letters with her, and in the context of her treatment plan he decided a contract would not be useful.

**116**  The only conclusion one can reach with respect to these letters was that they were the subject of discussions between the defendant and the plaintiff, as described by her. They support the allegations of abuse alleged by the plaintiff.

**117**  When I consider the whole of the evidence, the conclusions I reach are driven by my belief that the nature of the abuse testified to by all three women has, in substance if not in detail, been accurately reported by them. The letters from the plaintiff reveal a bizarre relationship and I have no doubt the origin of these letters lies in a relationship which the defendant fostered and encouraged. The absence of whips, slave costumes and pictures of naked women can all be explained by the passage of time from the termination of treatment to the police investigation. The fact that no person saw welts or heard of the abuse of the plaintiff is explained by the nature of the disorder and the total control exercised by the defendant over the plaintiff. She was entirely dependent on him and saw him as the only way she could be healed.

**118**  I find the defendant did enter into a relationship of master/slave as described by the plaintiff. I find that in the role of his slave, the plaintiff was treated in a demeaning and degrading fashion. I find the defendant caused her to strip naked at least once and caused her to strip to her waist on numerous occasions. I find he frequently whipped her across her naked back. While I am unable to conclude the acts of whipping were accompanied by the defendant masturbating, I have no difficulty in concluding his entire course of conduct and the bizarre "therapy" in which he engaged was for his own sexual gratification. He was in breach of his fiduciary duty to the plaintiff, in breach of contract and his acts were criminal in their nature.

VIII Damage Assessment

**119**  A basic principle of tort law is that a plaintiff must be placed in a position he or she would have been in, absent the conduct of the defendant. The general, but not conclusive test for causation, is the "but for" test which is not workable in all circumstances. Where it is not workable, causation is established where the defendant's wrongful acts "materially contributed" to the loss and injury sustained. Past events must be proven and once proven, they are treated as certainties. Hypothetical or future events need not be proven on a balance of probabilities. They are 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=).

**120**  In Norberg v. Wynrib, [*[1992] 2 S.C.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=), McLachlin J. (as she then was), dissenting on the issue of quantum said the following at 270-271:

The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of ***negligence***. In common with all members of society, the doctor owes the patient a duty not to touch him or her without his or her consent; if the doctor breaches this duty, he or she will have committed the tort of battery. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. All the authorities agree that the relationship of physician to patient also falls into that special category of relationships which the law calls fiduciary.

**121**  As she pointed out later in her judgment, the argument for finding a fiduciary obligation in the situation of a psychotherapist-patient relationship is particularly compelling. I have no difficulty in finding there was a breach of a fiduciary relationship in this case. A goal of equity is to restore a plaintiff to a position he or she would have been in, had the breach not occurred. Damages may be assessed with reference to the principles in contract and tort insofar as they may be relevant.

**122**  It was Dr. Friend's opinion that:

If the alleged behaviours, as stated by Ms. J.R.I.G. did occur, it could reasonably be anticipated that Ms. J.R.I.G.'s illness would have been more protracted than otherwise would be expected and symptoms of depression, substance abuse and eating disorders might all be exacerbated during this period.

**123**  Dr. Semrau stated:

Given that the literature on the treatment of patients with mood and personality disorders indicates a general fairly good outcome, this lack of appropriate treatment will have been a major factor in causing adverse outcome for Ms. J.R.I.G.

**124**  I acknowledge and accept the opinion of Dr. O'Shaughnessy when he said that on the assumption the defendant's inappropriate conduct did occur, her worsening condition is consistent with that conduct. However, if the conduct did not occur her present condition can be wholly explained by her Borderline Personality Disorder.

**125**  On the assumption the conduct alleged by the plaintiff did occur, Dr. O'Shaughnessy, in his written opinion, said:

Damages as a result of this abuse are understandably difficult to evaluate given that she presented initially with signs of psychopathology. From my review of the records and her own statements to me, it is clear that instead of improving with the treatment she clearly worsened over time. It is certainly possible for patients with Borderline Personality Disorders to worsen as part of the natural course of that disorder but, in my opinion, the main reason for the worsening of her pathology is the treatment provided by Dr. Tyhurst....

Another area of obvious damage is the fact that her treatment by Dr. Tyhurst was of such an abusive quality that it drastically affected her capacity to trust others including therapists and generally men. I doubt that this area will be rectified and she will always understandably have great concern and mistrust of any directions or any advice given to her by any practitioner in the future. This generally leads to avoidance of possibly needed therapy and failure to treat underlying psychopathology....

A third area of damage is the issue of failure to adequately treat her psychopathology and its attendant worsening of her symptoms. Although she clearly came from a clearly disturbed background, she also had a number of other assets that could have been of great use in helping her make a good adaptation. She is obviously very bright and found schooling and her social life at school a refuge from an otherwise deprived family background. These are strains that can in fact, lead to a relatively good prognosis for individuals with Borderline Personality Disorders if they are given the appropriate therapy. The desired approach in which you assist the patient in recognising the severity of their family pathology and its impact upon them growing up, is only helpful if you also assist them in the recognition that they have strengths and attributes that allow them to get past that pathology and forge a stable and fulfilling life on their own. Certainly from her description this was never done but rather she was made to feel that, because of her family psychopathology, she herself would always be impaired and pathetic as opposed to being encouraged to distance herself from the family pathology and capitalize on her own strengths and assets. Certainly from my discussions with her, she never gained this perspective but rather felt treatment reinforced her pathological view of herself as being incompetent, inadequate and hopeless because of her family of origin. Although, as I stated above, it is possible that her condition would have worsened in any event, it is more probable that the improper treatment given by Dr. Tyhurst was a much more significant factor in her failure to improve and indeed worsen over time. As a result she has never been able to complete her education or maintain even a modicum of continuous employment or independence. Her relationships have remained disruptive and dysfunctional and she has obviously never married nor at this point is she likely to marry or be in a position to raise a family, etc. She has lost much opportunity to gain the kind of education and employment experience one would require in order to make a reasonable career at her age.

**126**  I accept the opinions expressed by Dr. O'Shaughnessy and conclude that the actions of the defendant worsened the plaintiff's Borderline Personality Disorder. Her treatment by him has affected her ability to trust others. She is obviously a bright person who, despite her impoverished family background, was able to succeed at school. While it is true that her condition might have worsened over time, I conclude it was the defendant's conduct that was a much more significant factor in that regard. Her condition did get worse over time, and I find it was the bizarre, unconventional and inappropriate treatment of the defendant that was the most significant factor leading to the degeneration of her condition. Her self-esteem has been damaged by the defendant's actions. She has lost much of what she could have achieved had she received appropriate treatment.

**127**  In tests administered by Dr. Mel Kaushansky, the plaintiff demonstrated a superior level of intellectual functioning. She is undoubtedly a bright person. However, intellectual capacity is but one factor in assessing whether a person would have succeeded in life. The plaintiff's mental health would have been a major stumbling block on her road to success. I am not prepared to accept that with proper treatment she would have returned to university in two years and obtained a degree, an opinion expressed by Dr. Semrau.

**128**  However, I find on the whole of the evidence, that the plaintiff would have completed a university degree but for the conduct of the defendant. I am satisfied her mental health would have gradually improved and she would have completed her studies at university, but for the actions of the defendant. However, it is not possible on the whole of the evidence, to say when this would have been accomplished. As well, her work record would have suffered because of her illness and late entry into the workforce. Accordingly, when I come to calculate the plaintiff's wage loss, the evidence relating to average B.C. females with a university degree must be drastically discounted.

**129**  During some of the years the plaintiff was attending the defendant she had very minor earnings. For the most part, her income from the early 1980's to date has consisted of family support, student loans and social assistance. Social assistance must be taken into account in assessing her past wage loss.

**130**  I am satisfied that with proper treatment the plaintiff would have commenced earning some income by the early 1990's. Her work would not have been steady, because of her mental health. When I take into account all of the contingencies and the fact she did have income from social assistance, I assess her past wage loss at $100,000.

**131**  Her condition is only now showing signs of improvement. She is capable of receiving some training and education that will allow her to enter the workforce in the next few years. With improved health, she will be able to remove herself from social assistance and earn some income from employment. That income will not be substantial. I have no difficulty in concluding she will have a future wage loss and that the actions of the defendant materially contributed to that future loss. Once again, taking into account all of the contingencies including the fact she is capable of earning some income in the future, I fix her future loss of wages at $200,000.

**132**  The plaintiff submits his client is entitled to a substantial award for loss of marriage benefits. When I take into account the whole of the evidence, and in particular the evidence of her mental condition untouched by the actions of the defendant, I am not satisfied the plaintiff is entitled to recover anything under this head of damage.

**133**  Counsel for the plaintiff seeks to recover the sum of $31,790 as special damages. This is money that has been expended by the Workers' Compensation Board, Criminal Injuries Program, $21,790 for counseling and an award of $10,000 for general damages. If she recovers this money, the plaintiff is required to reimburse the Workers' Compensation Board. Counsel for the defendant says part of the counseling relates to the plaintiff's underlying Borderline Personality Disorder and the plaintiff has failed to prove what portion, if any, is attributable to the actions of the defendant. I am satisfied that the actions of the defendant were a material contribution to these expenditures and the whole amount is recoverable.

**134**  The defendant's treatment of the plaintiff was deplorable and defies all norms of civilized conduct between individuals. It is aggravated by the fact that he was in a position of trust and she undoubtedly placed her trust in him. She was required to endure pain and suffering of an inordinate degree. The nightmare of his "therapy" will live with her for the rest of her life. It has left her with permanent psychological scars that will impair her relationships with care providers and male friends for a long period of time. No similar case has been cited to me where the abuse of a care provider in a position of trust has been so appalling. There is no cap on an award for non-pecuniary and aggravated damages in cases of damages for intentional tort of a quasi-criminal or criminal nature: Y.(S.) v. C.(F.G.) [*(1996), 26 B.C.L.R. (3rd) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=) (B.C.C.A.). This is an appropriate case for an award of aggravated damages where the actions of the defendant have occurred in such humiliating and undignified circumstances. Norberg v. Wynrib, supra. Given the extreme nature of the "therapy" endured by the plaintiff, I fix general and aggravated damages in the amount of $200,000.

**135**  Punitive damages are awarded, not as compensation but to punish the wrongdoer and deter both him and others in the future from engaging in such reprehensible conduct. This is undoubtedly an appropriate case for such an award: Norberg v. Wynrib, supra. I award the plaintiff the sum of $25,000 as punitive damages.

IX Summary

**136**  I find liability against the defendant in tort, breach of contract and breach of fiduciary duty. Taking into account all of the evidence, I have attempted to place the plaintiff in a position she would have been had the actions of the defendant not taken place. I summarize her recoverable damages as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $31,790 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Loss of Earnings | 100,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Loss of Earnings | 200,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | General and Aggravated Damages | 200,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Punitive Damages | 25,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $556,790 |  |

**137**  The plaintiff is entitled to recover from the sum of $556,790 and costs.

VICKERS J.

**End of Document**

[***Kandola v. Mactavish, [2016] B.C.J. No. 1530***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K9P-92K1-F1H1-217F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R. Crawford J.

Heard: November 16-20 and 23-27, 2015.

Judgment: July 19, 2016.

Dockets: M131866, M153314

Registry: Vancouver

**[2016] B.C.J. No. 1530** | 2016 BCSC 1338

Between Kuldip Singh Kandola, Plaintiff, and Michael Bradley Mactavish, Defendants And between Kuldip Singh Kandola, Plaintiff, and Norman Murray McDonald and Eddi's Wholesale Garden Supplies Ltd., Defendants

(482 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Psychological injuries — Depression — Action by Kandola for damages for personal injuries sustained in two motor vehicle accidents allowed in part — Kandola had a pre-existing injury to his lower back — The defendants accepted liability for the first accident only — Kandola was 75 per cent liable for the second accident — In the first accident, Kandola suffered a neck and upper back injury and his lower back pain was exacerbated — The second accident caused a small exacerbation of all pre-existing complaints — Kandola was awarded $57,500 in non-pecuniary damages, $7500 for the cost of future care, and special damages of $6500.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Special damages — Non-pecuniary loss — Action by Kandola for damages for personal injuries sustained in two motor vehicle accidents allowed in part — Kandola had a pre-existing injury to his lower back — The defendants accepted liability for the first accident only — Kandola was 75 per cent liable for the second accident — In the first accident, Kandola suffered a neck and upper back injury and his lower back pain was exacerbated — The second accident caused a small exacerbation of all pre-existing complaints — Kandola was awarded $57,500 in non-pecuniary damages, $7500 for the cost of future care, and special damages of $6500.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Action by Kandola for damages for personal injuries sustained in two motor vehicle accidents allowed in part — Kandola had a pre-existing injury to his lower back — The defendants accepted liability for the first accident only — Kandola was 75 per cent liable for the second accident — In the first accident, Kandola suffered a neck and upper back injury and his lower back pain was exacerbated — The second accident caused a small exacerbation of all pre-existing complaints — Kandola was awarded $57,500 in non-pecuniary damages, $7500 for the cost of future care, and special damages of $6500.**

|  |
| --- |
| Action by Kandola for damages for personal injuries sustained in two motor vehicle accidents. The first accident took place in March 2011 and the second in January 2015. Kandola had a pre-existing injury to his lower back caused by a workplace accident in 2000. The defendants accepted liability for the March 2011 accident but disputed liability for the January 2015 accident. Kandola took the position that he had made significant improvement with his pre-existing lower back injury and depression before the March 2011 accident. He submitted that it was after the accidents when his physical and mental health declined. He was seeking a total of $280,950 in damages. The defendants took the position that Kandola's complaints related almost entirely to his pre-existing lower back injury and prior depression.  HELD: Action allowed in part.  The January 2015 accident was caused in greater part by Kandola. Liability was apportioned 75 per cent to Kandola and 25 per cent to the defendant McDonald. Prior to the 2011 accident, Kandola was still suffering the consequences of his lower back injury and ongoing depression. In the first accident, Kandola suffered a neck and upper back injury, his lower back pain was exacerbated, and his chronic pain worsened. The second accident caused a relatively small exacerbation of all the pre-existing complaints. There was no basis for a loss of income claim and no proper foundation for a loss of housekeeping capacity claim. Kandola was awarded $57,500 in non-pecuniary damages, $7500 for the cost of future care, and special damages of $6500. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, s. 144, s. 166, s. 168, s. 169, s. 171, s. 193

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

**Counsel**

Counsel for Plaintiff: M.A. Chaudhary and A. Pang.

Counsel for Defendants: A. Kontsedalova and M. Klimo.

**Reasons for Judgment**

|  |
| --- |
| **R. CRAWFORD J.** |

**Introduction**

**1**  Mr. Kandola is 54 years of age. He is married with three children, ages 25, 24 and 23. The children all live in their parent's home.

**2**  Mr. Kandola seeks compensation for injuries he alleges he sustained in two motor vehicle accidents that occurred on March 29, 2011, and January 23, 2015.

**3**  The assessment of Mr. Kandola's claims is made difficult due to a pre-existing injury to his lower back caused by a workplace accident in 2000. That resulted in spinal fusion surgery in 2002 and ongoing treatment for chronic pain and depression. He qualified for and has been provided compensation for a permanent lower back disability, that compensation being paid from WorkSafeBC and the Canada Pension Plan ("CPP"). He did not return to the workforce, save for a brief time in 2006 as a security guard which he said was too difficult. Other attempts at sedentary jobs have not been successful.

**4**  However, Mr. Kandola says he worked in a moderate fashion helping build his brother's house in 2009 and that he was on a path to return to the workforce when the accidents removed him from it.

**5**  Today he seeks general and special damages for injuries from those motor vehicle accidents, including injury to his neck, and exacerbation of a low back injury and his depression, as well as the alleged development of a chronic pain or somatoform disorder.

**6**  He also claims costs of past and future earnings, future care; and lost homecare capacity.

**7**  The defendants accept liability for the March 2011 accident but dispute liability for the January 2015 accident and, to the extent relevant, the injuries that resulted from both. The defendants say his complaints relate almost entirely to his pre-existing low back injury and prior depression as well as to other motor-vehicle accidents that occurred in February of 2009 and February 2010. They say Mr. Kandola was not forthright in disclosing his medical history to the doctors who have more recently treated him. They say he was not truthful in his pre-trial testimony or in his testimony at trial. They argue his credibility is in issue and that affects the ability of the medical witnesses to correctly assess his claims as they do not have a complete historical picture of Mr. Kandola's complaints.

**The Evidence**

**Mr. Kuldip Kandola**

**8**  Mr. Kandola gave evidence that was interrupted from time to time while other witnesses were called. He was not the best witness. He claimed he had a poor memory. He was evasive and disputatious in cross-examination. The simplest of questions could provoke rambling answers, even as simple as being asked to agree to questions and answers that had been put to him from his examination for discovery. For these reasons, and reasons I detail further below, he was not a credible witness. Otherwise, his evidence was as follows.

**9**  Mr. Kandola said he completed grade 9 in the Punjab and worked on the family farm. He came to Canada in 1980. He eventually obtained full-time work in a lumber mill where he obtained his grading certificate. This work continued until 2000 when he was working with a large piece of lumber and injured his lumbar sacral spine.

**10**  That injury was eventually treated by way of a low back fusion in 2002.

**11**  From that time onward he suffered from ongoing low back pain and had difficulty bending and performing household tasks. He took pain medication for his back, and antidepressant medication for the depression and anxiety he suffered as a result of this injury and its effect in his life.

**12**  He said that during this time he sought various jobs without success. In 2006 he took "security training" and obtained a position as a guard, which lasted approximately six weeks. In 2008 he said he took taxi driver training but said his lack of English-language skills was an impediment.

**13**  In 2009 his brother built a house across the road from his own house. He said he took a significant role in this project, and helped not only in daily cleanup, but screwing in plywood floors; raking the gravel deposited onto the driveway; helping with framing; and landscaping. Additional tasks included lifting 30-40lbs garbage bags to the street, moving garden ties which were up to 6 feet long, calling contractors for estimates, and with his son, carrying a large, approximately 250lbs dining room cabinet or server into the first floor living room. He said he did these tasks for five to six hours a day on a regular basis. He said that he would experience some pain every second day, but otherwise he paced his work, becoming fatigued after approximately one-and-a-half hours, and when he became tired he would rest.

**14**  When the project was complete his brother, Gurmail Kandola, paid him $10,000 for his help. He explained he could earn $2,400 per month before his Workers' Compensation Board ("WCB") benefits were affected, and $5,000 per annum before his CPP benefits were affected. He did not report this amount to either because he thought it was a gift, excluding it from reporting requirements, and that otherwise the limits allowed him to withhold reporting amounts earned unless he reached those thresholds. He likewise did not report the amount to the Canada Revenue Agency.

**15**  With respect to his own house, he said he was slowly recovering from his earlier injury and returning to additional responsibilities in the home. He said outside the house he trimmed the shrubs; cut the lawn; pressure washed the driveway and the roof; and washed his cars and the house windows. He said in October 2010, he painted his house over two or three weeks, working five hours a day four or five days a week. He would service the family's cars by doing oil and tire changes.

**16**  Psychologically he said he was well and getting better.

**17**  With respect to his family life, he said he was involved in his children's activities such as soccer, swimming and helping with homework since the time of the first accident.

**18**  Recreationally he said he had a family of five brothers and the families regularly gathered every two to three months. Otherwise, he regularly attended a gym and walked in order to return to work, performing a routine of cycling and lifting weights of up to 50lbs. With respect to other exercise, he said he walked five times a week for 30 to 40 minutes but he said if he walked any longer he became tired.

**19**  Before the accident, he claimed that he was considering an auto mechanics repair course.

**20**  He said with regard to his cognitive abilities that he was fine before the March 2011 accident and he became slow after the accident.

**21**  He said he had been in another motor vehicle accident on February 10, 2011, when he was rear-ended while waiting to make a left turn. He said had some low back pain but relatively little and had not sought any treatment.

***The First Accident of March 29, 2011***

**22**  The parties agree to certain facts which I now repeat:

1. The first motor vehicle accident that is the subject matter of these proceedings occurred on March 29, 2011, at or near the intersection of 138th Street and 70th Avenue, in Surrey, British Columbia (the "First Accident").
2. At the time of the First Accident, the Plaintiff was driving his 2004 Honda Pilot. The damage was to the right front bumper and corner. The damage to the 2004 Honda Pilot was repaired in the amount of $6,598.64. The 13 colour photographs at Tab 1 depict the 2004 Honda Pilot after the First Accident.
3. At the time of the First Accident, the Defendant was driving his 2006 Ford Mustang. The damage was to the left side. The damage to the 2006 Ford Mustang was estimated in the amount of $8,447.02, and the vehicle was subsequently deemed a total loss. The four colour photographs at Tab 2 depict the Ford Mustang after the First Accident.
4. Liability has been admitted for the Accident.

**23**  Photographs of the vehicles involved show that the side of the defendant's vehicle was struck by the front of the plaintiff's Honda Pilot, damaging the right front bumper and corner.

**24**  Mr. Kandola said he was driving to pick up his daughter when the collision occurred. He could not estimate the speed of the other car. He said he was seatbelted.

**25**  He said at the time he felt chest pressure, a sore upper back, a stiff neck, and a tight low back. He saw his family doctor the following day with the same symptoms.

**26**  He said he then had two or three weeks' pain and numbness in his arms, pain in his hips and legs. He was forced to stop exercising and helping around the house. if he tried either his pain would increase. He said he had not done any housework since March 2011. When he tried chores he found them painful.

**27**  Mentally he "got sad" because he was so limited. Socially he said he was sad and angry and he did not feel like going anywhere and he only socialized with his own family. He said with respect to his wife that she had become aloof and did not want to hear any more of his physical complaints, so he stayed sad, angry and away. He said he was unable to speak or spend time with his children because he is "lost in [his] pain".

**28**  Asked if there were differences in his personality he said he had a lot of muscle pain and had lost a lot of weight perhaps 10-12 pounds since 2011. He said he could see his ribs and his entire body is skinny and people are commenting about that.

**29**  He said he had a very weak memory and could not remember very much.

**30**  He said the pain was worse at night or when he went outside.

**31**  He said he had not improved after March 2011 but the doctors could give him no reasons.

**32**  He said after the first accident, he took medications that his family doctor prescribed and the family doctor often gave him samples as he could not afford them. Reference was made to drugstore and Costco printouts which appeared to overlap.

**33**  He said he found it very difficult going to non-Punjabi doctors and would take a child with him to translate.

**34**  He said his family doctor was a Dr. Sheik and his previous family doctor had been Dr. Ng.

**35**  He was asked why he stopped seeing Dr. Ng. Mr. Kandola said that he asked him for a scan and the doctor ignored him. He said he saw other doctors who referred him back to Dr. Ng so then he went and saw Dr. Sheik and he got "all these scans done".

**36**  He said he stopped seeing Dr. Ng in early 2014. He said he had been to see Dr. Manjunath (his psychiatrist) for three months one to two times per week but said he did not remember what he said and he did not understand the doctor. He agreed he stopped seeing Dr. Manjunath, but could not recall when he last saw him.

**37**  He was seeing a new psychiatrist, Dr. Harrad, and he said the gap in psychologists was because of the family doctor's referral and the family doctor was giving him anti-depressants.

***The Second Accident January 23, 2015***

**38**  The statement of agreed facts addresses the second accident as follows:

1. The second motor vehicle accident that is the subject matter of these proceedings occurred on January 23, 2015, at or near the intersection of King George Highway and 68th Avenue, in Surrey, British Columbia (the "Second Accident").
2. The two colour images from Google Maps at Tab 3 depict the area where the Second Accident occurred.
3. At the time of the Second Accident, the Plaintiff was driving his wife's 1996 Toyota Camry. The damage to the 1996 Toyota Camry was estimated in the amount of $2,632.30, and the vehicle was subsequently deemed a total loss. The records at Tab 4 are the material damage Supplement 1 dated February 3, 2015 and Estimate dated February 20, 2015 for the 1996 Toyota Camry. The five colour photographs at Tab 5 depict the 1996 Toyota Camry after the Second Accident.
4. At the time of the Second Accident, the Defendant was driving a 2008 Peterbilt Tractor. No damage was claimed for this vehicle, and no repairs were made. The three colour photographs at Tab 6 depict the 2008 Peterbilt Tractor present day.
5. Liability has been denied for the Second Accident.

**39**  Mr. Kandola said he had gone to physiotherapy that day and was planning to go to Trail Appliances, whose store is on the east side of King George Highway, before going home. He approached it at approximately 12:50 p.m. on a sunny, clear day.

**40**  He said he was stopped and preparing to turn left, i.e. coming from the north and turning to his left across the King George Highway. He could not remember whether there were yellow lines marking the median area of the road. While waiting, he saw a truck three car lengths in front of him with red lights on. He claimed that the truck then suddenly backed up without warning, accelerating to 20-25km/h, and that he tooted his horn 10-15 times to no avail before it hit his vehicle at a slight angle.

**41**  Pictures of Mr. Kandola's vehicle show some slight damage to the right front wheel well and right front bumper.

**42**  He felt there was "quite a bit" of force to the impact.

**43**  He said after the collision the truck driver came running back to him, asked if he was okay, and said that he did not see Mr. Kandola and that he was sorry. They then drove over to the warehouse, the truck backing in, where they exchanged information. He was there for 15-20 minutes before driving home.

**44**  He said that immediately after the accident he felt pain in his upper back and neck. The pain increased at night, where he also had pain in his arms. Over time, as his symptoms progressed and he began experiencing pain in his legs, stiffness in his chest, and a painful swollenness in his upper shoulders. Since the accident, the pain in his neck and additional pain has not subsided.

**45**  He said that as a further result of this accident he could not do any housework or any work outside the house and that his psychological symptoms got worse.

**46**  Asked what future treatment he anticipated, he said physio, massage, pain clinic subject to medical recommendations, that he would accept the recommendations and would take his medications.

***Cross Examination***

**47**  Mr. Kandola agreed that if he turned his neck everything hurt and that he still had range of movement limitations with his neck.

**48**  He said it is sometimes hard for him to turn his neck right or left 90[degrees].

**49**  Asked if he sometimes could move his neck freely, he said it was possible with medications and that he takes his medications daily and that he could with an effort to move his neck freely. I observed that he promptly turned his head 90˚ to the left.

**50**  Various questions were then put forth from examination for discovery:

160 Q Do you have any range of motion limitations with respect to your neck?

A Yes, yes. If I do activity, then the neck stops moving. If I lift dumbbells, 2, 3, or 5 pounds, if I do that four times, three reps, then my neck totally stops moving

161 Q My question is really in general are you able to turn your neck to the right, to the left, up and, down?

A Yes. That's limited.

162 Q Okay. What can you not do?

A It's difficult to move my neck upwards, and even to look straight continuously is difficult. And I have problems looking left or right.

163 Q So how far can you look to the right?

A I could see about this far to the left and the right.

164 Q So you - -

A I can't see parallel.

165 Q What do you mean by "parallel"?

A I mean I can't see at 180 degrees alongside.

166 Q So when you were talking before, you were saying that I can move my neck like this and like this, but you cannot turn your neck to a 90-degree angle; is that right?

A What do you mean by "90 degrees"?

167 Q 90 degrees would be like this. So this is straight; right? If you turn your neck this way to look that way, that's 90 degrees.

A Yes. I have pain in the neck like this. It's difficult.

168 Q But are you able to do it or no?

A No, I can't.

169 Q Okay. So you cannot turn your neck to a 90-degree angle to the right or to the left?

A Yes. It's difficult. It hurts.

170 Q Sorry. Again, my question, though, is are you physically able to turn your neck to a 90-degree angle to the right and to the left?

A No. There's a bit of difficulty. It hurts. Sometimes it's very stiff. In the morning and at night it's very stiff.

171 Q Are there days when you're able to turn your neck fully to the right and to the left with no restriction?

A No. It's not like that. It always hurts.

172 Q I just --again, I understand that it hurts, but what I'm asking is whether there is any physical limitation that you actually have that is preventing you from doing it or if you're able to do it but with pain.

A I didn't understand.

173 Q Have there been any days since the accident that you have had no difficulty moving your neck to a 90-degree angle, whether to the right or to the left?

A There is difficulty.

174 Q Have there been any days since the accident where you have been able to do it?

A Yes. When I'm in hot water, I feel better. I'm able to do it then. Otherwise it gets stiff. It's worse in the mornings.

175 Q So aside from when you're in hot water, you're not able to rotate your neck to a 90-degree angle to the right or to the left?

A Yes. It continues to hurt. It's difficult.

**51**  Mr. Kandola agreed his answers were true but then said he was "doing it though pain with medications" and he made a full turn of his head i.e. 90[degrees] thereabouts to his left and said he has now got pain.

**52**  During the course of answering these questions I noted Mr. Kandola looked up and down quite freely from the transcript with no apparent restriction in his neck movement. He had looked forward without any difficulty and from time to time he moved his head 90˚ to the left where his translator stood.

**53**  He agreed he had seen Dr. Nikolakis in August of 2015 and the doctor had carried out a physical examination and that included assessment of his neck range of motion. The report stated: "his cervical range of motion was extremely reduced. He had almost no range of motion on flexion, extension, rotation or lateral bending."

**54**  Mr. Kandola said sometimes he had lots of problems and that he has to take a hot tub for 20 minutes every day. When asked if he was saying that was his range of motion on the date of the exam, he said it depends. He said his daughter drove him to the appointment as he was in a lot of pain.

**55**  Developing on his discussion of weights, Mr. Kandola said he could not lift heavy items. Asked if he could lift five pounds he said he could do it once but not for three or four minutes otherwise his neck would "totally seize" and went on to say the accidents had made his body a wreck, that it was difficult for him to even lift 20 pounds and therefore he stopped exercising.

**56**  Asked if he could move 20 pounds he said he could pick it up and place it but difficult if it was on the ground. He agreed he was generally limited to lifting light weights.

**57**  He agreed that even lifting five pounds would cause him to experience pain and that even now he had pain in his arms (which he then waved vigorously) and that is why he was not going to the gym.

**58**  He said he could not walk some days due to pain in his legs and back.

**59**  It was put to him he said he was not taking any medications at the examination for discovery and he said that was because he did not pay attention and had a slow memory. Asked if he could squat and crouch if taking medications, he said sometimes and maybe even up to four times if there was less pain.

**60**  Asked if he had a day with less pain since March 2011, he said sometimes when he stretched. Asked if that contradicted him saying there was no improvement he says one day he can and the next day he cannot. Asked if the pain was continuous in his arms and the back of his head, he said the doctor could palpate the back of his head and find the muscles were tight and the pain continued in his chest, arms, legs and back. He said it is continuous since the first accident and that when he walks he gets dizzy because he has had so many injuries.

**61**  Mr. Kandola was under surveillance in July, August, and September, and November of 2015.

**62**  On the morning of September 11, he moved in and out of his Toyota Yaris with little difficulty. He is shown making a 90[degrees] right shoulder check with apparent ease. During the day he drove to the Cloverdale Athletic Park, and walked for about 15 minutes, stretched and then went home. He then left again and went to the Superstore at 7550 King George Boulevard where he entered the grocery store and shopped for some 18 minutes. He was seen in full active movement with arms, hands and legs, using both arms, bending at his hip, and being able to crouch down, bend at the knees, and then stand up over several minutes.

**63**  Later Mr. Kandola drove to Fruiticana on 72nd Avenue and came out of the store with groceries in one hand.

**64**  On November 5, 2015, Mr. Kandola drove to a Chevron gas station for a coffee and exited and returned home. Then he drove his Toyota Yaris, went to a Shell gas station and filled his vehicle.

**65**  Later he went to strip mall on 72nd Avenue and to a Costco on King George Boulevard, entering and pushing a shopping cart, standing in line at the pharmacy, walking around inside for some 11 minutes at all times freely moving his arms, legs, hands and feet and head and neck. After paying he exits with a full shopping cart of items which he placed in his vehicle.

**66**  He then drove to the Real Canadian Superstore on King George. There he made a cellular phone call and squatted looking at shelving with no difficulty, then squats a second time, holds a crouch of more than 10 seconds, rises, goes into a third crouch, rises, then a fourth crouch which he held for approximately a minute, reaching into the lower shelves (seemingly not being able to find the item he is looking for). He then sought assistance from a salesperson and returned to the area, squatting beside the assistant looking for the item. The assistant stands and leaves and he continues to stay in a crouch for some 45 seconds and then returns to his cellular phone. He exits carrying two grocery bags and effortlessly places both in his left hand. Again he has no difficulty looking right and left getting into his car, backing up the car and leaving.

**67**  He agreed the videos showed him walking more than ten minutes, driving, standing, turning his neck in all directions, on multiple occasions bending and crouching and holding a crouch.

**68**  Asked if he agreed there were no apparent problems with his movements he agreed and smiled and said "Am I crazy to get a doctor and MRIs?"

**69**  Put to him that the video showed him moving without any apparent difficulty, he said that he gets up in the morning takes a shower, does floor stretches, he gets his energy, takes his medications and with that support he starts.

**70**  Asked if that made him feel better during the day he said no, he cannot repeat that kind of activity, and does it once in a while. He said if he could not find an item at the store his wife would go.

**71**  Asked if he agreed he moved without difficulty on the video, he said pain was occurring. He said there was difference between what he was doing and his pain. Asked if he is saying today he can do some movements with medications, he said not repeatedly. It was put to him he crouched and stood in the video several times and he said sometimes he did not feel like it and it is difficult.

**72**  He said due to the pain he has found it difficult to get up from the floor, and he could not do it for 15 to 20 minutes but he could do it four or five times but then he had a lot of pain for three days. It was put to him on his examination for discovery he said he was unable to crouch:

187 Q Were you able to crouch after the first accident?

A No.

188 Q Were you able to squat after the first accident?

A No.

189 Q Were you able to crouch after the second accident?

A No.

190 Q Were you able to squat after the second accident?

A No.

191 Q Have you tried?

A Yes.

**73**  He agreed that was what he said and that he had given his evidence under oath but that he meant he could not do it without medication. It was put to him sometimes he did not know if he was telling the truth and he agreed. Asked if he knew he was saying things that are not true, he said he tries his best to tell the truth and possibly makes mistakes.

**74**  When it was put to him that on November 2, 2015, he said he was not able to squat and crouch, he said I did not understand and did not recollect that.

**75**  When it was put to him that on the discovery he had been told that if he did not understand he was to say so, he responded that even now he was sitting in pain and he could not tell, that he did not have time to think.

**76**  It was pointed out to him he had sat in the witness box without any apparent difficulty much of the previous day and he promptly stood up and then said he was in pain now and that he knew what pain is. It was pointed out to him that he had sat continuously for 44 minutes save for standing to look at documents and he laughed and said that could be. When it was suggested he had done that much on the previous day, he replied that if he had to go to class daily he could not go, and he thought it would not look good if he now stood up, and that he was in a lot of pain. He said it had been difficult for him to sit the previous day. Asked why he would not stand and stretch, he said that was the question but it was not a playground. Asked why he would not give his evidence standing he said it would induce some pain then he would sit. When it was suggested the Court had "given him an option of sitting or standing as he wished", he said he did not know. He said he did not know whether he could have taken a break the previous day and then he stood again and went on to say that all of his activity had ceased and he used to enjoy his sports and won many trophies when he was in school.

**77**  He then gave evidence as to his work as lumber grader and the accident that occurred 2000, where he would be working with pieces of wood up to 24 feet long and up to 200 pounds.

**78**  He was shown a job analysis from 2001 by a vocational rehabilitation advisor, describing working beside a conveyor belt, and requiring constant standing and walking. Mr. Kandola said that it only required two steps and not a lot of walking.

**79**  With respect to the physical demands analysis of being able to lift up to 35 to 50 pounds he did not agree and said that would not be light or medium work but heavy work as the weights that he faced in the job were much more.

**80**  He agreed he had not held a full-time job since 2000.

**81**  He agreed the low back injury was serious and had prevented him from working since even after low back surgery in 2002 and post-operative therapy and as a result of his low back pain he became depressed.

**82**  He said with respect to the surgery it was "a little bit result" in that his leg that "went to sleep... got better"

**83**  He said he continued to work at his exercise, walking and stretches but continued to have low back pain from 2003 through 2006. He said if he worked and he got pain, he would walk, stretch and get relief from that way.

**84**  He said he still felt sad from 2004 through 2006.

**85**  He said he had applied for a number of jobs in that time but had not been able to be comfortable with any of them, particularly if they had any bending or physical strength requirements. He said he would try and but could not do it.

**86**  He agreed he got some work in 2005 with a finisher company putting handles on cabinets, a job where he could stand or sit but he said they had no work or not enough work for him and that with respect to back pain he had worked more than two hours and then the work ran out. He said he did not leave the job because of its physical demands but because there was no work. He said he reported the attempt to the WCB.

**87**  He agreed he got no work in 2007 and he just read the newspapers looking for a suitable job within his limitations.

**88**  A job search record sheet from Workers' Compensation Board showed no jobs sought in 2007, but he said he made telephone calls.

**89**  He agreed he had started doing outside jobs around the house in 2007 and had pressure washed the driveway in 2007 and washed cars. He agreed in 2008 he had cleaned windows on the house exterior and that job would require standing and bending but he was able to take a break when he wanted to.

**90**  In 2008 he passed the security guard exams but then said he did not pass two tests and the third time the school passed him and he was then hired as a security guard. He said eh only worked a few days because the standing and walking caused him back pain. At this point Mr. Kandola stood up a few minutes in the stand and then sat down again.

**91**  He said he was gradually feeling better after 2008 and only had pain when he was fatigued and that bending was a lesser problem. He reported he was walking, doing his gym work and exercising, and he felt was improving.

**92**  He did not remember seeing Dr. Verdejo in 2008. Mr. Kandola was referred to a consultation report of February 6, 2008, where the doctor conducted a physical examination.

**93**  That report states "his neck was normal but the spine was exquisitely painful" in response to light pressure on the supraspinatus ligaments and paraspinal muscles and throughout the low lumbar region; thoracic-lumbar rotation was practically nonexistent; lateral bending was also minimal to hardly 5[degrees] due to "pain"; and he was able to bend from the vertical only about 10[degrees] due to "back pain". Mr. Kandola disagreed with the doctor's findings.

**94**  He disagreed Dr. Yousaf had referred him to physiotherapy in March 2000. Asked if he went to the Newton Sports and Physiotherapy Clinic he said he did not remember. He was shown a physiotherapy report from WCB and said he did not know the physiotherapist. When pressed he agreed he might have gone to Newton Physiotherapy before the 2011 car accident.

**95**  A March 11, 2008, physiotherapy report stated Mr. Kandola was not able to stand or sit more than ten minutes, could not bend and could not lift. He disagreed he had functional limitations but said everything at that point gave him some problem but not to the extent reported and denied he could not stand for ten minutes or walk although there was some trouble with bending and that he could pick up 20-25lbs. He said that was the reason he tried the taxi training in 2008 but failed the English proficiency aspect in spite of taking English language courses and having lived in British Columbia for 25 years; when that was put to him he said there was a problem in the way he wrote because his hands trembled. He then agreed there is also a question about his English proficiency.

**96**  The accident of February 2010 when he was rear-ended was then discussed. He agreed there was a somewhat significant collision but denied there was extensive car damage.

**97**  He agreed he told Dr. Ng he had experienced neck pain after the accident but he did not report the accident to any other treating doctor.

**98**  He agreed there was an accident prior to that in February 2009, when he was on 68th Avenue and slid on black ice and his motor-vehicle hit trees causing vehicle material damage of $6,663.42. He said he was not sure as to the costs of the repairs but agreed that was the amount showing on the damage assessment. He agreed the damage was greater than that which had occurred to his Honda Pilot in the accident of March 2011.

**99**  He agreed in 2009 he helped his brother Gurmail build his house and worked from January through to August.

**100**  In that span of time his CPP disability benefits had been reviewed and denied, but he hired a lawyer and appealed and attended a hearing in 2008. He gave evidence at the hearing and the Tribunal's decision was rendered July 12, 2009. At p. 3, para.4, the Tribunal judgment states

Due to pain and disability he has been unable to continue these work trials. The appellant reports a number of other disabilities or limitations and medical difficulties, including functional limitations related to reaching, personal care, bowel habits, household maintenance, remembering, concentrating, sleeping and breathing.

**101**  He agreed that was at the evidence given at the hearing and that it was true. He had been granted CPP disability as a result of the tribunal's finding.

**102**  Mr. Kandola agreed there had been a finding he was not able to work because of difficulties associated with his disabilities which came out at the same time he was working on his brother's home.

**103**  Mr. Kandola agreed he could do all his household chores with breaks including tree and hedge trimming, power washing, cleaning gutters, plumbing and vacuuming as long as he was able to take a break.

**104**  An examination for discovery evidence from November 13, 2014, was then put to him.

**105**  On discovery Mr. Kandola said he is unable to push the lawnmower, vacuum, or mop. He said his wife did that. After the accident, if there was a problem in the house like plumbing or electrical matters he would call someone.

**106**  He said his evidence was the best of his knowledge at that time. He agreed he might have vacuumed or mopped but his wife normally did it and then he went on to a long rambling answer about his memory being bad and he could not remember as the accident had ruined his life. Put to him that the loss of his memory was in issue before the accident of March 2011 he said "it could be, who knows?"

**107**  He agreed that in building his brother's house he had helped screw in the plywood floor, cleaning, picking up garbage, shovelling and levelling gravel in the driveway, helping the framers, cleaning the bathroom, washing the windows, moving and building the retaining wall, and moving the server. He agreed some of these tasks were difficult, and contradicted claims he made about his physical limitations, but said he worked slowly with breaks.

**108**  He agreed he was working five to six hours a day taking breaks and would work for ten minutes and then take a break but he said an employer would not let him do that. He agreed he would take four or five breaks in a day. Apart from some fatigue he had few issues working on Gurmail's house; he was pushing himself and felt happy at the result. He did well in 2009, he was improving and looking forward to work.

**109**  Put to him that he had days without pain in 2009, he said he was a bit better. He agreed he had said every second day he was without pain prior to March 2011 and it was the best he had felt in about nine years, and that he might be able to work 30 hours in a flexible job.

**110**  He agreed he had worked January to August 2009 on Gurmail's house and that his low back condition had improved but he did not tell Dr. Ng of that improvement. He did not know why he would not tell Dr. Ng. He did not remember if he had spoken to Dr. Ng.

**111**  He denied not seeking work in 2009 and said he obtained the automotive technician documents at that time.

**112**  He agreed in 2011 he considered an auto mechanic repair course. He said he was sent a kit but did not register for the technician course and said he had to think about the money as it was more than $100. He agreed he was just thinking about it and had not enrolled. He agreed he did not get a job in 2010 or the three months of 2011 before his accident.

**113**  He agreed Gurmail paid him $10,000 six months after he moved into his house. He said he did not remember not mentioning the housework at an earlier examination for discovery or that he was paid $10,000 because it was not "in mind". He agreed he had mentioned the security guard and taxi driver attempts but he had no answer for why he failed to mention Gurmail's house.

**114**  He agreed he had said on the examination for discovery of November 2, 2015 the cheque given to him by Gurmail was because he had worked for Gurmail for a short time when his house was being built and he paid him. He agreed he expected he would be paid something (providing a figure of $500-$700), but said Gurmail did not have to. Put to him that the cheque was not a gift, Mr. Kandola said it had to be looked at in light of the brotherly history and that they had lived together.

**115**  He agreed CPP had a $5,000 per annum limit on employment income affecting a disability pension and that if he made more he was obliged to advise CPP. He was shown a letter from CPP dated February 16, 2009, which provided information about his CPP disability benefit. He was being provided a monthly amount both for himself and for his three children and the benefits from 2005 to 2009 totalled $57,858.34 on which he would be obliged to pay taxes.

**116**  Mr. Kandola said he did not see that letter nor was he aware of his obligation to immediately notify Service Canada of any changes affecting his entitlement which included a significant improvement in his medical condition or employment.

**117**  He agreed he did not report the monies received from his brother to CPP or any improvement in his physical condition. He likewise did not report on his condition to WCB and said in that regard he was allowed to work part-time.

**118**  He agreed he and his brother helped each other if they were available on occasion but never with the housework.

**119**  He said his wife did not work but the children did. He agreed painting his house is not a common house job and the children would not help on the house painting job.

**120**  He agreed he can change oil, check tire pressure, change wiper blades and even replace a light bulb in his car. He said however that he could not change oil now and he could not even walk; that he could check tire pressure by sitting on the stool but if he tried to crouch he would have a lot of back pain. He agreed he could check tire pressures at his own pace.

**121**  Mr. Kandola was then asked about his family physician, Dr. Ng, who had been his family doctor from 1992 until 2014. In 2014 Mr. Kandola had changed to Dr. Sheikh who was younger and less experienced than Dr. Ng, but Mr. Kandola said that Dr. Ng was not listening to him, was not prescribing the proper prescriptions, told him he did not have an injury but depression, and would not give him "scans". He sought other doctors and they referred him back to Dr. Ng. However Dr. Sheikh said he would get scans done and that is why he changed to Dr. Sheikh.

**122**  He agreed he saw Dr. Manjunath with respect to his depression from 2006 and saw him on a regular basis approximately every three months and continued taking antidepressants between 2009 and 2011, when he said he was "doing well". He said Dr. Ng gave him samples after this time.

**123**  He agreed he said he had been feeling sad because he did not have a job and because of his back injury. Mr. Kandola agreed he told Dr. Manjunath that he was still having back pain and not doing well on March 15, 2011.

**124**  He said he did not know for what reason he stopped seeing Dr. Manjunath but eventually he was referred to Dr. Harrad and saw him in January 2014. He said he did not see any psychiatrist between June 2011 and January 2014.

**125**  Asked if he told Dr. Harrad that he had stopped taking antidepressant medications well before the first accident he responded by saying Dr. Ng gave him samples because he could not afford the medication otherwise. Then he said he did not remember what he told Dr. Harrad. He likewise did not remember if he told Dr. Harrad he was much better in terms of the depression prior to the first accident. He did agree he continued to take antidepressant medications between 2009 and the date of the first accident and then he said he could not afford medications and Dr. Manjunath gave him "a similar type".

**126**  It was put to Mr. Kandola his evidence in direct examination that since 2011 he had lost 10 to 12 pounds was contradicted by his evidence on examination for discovery on November 13, 2014, where he said that he had lost some weight after his surgery due to stress, and then his weight after the accident stayed approximately the same. Asked if he gave those answers he said he did not take it seriously.

**127**  Asked if the main issue after the second accident was that his neck pain became aggravated, he said pain is happening and he cannot go to sleep at night. He disputed it was just his neck and said everything has become more serious. He said his "upper traps" are very painful and a good health professional could see they are "still swollen now". His examination for discovery of May 20, 2015, page 98, questions 590-593, was put to Mr. Kandola where he said the pain in the back is pretty much the same as it used to be and that the only thing that had changed was his neck become more aggravated. He agreed he gave those answers and they were true but then said "compared to my first report, the accidents have totally wrecked my body." He said he was having pain, was waiting for a CT scan, his buttocks were numb all the time, he has leg pain, and he had no life.

**128**  Mr. Kandola then said that he was suffering dizziness, pain in his arms and shoulders and tightness in his neck at the time of the discovery.

**129**  Mr. Kandola said that he continued going to the Tong Louie Family YMCA after the first accident and sat in hot water, stretched, did some exercise and rode a bike for 10 minutes.

**130**  With respect to the second accident in 2015, he agreed that he knew from his driver test that if he could not see the mirrors of a big truck then the truck driver could not see him. He said he knew that he should be able to see both mirrors of a truck that he was parked behind; he said he would normally be three car lengths and perhaps two car lengths behind a truck.

**131**  He said when he stopped behind Mr. McDonald's truck he thought the truck was going to move to the right and go south, i.e. straight, even though it was parked on the median lane.

**132**  He claimed there was no indication the truck was intending to backup. He said he did not hear a backup alarm, and that when he began to backup he honked his horn numerous times but the truck did not stop.

**133**  He again claimed he could see the truck mirrors, but he said he did not see the face of the driver.

**134**  He said it was possible the truck backup alarm and lights activated but the truck reversed very quickly and he did not have a chance to move out of the way. He said he guessed at the truck speed being 25 to 30 km/hr and drove approximately three car lengths straight back in the median area.

**135**  Mr. Kandola disagreed the truck had commenced a left turn into the driveway on the east side of King George Highway.

**136**  He agreed he could not see oncoming traffic so he did not make his left turn, Asked if he was parked three car lengths behind the defendant's truck he would have had a view of some of the oncoming traffic, he then said he could have seen somewhat. He repeated, however, that there were about three car lengths between his car and the back of the truck.

**137**  With respect to amounts claimed for future care and his loss of homecare capacity, he was asked why all the invoices produced were for 2015 and none prior to that date he said he would find them.

**138**  He agreed he could not wash his car because it required him to bend. When asked why he was apparently able to bend, crouch and squat in the video he said sometimes he had pain but he could not normally do that. It was put to him he would use the same movements to wash your car, he answered with the question "how can I?" and then said it was very difficult to wash the car, as he extended his arms out comfortably.

**139**  Asked why the children could not assist, he said they could take the car to the gas station. Asked if the carwash bill was a bill to the children or himself, he said it was for himself. He repeated he cannot cut the grass or trim hedges and he cannot push an automatic mower because he has too much pain when he bends.

**140**  He said the children could not help with household chores because they were buried in their work.

**141**  It was noted the hedge trimming receipt was not dated, had no address and no name on it.

**142**  Mr. Kandola said that he cannot pressure wash because it gives him pain in his buttocks and his legs swell. Asked if he paced himself he could do the power washing, he said he cannot walk more than 15 minutes and his arms go numb.

**143**  With respect to the power wash card with no address and no date he said they were uneducated people doing a labour job. He agreed he had no receipts and payments for the power wash.

**144**  On September 14, 2014, he saw Dr. Harrad who referred him to the Jim Pattison Healthcare at Surrey Memorial Hospital. He agreed that they had called him on May 13, 2015, and he cancelled the appointment.

**145**  He was then shown a document which indicated the patient stated he no longer needed the appointment from Fraser Health Chronic Pain Clinic. He disagreed that he had done that and said he called many times for "an injection". He claimed there were some problems in the telephone discussions with the hospital.

***Re-examination***

**146**  He was shown a video showing him walking at a nearby park on August 19, 2015, and said that was a school sports field by. He said he was in pain and walked for some 10 or 15 minutes but then he was not able to continue and went home.

**147**  He was shown a video of September 11, 2015, showing him walking for approximately half an hour around a field hockey ground. He appeared to be keeping good posture and had free arm movement. He took a break after approximately 20 minutes for a minute or so and appeared to walk comfortably. He said about halfway through he had to stop because of his pain and stretched but it was easier walking on the turf. He said was able to walk so long because he had stretched and was able to walk a bit more.

**148**  With respect to the video of November 5, 2015, he was driving and able to turn his head but in exiting the Tim Hortons's, he was careful putting coffee into the passenger side but then appeared to move freely to get in the driver side.

**149**  On September 11, 2015, he was at Superstore using a basket and pulled off an item above shoulder height to put in the basket. Asked why he did not put the basket on the floor, he said he was in much pain.

**150**  He said he felt very tired at the end of the first day of trial and said he knew he could stand but he thought it did not look good.

**151**  With respect to the motor-vehicle accident of February 2009 when his car slipped off the road on black ice and hit a tree, he clarified he did not see a doctor regarding that.

**152**  He attempted to explain what he could and could not do regarding the November 13, 2014, examination for discovery and said that he could do some things before the accident if his wife could not do it.

**Other Lay Witnesses**

***Ms. Jaswinder Kandola***

**153**  Ms. Kandola obtained a B.A. in India. She married the plaintiff in 1987 and their three children were born in the early 90s. She said she instilled in her children respect for others, and the value of studying hard and to becoming something.

**154**  She said her husband was strong physically before the 2000 back injury. By then they had paid off their house mortgage. She had worked prior to that time as well.

**155**  She noted that after his 2000 back injury; Mr. Kandola had foot numbness and eventually surgery in 2002. She said he went to the YMCA gym and moved from the cycle to the treadmill and eventually took up weight lifting. He also enjoyed the hot tubs and swimming pool.

**156**  She said he took the children to their extracurricular activities.

**157**  She said Mr. Kandola was some help around the house but that it was primarily her concern. He did some house maintenance. For example, she said he did exterior work from 2008 on, and generally had no difficulties although he occasionally he said he was sore and had the odd complaint of pain, but wanted to push himself. He painted the interior of the house in 2010 over a week, taking breaks as he needed them.

**158**  She said prior to March 2011, he was happy, enjoyed people and still wanted to return to work. He enjoyed family gatherings, which would be up to 25 people. She said he was caring and responsible for her and the children.

**159**  She said that after the March 2011 accident, she recalled him looking yellow, shaking, afraid, having slow neck movement, sore back and swollen shoulders. She said the swollen shoulders are still visible today. She said he is always palpating his chest.

**160**  She said after the February 2015 accident, he complained of thigh pain and difficulty getting up.

**161**  She said he slowly lost weight. His buttocks have flattened and his neck is sometimes good and sometimes bad.

**162**  She also said that after the second accident he was complaining of arm numbness. She said he has changed and seems to like being alone. She said he will sometimes go downstairs to sleep. She said her daughter tried to get him to come back upstairs, but he said to his wife "I'll come back up on my own."

**163**  She said since his accidents he will say he is in pain and not come to dinner. She said she can see he is in pain. He has developed a temper, getting mad at the children if they do not listen to him and saying critical things to her if she does not keep the house tidy. She says he keeps to himself even though his daughters try to help him.

**164**  She said he is no longer able to do home maintenance. She testified she once set up the pressure washer for him to use, but he gave up after 10-15 minutes, saying he could not stand. He occasionally helps with dishes. She said he tried trimming a tree but he said his chest hurt. She has also mowed the lawn on occasion when he could not.

**165**  They do go for walks about three times per week, driving to where they can walk on grass.

**166**  She thinks he does not eat enough.

**167**  In cross-examination she said Mr. Kandola was able to rest as he wished when he helped with Gurmail's house in 2009. She said he continued to work out in 2010, still trying to improve so that he might be able to work five to six hours a day.

**168**  She did not know her husband had been seeing a psychiatrist.

***Mr. Gurmail Kandola***

**169**  Mr. Gurmail Kandola's evidence was by way of video deposition taken November 4, 2015.

**170**  He is an electronic engineer and his company builds Wi-Fi chips.

**171**  The family moved from India to Canada in 1980. He began university in Vancouver in 1984.

**172**  He noted Kuldip built his own house in Surrey in 1994, which sold in 1996 when he moved to California.

**173**  He said he kept in regular contact with his family while he lived in California.

**174**  He noted how physically strong his brother was prior to his work injury in 2000. Post-injury he was very weak and in apparent pain. He did not believe there was a big change in his personality.

**175**  Gurmail returned to BC in May 2008. He purchased a lot across the street from Kuldip in August 2009.

**176**  He said his brother volunteered to manage his construction project in 2009. In doing so, he said his brother was responsible for calling the contractors, negotiating the prices, opening and closing the construction site, cleaning up debris, cleaning up tubs and windows and doing minor carpentry. He also helped with a six-hour weekend job as well as the shovelling gravel and raking same, planting trees, installing of building ties weighing up to 80 pounds, screwing plywood floors and constructing window wells.

**177**  Other than working at his own pace and sometimes getting tired, he seemed functional.

**178**  Gurmail said there had been no arrangement about compensation but his brother was fully involved and worked hard. He decided to pay him $10,000. He figured that was fair for the 20-30 hours per week his brother spent on site. He said there was ongoing consultation on the phone and he would be there on site at weekends and evenings. The $10,000 cheque is dated February 27, 2010.

**179**  Gurmail referred to photos taken during the construction: the retaining wall, and the server that was moved from the basement to the main floor kitchen in or about December 2009 which he estimated 150 lbs. He said he did not move it, thinking his brother and nephew were stronger than he was.

**180**  He said from the time he moved in August 2009 until the accident in March 2011 they used to walk together for 45 minutes at a time once or twice per month, and he saw him doing exterior housework such as mowing lawns and trimming shrubs, doing some pressure washing, and washing his cars as well as climbing ladders to clean his roof gutters. He also saw him doing some interior painting, changing lightbulbs and fixing faucets.

**181**  Mr. Kandola said his brother was quite social from September 2009 to March 2011 but that after the accident he was physically weak, not able to walk and became "not functional". As well, he could see he was not doing any house activity.

**182**  In his view, Kuldip become a weak person and was in pain, quiet and would not initiate conversation. He felt distanced from his brother. He had not seen any improvement in his mood. He had not seen much difference in his brother before and after the second collision in 2015.

**183**  He said since the March 2011 accident he had thought of getting into a housebuilding project and having his brother manage it but changed his mind because he knew his brother could not do the job.

**184**  On cross-examination, Gurmail said he was not aware his brother had been under the care of a psychiatrist or that he used antidepressants.

***Mr. Jaskamal Kandola***

**185**  Jaskamal Kandola is the plaintiff's son. He lives with his father and mother. He has obtained a diploma in Business Administration and works for a collection service.

**186**  He had little recollection of the initial work injury of his father in 2000 as he was eight years old. He did recall his father being in pain after his surgery because his mother drove them to school for a month or so.

**187**  He said up to the March 2011 car accident his father went to the gym daily, doing exercises and lifting dumbbells to improve his strength. He felt his father's back strength improved quite a bit.

**188**  As to his father's physical condition, he could work out at the gym with some back discomfort, doing 30 minutes on the treadmill with a 20 minute warm-up.

**189**  He said his father got him ESL help in grade 7 as he wanted the children to excel in school and sports and he was a motivating force. He said his father put him into sports, hiring him a professional soccer coach and for basketball sending him to a professional camp. He said his father pushed him. As well he hired a math and English tutor to improve his skills in these subjects and it helped significantly.

**190**  He said he broke his ankle weight lifting and his father would go to the gym with him while he was recuperating. He said his father was helpful to his sisters in the same way, going to all their practises and games and encouraging them.

**191**  Jaskamal described the tasks his father performed around the home. He listed that his father changed the oil and transmission fluid in the two cars, would clean the roof gutters while he would hold the ladder, trim the trees once or twice a year (if he found it too difficult he would come inside and rest for a half an hour, stretch and then return to his chore), and mow the lawn and wash the car. He recalled doing more in the two or three years before the March 2011 accident.

**192**  He said he himself was busy as his parents pushed him and he went on to participate in weight lifting and get his diploma. He said he would sometimes help his father, getting him tools or a glass of water.

**193**  He said inside the house his father did occasionally cook, help with the dishes and vacuumed. He fixed faucets and could do some basic plumbing in the two to three years before the March 2011 accident.

**194**  He recalled his father helping on Gurmail's house in 2009 and would go over to the house and saw his father cleaning up daily after the trades, and cutting wood with an electric saw. He recalled his father cleaning the bathtubs with a bucket and sponge and doing all the simple things, including helping Gurmail cut his lawn.

**195**  With respect to the server he recalled his father and he moved that from downstairs to upstairs and its weight was some 250 pounds in his estimation.

**196**  In terms of his father's recreation pre- 2011 his father used to walk 30 to 45 minutes but would come back in some discomfort. At the gym he could do 30 minutes of treadmill and 15 minutes of cycling, do some basic weights and at the time had a set of 15 to 20 pound bar bells.

**197**  He said his father was very sociable and likable and made people laugh. He said his father's mood was very good.

**198**  He said he heard about the March 2011 accident from his sister. His father seemed shaken up when he saw him, holding his neck and low back and seeming to have a limited range of movement.

**199**  After a week he started holding his chest and rubbing his thighs.

**200**  He said his father was even more injured after the second car accident in January 2015 and seemed a lot worse, being able to walk for only as much as 15 to 20 minutes but sometimes five minutes or not at all.

**201**  He said his father would get up late at night and watch TV or go downstairs by himself. He said his father's face seemed "fuller" since January 2015 and he is holding his arms "like they are sleeping".

**202**  He said his father had physically changed since March 2011, that he was bulkier and fuller in his face and chest and now seemed very skinny. He said people ask his father what's has happened, and he said his father is a stick, that he was previously 200 pounds and now 165 pounds.

**203**  He said his father's activity is limited around the house and his mother does the lawn, people are hired to trim the trees, wash the driveway and clean the gutters.

**204**  He has seen his father do the dishes a few times but he does nothing else except walk five minutes or lift five pound weights, doing a few repetitions. At the gym he simply stretches and goes to the hot tub daily.

**205**  He said since the accidents his father seems to forget things and then will repeat things 15 to 20 times each day. He said his father's poor memory seems recent.

**206**  Jaskamal avoids his father as he is very negative and seems to be "all about himself". He is no longer a motivator and they are no longer close. He said he hides in his bedroom, goes to work, does his weightlifting, goes to sleep and he says his father now seems like a stranger.

**207**  In cross-examination he said he wanted his father to get better. He said before the March 2011 accident they were very close.

**208**  He said he had been weightlifting for five and a half years, and trains 6 to 7 times a week for two and a half hours. He also coaches. Jaskamal appears to be over 6 feet in height and over 200 lbs.

**209**  He said his sister Natalie has obtained a bachelor of accounting and works full-time, usually coming home at 4-4:30 p.m. His other sister is a science student at Simon Fraser University. He said all the children have been provided for at home and each have separate bedrooms but do not pay any rent and make no contribution to the running of the household. He said his only responsibility was his own room and the family room. He said he did not help his father that much with his chores as his father wanted to do it himself. If it was an outside job, he would help get his tools, like the funnel for an oil change or a glass of water. He said he had never learned how to change the oil in the car but he agreed he could do so if his father assisted. He said he was too busy with his own life to wash the car. As to the lawn, it takes 60 to 90 minutes to cut it and he does not have time because he is exhausted. He said he does not do the gutters because he is afraid of heights and he does not otherwise assist around the house.

**210**  He has been at the same job for three years having graduated in 2010.

**211**  He agreed he was somewhat less reliant on his parents than he had been in high school and he had access to family vehicles.

**212**  He said he has only recently become aware that his father has been seeing a psychiatrist since 2006, as his father had not told him.

**213**  In re-examination he said the news of the psychiatrist had surprised him but that he can now see his father's depression and his forgetfulness and his personal focus. The memory loss seems to be gradual over time.

***Mr. Norman Murray McDonald***

**214**  Mr. McDonald is an experienced truck driver and a 12 year employee of the Eddi's Wholesale Garden Supplies Company.

**215**  His daily job from 8 a.m. to 5 p.m. is driving a 2008 Peterbilt Panamax 2000kg truck with a total length of some 37 feet, the cab measuring 24 feet.

**216**  He is a careful man as illustrated in his pre-driving routine each day as he checks over his vehicle, including lights, warning signals and brakes.

**217**  On January 23, 2015, he was making deliveries including a delivery to the garden supply store at 6734 King George Highway, where he goes to every 2 to 3 weeks.

**218**  His practise is to approach from the north and swing onto the median past the entrance to the supply store and back in across the northbound lanes as the store does not have a turnaround area.

**219**  He said had been at least 50 times before the accident, and on the day in question, was delivering two or three skids of supplies.

**220**  He recalled the weather being cloudy but there being no rain and the visibility being fair. The road was dry and busy with traffic.

**221**  Once he crossed 68th Street he put on his four way flasher, pulled into the median, stopped and glanced over to the parking lot to see if it was empty so he could back in. He then put the vehicle into reverse and waited for the traffic for one to two minutes. He checked his mirrors and could only see the traffic island behind him and slowly backed up some five to eight feet and at much the same time heard a honk and then a crunch. He estimated his speed to have been five to seven kilometers per hour. He braked, checked his mirrors and saw nothing but then moved forward two to three feet and got down from his truck. He was still in the median when the impact occurred. The four way flasher was still flashing. The beeper had been beeping while the vehicle was in reverse.

**222**  He first saw the car when he walked to the back of the truck. He said there appeared to be a dent on the right front end and damage in the front grill. He said it was a small white car, perhaps a Toyota.

**223**  There was no damage to the truck.

**224**  He said the Toyota vehicle was directly behind his truck and 10 feet or more in front of the median island.

**225**  Mr. McDonald said he asked Mr. Kandola, "What are you thinking parking behind a truck like that out of sight?" and Mr. Kandola replied he thought Mr. McDonald was going into the flooring company to which Mr. McDonald said "I would have my turning lights on."

**226**  Mr. McDonald said he then backed over the road into the supply store, delivered his supplies and then exchanged information with Mr. Kandola. He said they were there about 10 minutes. Mr. Kandola made no complaint about being injured.

**227**  In cross-examination, much of this evidence was repeated. He said his truck would have been, when stopped, probably five to eight feet from the west side of the median marking on the roadway. He said he had only started to the make his turn when the impact occurred.

**228**  He said the traffic at the time was typical on King George Highway. There were a lot of trucks.

**229**  He agreed the Peterbilt diesel tractor has a loud engine.

**230**  He agreed the damage to the Toyota vehicle was on the front and side, there being a dent on the front corner passenger panel. He said the distance from his back bumper to the concrete median would be close to three car lengths and not much more.

**231**  He agreed it would not be unusual for people turning left to be in a position of the plaintiff and not unusual for them to turn there, but not to park in that position if they were going to the store.

**232**  He said he did not hear a horn before impact, that the horn sound and crunch were simultaneous.

**233**  He agreed he was in "a window situation" to make his turn.

**234**  He estimated one would need to be 45-50 feet behind his vehicle to show in the side view mirror.

**235**  He agreed he had changed his approach to the garden supplies store by going north on the King George Highway.

**236**  He said it was the first time someone had pulled in behind his truck like that in 43 years.

**237**  He agreed he apologized to the plaintiff, stating "of course, I backed into them".

**238**  He said he had taken all the care he could of a professional driver of his class III qualification and knew of his obligation to make a turn or move backwards safely.

**239**  He agreed that on examination for discovery he had said the truck had no back up light but had promptly advised counsel that was a mistake, that the backup light is in fact incorporated into the red rear light.

**240**  He agreed that on preparing for his trips each day he checks the lights including putting the vehicle into reverse and inspecting the lights.

**241**  He said the flasher is located by the taillights and the sound of the backup signal is a very high-pitched and loud, repeating "beep".

**Medical Evidence**

***Dr. M. Nikolakis, Neurosurgeon***

**242**  Dr. Nikolakis provided a report dated August 28, 2015. In that report, Dr. Nikolakis found Mr. Kandola's low back pain flowed from his original injury in 2000. He was not able to say the motor-vehicle accident was responsible for the severity of Mr. Kandola's L5-S1 degenerative disc disease as it presented at the time of his assessment. Dr. Nikolakis suggested his prognosis for Mr. Kandola's back issues was good if the plaintiff underwent a surgical fusion.

**243**  With respect to Mr. Kandola's neck pain, Dr. Nikolakis determined it was related to a C6-7 intervertebral disc injury with a right sided posterior annular tear and a small disc bulge with mild-to-moderate right C7 neural femoral narrowing and purely mechanical, with no symptoms of nerve root compression.

**244**  He believed the March 2011 initially caused a disc injury and was possibly exacerbated by the January 2015 accident. In doing so, he described the latter accident in terms of the damage to the motor-vehicle as being considerable and noting the motor-vehicle was a write-off).

**245**  With respect to Mr. Kandola's neck pain, he indicated the plaintiff presented with a reduced range of motion, he suggested a follow-up every six months and if need be pain blockers to see if there was any improvement. He was reluctant to suggest surgery before such an assessment. He made it clear in approaching the question of surgery that he would want objective signs before he agreed to proceed.

**246**  In cross-examination, he agreed he is not aware of Mr. Kandola's car accidents prior to March 2011.

**247**  Although he had Dr. Ng's clinical records, he had not noted the February 24, 2010, complaint of neck stiffness and after referring to the note of November 26, 2010, accepted that there had been a previous chronic problem. He could not discount the February 2010 reference made it possible the annular tear occurred in a prior accident.

**248**  On re-examination, he repeated the February 2010 notes of symptomology, i.e. neck stiffness, were possibly relevant to an annular tear but if there was recovery within weeks and no medications it could have been a soft tissue injury.

***Dr. U.S. Harrad, Psychiatrist***

**249**  Dr. Harrad provided a medical opinion by way of several letters dated July 14, 2015, August 11, 2015, and October 27, 2015.

**250**  He initially saw Mr. Kandola in January 2014 on referral from his then family doctor, Dr. Sheik.

**251**  Dr. Harrad relied primarily on Mr. Kandola's self-reporting of his symptoms and history. Mr. Kandola told him he had been doing well until a relapse had occurred to his depression after the accident of March 2011.

**252**  His diagnosis was major depression on the basis of reported sadness, slow physical symptomology, difficulties with daily functioning, sleeplessness, hopelessness and not having any future. He described this depression as being of moderate severity with symptoms of shakiness, panic, and increased heartbeat.

**253**  He noted with the accident in early 2015 the symptoms seemed to become more severe, with some report of suicidal ideation and further concerns about hopelessness and lack of money. He prescribedWellbutrin and Effexor for these symptoms.

**254**  It was also his opinion the ongoing reports of pain amounted to a chronic pain disorder.

**255**  In the letter of October 27, 2015, Dr. Harrad stated he had read the reports of the previous psychiatrist Dr. Manjunath. These affected his opinion to the extent that Mr. Kandola had not reported the nature and extent of his consultations and depression treatment from Dr. Manjunath. He admitted he relied on the plaintiff's assertion that his depression was in remission after he was initially treated and that it relapsed after the first accident. Though had been provided a Medical Services Plan ("MSP") and Pharmanet print-outs, he admitted had not read them.

**256**  In cross-examination, Dr. Harrad agreed Dr. Manjunath made similar findings in October 2006 regarding Axis 1 depression due to a back injury and prescribed Mr. Kandola Effexor.

**257**  Dr. Harrad was likewise not aware that Dr. Manjunath had kept Mr. Kandola on Effexor from 2007 to the time of the accident. Dr. Harrad agreed Mr. Kandola said he only saw Dr. Manjunath for two years, and that his understanding was that from mid-2011 to January 2014 Mr. Kandola was not seeing a psychiatrist. He further agreed he was not aware he had decreased or his anti-depression medication post-March 2011.

**258**  Indeed, Mr. Kandola said he had stopped taking Effexor in 2009. In fact he continued to see Dr. Manjunath after the March 2011 accident and had been continued on Effexor by Dr. Manjunath.

**259**  A review of medical notes showed a reduction in medication and no medications purchased from October 2011 to October 2013 save a purchase of Nortriptyline in December 2012.He agreed his understanding was Mr. Kandola's depression had worsened post the March 2011 accident.

**260**  He was not prepared to concede that had Mr. Kandola continued on his medications his symptoms would have been lessened as the medications could stay in his system for a while though he conceded attending the psychiatrist could have been of benefit.

**261**  With respect to the reported chronic pain Dr. Harrad was aware of the accidents in dispute and the low back injury and history but not aware of the earlier February 2009 and February 2010 accidents.

**262**  Dr. Harrad agreed his review of Dr. Manjunath's clinical records reflected in his letter of October 27, 2015, contradicted his assumptions and changed his opinion to the extent that Mr. Kandola had a pre-accident history of depression noting that in September 2009 he was doing better but his pain was making him depressed and that he continued to have symptoms of depression until March 2011 and was still on medication.

**263**  He agreed he had opined Mr. Kandola would need to stay on Effexor the rest of his life and had not been aware he was taking Effexor before and after the March 2011 accident. He said a further depressive relapse meant there would be an ongoing, lifelong need for the Effexor medication.

***Dr. U. Sheik***

**264**  Dr. Sheik qualified in South Africa and British Columbia and has been in a family practice since 2009, recently moving his practice Surrey. He said Mr. Kandola came to his walk-in-clinic in early 2014 and he had been seeing him more regularly since November 2014.

**265**  He has been treating Mr. Kandola for ongoing neck pain with decreased range of movement. This is posterior neck pain manifested with radiation into both arms into his hands, worse at night and on activity. An MRI of the C-spine March 21, 2015, revealed a C6-7 annular tear with right posterior lateral disc protrusion at C6-7, which he opines is causing those symptoms.

**266**  In Dr. Sheik's opinion the neck pain had been caused by the motor vehicle accident and the low back and radicular leg symptoms seem to have been exacerbated by the first motor-vehicle accident.

**267**  He had a guarded prognosis and referred Mr. Kandola to a pain clinic at Surrey Memorial Hospital.

**268**  As well, Dr. Sheik has been attending to Mr. Kandola's complaints of low back and scapular area back pain with radiation to his legs, thighs and buttock area, as well as anterior chest pain. His observation was that a May 16, 2013 MRI showed moderate to severe foraminal stenosis at L3-4 bilaterally with L4-5 lateral recess stenosis and possible L5 nerve root impingement.

**269**  Dr. Sheik said the low back and neck pain were preventing Mr. Kandola from doing normal activity as his pain was exacerbated by walking, standing and exercise for more than 15 minutes and worsening of pain if lifting small objects of five pounds. He said his patient had been going to the gym regularly before the accident and was not as active since.

**270**  Pain blockers have been considered for the low back pain and failing that a possible fusion.

**271**  Ongoing treatments therefore would include a possible L5-S1 fusion, multidiscipline pain management program, counselling for chronic pain, an occupational rehabilitation consultant and ongoing physiotherapy but the length of such treatments would entirely depend on the patient's response.

**272**  It was soon evident on cross examination Dr. Sheik was not familiar with the prior medical history of Mr. Kandola save for the low back injury and subsequent back fusion. He likewise had not seen the imaging reports from 2003-2013, or the psychologist's records of Dr. Manjunath. The doctor did say he was aware Mr. Kandola had a long history of depression but was not aware of his medications.

**273**  He said his focus had been on treating the matters before him rather than their history and he gathered from Mr. Kandola's self-reports that prior to the motor-vehicle accidents; Mr. Kandola's pain was manageable.

**274**  With respect to stating the March 2011 accident had caused the neck pain, he was not aware Mr. Kandola had been in two previous accidents in February 2009 and February 2010. He agreed that the circumstances of the 2009 accident where the vehicle slid on ice into trees could cause neck pain.

**275**  Dr. Sheik agreed Mr. Kandola's low back pain was a larger factor in his inactivity than his neck pain. He agreed that while the accident seemed to have exacerbated his back pain, it may have been that a fusion would be required in any event.

**276**  He said he had been aware of Mr. Kandola's pre-accident low-back complaints and leg pain and agreed that chronic pain may have occurred without the car accident.

**277**  He agreed the possibility of Mr. Kandola returning to work was his optimistic prognosis but it was guarded as Mr. Kandola's pain presentation was complex.

**278**  He said Mr. Kandola had retained good body mass, took care of himself and had not gained weight.

**279**  In re-examination, it was noted that with respect to the February 2009 accident Mr. Kandola had neither consulted with the doctor nor had there been any treatments or medications taken and that would indicate Mr. Kandola was not harmed as he seemed to see doctors quite often.

***Dr. J.S. Jaworski, Physical Medicine and Rehabilitation***

**280**  Dr. Jaworski is a senior physician specializing in physical medicine and rehabilitation. His report was dated June 6, 2015, with a follow-up of October 23, 2015, when he was provided a copy of Dr. Manjunath's clinical records from October 2006 to June 2011. His reports were otherwise based on meeting Mr. Kandola at the request of Dr. Sheik on April 22, 2015, and Mr. Kandola's reports at that time.

**281**  Dr. Jaworski noted Mr. Kandola complained of pains affecting most of his body with the low back/buttock and thigh pains dominating, described by Mr. Kandola as fluctuating from 5 to 9 on 10 point subjective scale. His mood was noted to be on the low side with vague suicidal ideation and anxiety issues. Mr. Kandola said any physical activities tended to aggravate the pain, his sleep was poor and his walking tolerance was 15 minutes. Any prolonged sitting or standing would make the pains worse.

**282**  Mr. Kandola told him of the back injury in 2000, the March 2011 car accident and the January 2015 car accident.

**283**  He noted his medications were a pain killer and anticonvulsant, antidepressant medications, antipsychotic medications and blood pressure medication. On examination he noted a slow, gingerly gait and evident pain behaviours but there was no obvious muscle wasting, reflexes were normal and symmetrical, sensory examination was normal and straight-leg raising on one occasion was 90[degrees] and on another occasion 30[degrees]. His heart, chest and abdomen were normal.

**284**  The radiology reports were as previously noted in evidence.

**285**  Dr. Jaworski felt Mr. Kandola needed a multi-discipline pain management program with a focus on cognitive behavioural therapy and general physical remobilization and to continue his treatment under the supervision of his psychiatrist.

**286**  Dr. Jaworski did note from the historical records ongoing myalgia from 2002 including chronic low back pain from 2004 through 2010; the car accident of March 2011 with no change in back pain; developing upper back and neck ache with the notation in April 26, 2011, of "neck assessment very difficult due to pain modification behaviour"; and by 2013 myalgia and global pain with the note "likely psychosomatic complaints".

**287**  He noted Dr. Manjunath's findings from October 19, 2006, of major depressive episodes due to chronic pain and disability and other physician's assessments of like-nature through to 2010.

**288**  An exercise treadmill test done on December 18, 2013, noting no electrical abnormalities and "excellent exercise capacity". "Symptom magnification" was noted in other reports. In other opinions, he noted injury to the C4-5 and C5-6 discs with possible effect on the nerve roots but nothing supporting radiculopathy in the neck.

**289**  Dr. Jaworski's opinion was of low back pain from the 2000 accident complicated by an affective disorder (depression) and the March 2011 accident primarily injuring the neck causing soft tissue injury and possible aggravation of the pre-existent cervical spondylosis and the development of the condition of chronic pain disorder, or generalized severe pains and continuing disability. He opines the second accident aggravated the plaintiff's physical condition and chronic pain disorder.

**290**  Dr. Jaworski said Mr. Kandola's prognosis was guarded, i.e. he did not know his prognosis as chronic pain is hard to forecast.

**291**  In cross-examination, he noted Mr. Kandola had some of the prior history. He stated he had received more documents from the solicitor for the plaintiff after his first report, and his final opinion was a combination of both these and the plaintiff's self-reporting. These included psychologist notes. He stated he had been aware of the ongoing care from Dr. Manjunath though it was not explicitly stated in his report.

**292**  He agreed Mr. Kandola's pain questionnaire was incredible, i.e. he was referencing pain from 5 to 9 on a 10 point scale and using words such as torturing, crushing, heavy, unbearable, vicious, squeezing, burning and splitting, all indicative of Mr. Kandola's subjective opinion of his symptomology, while there were very few objectives indicators of such pain.

**293**  He was not aware of prior car accidents in 2009 and 2010 but he did not think they would have been major.

**294**  It was his opinion the global pain only occurred after the March 2011 accident and that the other more general complaints prior to that time did not affect his opinion.

**295**  Dr. Jaworski was then taken through Mr. Kandola's historical records relating to neck complaints, chest pressures, references to chronic pain (usually low back pain), chest pressure, anxiety, and chest pain through the 2008-2010 period.

**296**  Dr. Jaworski noted that on the pain diagram while Mr. Kandola marked practically all of his back, he did not mark his chest. He agreed the complaints of chest pressure would be a somatic symptom of anxiety and could be a factor in the consideration of chronic pain. He agreed Mr. Kandola told him his weight had remained stable.

**297**  He agreed the difference in leg raising was a non-organic sign as was the pain questionnaire with its extreme language.

**298**  He agreed chronic pain has biological, sociological and psychological factors in its diagnosis. He agreed Mr. Kandola's pain is subjective and that the psychiatrist would be the best to opine on Mr. Kandola's chronic pain for that reason.

***Dr. P. Zarkadas, Orthopaedic Surgeon***

**299**  Dr. Zarkadas provided a report focusing on the orthopaedic injuries sustained Mr. Kandola's in the 2011 and 2015 car accidents.

**300**  He saw and examined Mr. Kandola on two occasions, January 22 and July 16, 2015. Dr. Zarkadas made a detailed examination of the radiology records and MRIs from July 2000 to May 2015. He summarized the medical reports provided to him. He noted the wide variety of treatment modalities provided to Mr. Kandola and noted he continued to have chronic pain but that he had no neck pain, shoulder pain, chest wall pain or upper back pain prior to the March 2011 accident. He noted complaints of severe subjective pain in each of the areas including the low back.

**301**  He noted the second accident of January 23, 2015, was the day after the examination on January 22, 2015, which Mr. Kandola said aggravated his injuries and complained of new, worsening neck pain, bilateral arm pain, chest wall pain and back pain.

**302**  Dr. Zarkadas accepted the neck pain, bilateral shoulder pain, chest wall pain and upper back pain were caused by the March 2011 accident.

**303**  However, he was greatly troubled by the exaggerated pain responses from Mr. Kandola, stating it was unusual that he could not forward-flex his shoulders greater than 130[degrees] and was unable to continue that examination. Further, on every anatomic area he touched, Mr. Kandola complained of pain. He noted a new complaint of bilateral upper extremity numbness after the second motor-vehicle accident yet there had been prior CT scans showing probable compression of the C5-C6 discs and in his opinion the accidents worsened his neck and upper extremity symptoms but not his underlying cervical spine arthritis or the disc protrusions noted on the MRI. As well, he noted the exaggerated pain response to any motion of Mr. Kandola's legs and said his "inability to forward flex either leg greater than 30[degrees] without excruciating pain was uncharacteristic and exaggerated".

**304**  He noted the contradiction between Mr. Kandola's claim he had little or mild low back pain prior to the 2011 accident yet he had remained on disability with respect to his lumbar spine injury.

**305**  He accepted Mr. Kandola had sustained whiplash injury and myofascial discomfort of his paraspinal musculature and it may be that the numbness in the arms as a result of the disc herniation seen in the MRI but other aspects such as the complaints regarding the shoulder or the low back were perhaps related to an underlying history of depression.

**306**  As with other doctors, he said the prognosis for Mr. Kandola was guarded as he had been on disability compensation since 2000 and he questioned Mr. Kandola's motivation to work (though he acknowledged that was for the court to decide). He indicated Mr. Kandola's underlying depression and chronic pain was playing a significant role in his recovery.

**307**  Dr. Zakardas was of the opinion that Mr. Kandola's low back would have deteriorated with or without the car accident. The accidents may have aggravated symptoms but would not have, in his opinion, accelerated the natural progression of the low back pathology and therefore he would have remained on permanent disability in the absence of the accidents.

**308**  In cross-examination he agreed he would defer to Dr. Nikolakis' spinal specialty and he further agreed that chronic pain disorder would not be an area of his treatment and that he would defer with Dr. Jaworski in that regard.

**309**  He had little to say regarding Mr. Kandola's home activity or house maintenance.

**310**  He maintained his findings on causation were consistent with the clinical records provided to him.

**311**  He agreed with respect to Mr. Kandola's complaints of neck pain that Mr. Kandola was asymptomatic prior to the 2011 accident, and the symptomology had been caused by the 2011 accident.

**312**  He agreed Mr. Kandola's perception of his pain was relevant to his function.

**313**  In terms of chronic pain, he agreed some people can appear limited on examination because of they are afraid of pain but he had not in the thousands of cases he had seen recalled a case like Mr. Kandola and that he was the most difficult. He found no correlation to the radiology reports and the physical examinations as everything he did in attempting to assess range of function was said to cause excruciating pain.

***Dr. C. Ng***

**314**  Dr. Ng was Mr. Kandola's family physician from April 1999 until December 5, 2014. He kept hand written notes which he made during visits and the occasional post-visit note.

**315**  He gave evidence as to his observations of Mr. Kandola by producing his notes from Mr. Kandola's file. The relevant pre-accident notes, organized by year, state as follows:

1. **2000**: On July 25, 2000, Dr. Ng noted the injury occurring at Fraser Mills and Mr. Kandola's complaint of back pain. On September 6, Dr. Ng noted myalgia in the plaintiff's neck and both arms and that the plaintiff was taking 400 mg Advil daily. A depressed affect was noted with poor coping skills and lack of understanding. Various medications were prescribed and a referral was made but not followed up. A September 23, 2000, note notes the ongoing complaints of neck, arm and shoulder pain, lack of sleep and depressed affect relating to chronic back pain. That was followed by a Workers' Compensation Board claim and a visit to Dr. Caines in October 2000.
2. **2001**: On June 8 Mr. Kandola reported pain had moved from his back to his left leg, and Dr. Ng noted he had a full range of movement with pain/exaggerated response on extension or when lifting his right leg. On October 29 Mr. Kandola returned to Dr. Ng's office where leg measurements were fairly equivalent, with no distress in full range of movement. On December 20, 2001, pain was noted at lower lumber paraspinal muscle.
3. **2002**: On January 14 Mr. Kandola complained that when performing stretches he experienced pain in his upper arm and felt his legs weaken after two minutes, that he ached all over; Dr. Ng noted further "numerous complaints/hypochondriac, tingling sensationally in forearm but full range of motion". On January 28, Dr. Ng recorded pain in Mr. Kandola's upper-right trapezius. On February 18, the plaintiff again complained about tingling in his left forearm, as well as reduced back movement and neck range of movement. On March 8, Mr. Kandola reported being depressed about being jobless and in pain, sleeping poorly and experiencing reduced esteem, but stated he was not suicidal; Dr. Ng counselled him about depression for one half hour. On July 12, Mr. Kandola complained of high amounts of chest pain. On August 16, Mr. Kandola said he was experiencing increased pain while standing, walking, lying, sleeping on his side, walking, swimming, and cycling and that he was still depressed over his chronic low back pain. Dr. Ng provided counselling for the adjustment to the chronic illness and lack of improvement. On December 30, Dr. Ng noted Mr. Kandola was more pain focused and disabled post-surgery.
4. **2003**: On January 27 Mr. Kandola complained of left leg pain after walking 20 minutes but on testing of range of motion, the doctor reported pain amplification behaviour. On March 11 Dr. Ng noted complaints of no improvements since surgery and ongoing low back pain radiating into the left leg, but noted the plaintiff was doing stretches and going to the gym. On July 8, Dr. Ng noted complaints of no improvements since surgery and ongoing low back pain radiating into the left leg. On July 29 Mr. Kandola complained about pain in the right big toe but no redness or swelling was noted. On August 6 there was a complaint about the right leg pain from the low back. In September 2003, it was noted workers' compensation payments stopped; Mr. Kandola otherwise reported headaches and neck ache and chronic low back pain with no improvement. On September 21, Dr. Ng noted Mr. Kandola complained of low back pain radiating into his right leg, but also that he looked fit and was keeping active. On September 29, 2003, equal leg circumferences were noted. Dr. Ng said he was providing reports to the Workers' Compensation Board in 2003 and referred to the report he made to WCB diagnosing chronic lower back pain and amplified pain behaviour and questioning whether a pain clinic or psychologist might help.
5. **2004**: On April 23 Dr. Ng noted a further report of chronic low back pain with poor effort regarding range of movement and Waddell signs. On May 21 Dr. Ng further notes ongoing chronic pain and numbness to the whole of the left foot, pain in the thighs while sitting and chronic neck and back pain complaints. On July 12, Dr. Ng further recorded Mr. Kandola's reports he was in chronic pain, not getting well, and was aching all over; he also recorded that he was working, stretching, using light weights and taking ESL courses. Dr. Ng noted a "lack of insight". On September 9 Mr. Kandola reported both legs were tired after 15 minutes of walking and that he experienced continual low back pain to the left leg and foot from work such as mopping or lawn mowing. On October 8, Mr. Kandola's blood pressure was normal but he was complaining of ongoing leg pain, both while standing and sitting. On the November 16 Mr. Kandola reported lower back pain radiating into his left leg and into his right leg. He questioned again whether he had any heart issues, but his blood pressure was again normal.
6. **2005**: On January 7 Mr. Kandola reported low back pain in both legs; Dr. Ng recorded there being decreased range of movement and noted the plaintiff's "poor effort". There was no change in February and March. On March 4 Mr. Kandola still had normal blood pressure but reported sharp pain on the right side and on the left leg which increased after sitting one to two hours. In May the doctor noted lower back pain and pain in the left leg, but described that he was able to walk for one to one-and-half hours. On June 20 Dr. Ng noted a general anxiety disorder and reports of panic attacks with waking up and sweating, complaints of forgetfulness, low self-esteem and a diagnosis of depression. On July 5, Mr. Kandola reported having a hard time coping with his unemployment, anger, depression and anxiety, but did not mention suicidal thoughts or ongoing complaints of chronic pain. On August 2 Dr. Ng noted no change with complaints of pain to the right and left legs after standing 10 minutes and sitting for 15 to 30 minutes or lying down 30 to 60 minutes but also exercising. Dr. Ng noted a depressed affect with complaints of disability and chronic back pain. On August 9, Mr. Kandola complained of chest pain when walking but rest gave relief. His blood pressure was normal and there was reference to a cardiologist. On August 19, 2005, Dr. Ng again noted depression, pain, a choking feeling, panic and low self-esteem, writing "can't find a job... money issues... going to an assessment of anxiety". Dr. Ng was providing advice on coping as well as various medications and talking of rehabilitation. On October 24 there is a report of assembling furniture with pain in low back, thighs and legs. Finally, on December 5 Mr. Kandola reported low back pain after 15 minutes driving. There is further reference to low back pain radiating into his the left leg and normal blood pressure.
7. **2006**: On February 1 Dr. Ng's noted a complaint of nerve root problems in the L5 area and bilateral calf measurements taken at regular intervals as still showing no change. On February 28 there is another report of pain in the left leg after a ten minute walk. On May 30 Mr. Kandola reported he worked two hours and 20 minutes as a security guard and left early from an eight hour shift and worked over four days. He reported lower back pain and pain in his left leg and that he was unable to tolerate the work due to his constant back pain. Stretching, floor exercises and walking were prescribed. On July 10 Mr. Kandola reported he had aggravated his chronic back pain while working as a security guard in May. Dr. Ng noted a difficult examination due to complaints of pain behaviour and range of movement was evidently decreased with complaints of pain of the whole of the back radiating into the left side. In that month Dr. Ng sought to refer Mr. Kandola to a pain clinic at Langley Memorial Hospital and eventually provided a referral on July 7 to the Surrey Memorial Hospital ("SMH") pain clinic. A date was set for November 15, 2006, for an assessment of the chronic low back pain and disc herniation but Mr. Kandola cancelled the referral. Through August there were ongoing complaints of chronic back pain, depression and tiredness as well as a complaint of right posterior neck muscle strain with decreased range of movement. On August 15, Mr. Kandola reported he was tired, unwell and without any energy and could only walk 10-15 minutes, that he was losing sleep, was forgetful and felling hopeless. Coping mechanisms and medications were prescribed. On October 12 Dr. Ng sought a referral to a psychiatrist for nocturnal panic attacks with disability due to discogenic low back pain with chronic pain disorder, but neither Dr. Harrad nor Dr. Manjunath were taking referrals. October 18 Mr. Kandola further complained of being forgetful and worried about his blood pressure, which was measured as normal. A depressed mood is noted, with Mr. Kandola stating he felt "unable to do anything" as he was reluctant to go to a pain clinic.
8. **2007**: On January 8 Mr. Kandola complained of chronic back pain radiating into his left leg and both thighs and stated he was only able to walk 10-15 minutes. There were no bowel or bladder signs noted. It was noted he was seeing Dr. Manjunath. On January 22 Dr. Ng noted back pain with the complaint Mr. Kandola had "over done it yesterday." A difficult exam was noted in which Dr. Ng recorded "patient not moving much in spite of much coaxing" and with positive Waddell signs. On February 9 Mr. Kandola reported mechanical back pain with complaints of pain to both legs is noticed and again a difficult examination was noted, as was a similar complaint and exam in March 2007. On April 3 Dr. Ng noted bilateral L5 S1 nerve root irritation but substantially similar calf measurements. On May 2 the degeneration at L5 was noted on an MRI and Dr. Ng provided a referral letter to the SMH pain clinic and an appointment date for June 4. The referral notes 'still on waiting list' on October 12. On June 18 Mr. Kandola reported sharp pains in both legs after standing and that the medications were giving no relief. On August 21 Mr. Kandola reported fever, headaches and tiredness and lack of sleep and ongoing reports "of chronic lower back pain in the assessment of depressed affect secondary to chronic back pain". On October 9 Dr. Ng noted ongoing back pain with complaints of pain into the left leg.
9. **2008**: Dr. Ng made two notes from the SMH pain clinic, each noting no change in his complaints of low back pain. There was no report after March and Dr. Ng had no notice as to why Mr. Kandola stopped attending. On July 7 Mr. Kandola reported pain after 10- 15 minutes of activity but his leg circumferences were measured as equal; Dr. Ng again recorded low effort levels by the plaintiff. On October 1 Mr. Kandola reported chronic pain and wanting massage treatment but refusing an injection as there is too much side effect for him. Dr. Ng found his patient depressed due to his low back pain and spent two-and-a-half hours counselling his patient. A note of December 18 noted no change in Mr. Kandola's low back pain.
10. **2009**: In January Mr. Kandola reported "a pressure sensation in his chest while driving or sitting"; an electrocardiogram and aspirin were prescribed. On April 21 Dr. Ng noted that this patient was still depressed, fatigued, and noted no change in his chronic pain. He advised the plaintiff on coping skills and strategies. On May 19 Dr. Ng noted Mr. Kandola's complaints of ongoing low back pain. While some improvement was noted in June and August, Dr. Ng referred Mr. Kandola to Dr. Manjunath for major depression secondary to chronic pain and reduced self-esteem and coping strategies were addressed. On December 29 Dr. Ng recorded ongoing complaints of the LS nerve radiation, there being no change in the chronic low back pain, and prescribed medication.
11. **2010**: On February 24, Mr. Kandola reported a car accident which occurred on February 12. He stated he was stopped for a lane change and was rear-ended by a Pathfinder vehicle. He said he was okay and his car was drivable initially, but then the following morning complained of neck stiffness. He denied any prior neck problems and said there was no change to his low back problems. Dr. Ng noted basic posterior neck complaints of C1 - 4 paraspinal muscle pain, and on range of movement, Mr. Kandola was quite resistant to movement, and showed no loss in grip strength. Exercises were prescribed with an instruction to keep his neck warm when outside. On February 26 Mr. Kandola complained of increased posterior neck stiffness and a range of movement of 50% was noted with the description "poor effort". A good grip was again noted. On April 14 Mr. Kandola complained of ongoing chronic low back pain and was noted to weigh 186 pounds. On June 9 Mr. Kandola complained of sub-sternal chest pressure and increased shortness of breath which could occur daily at any time. There was elevated blood pressure and medication was prescribed. On July 20 chest pain was again noted and a referral made to emergency. On August 24 Mr. Kandola complained of pain on the top of his head, his blood pressure was normal his neck was normal and Tylenol was prescribed with other medications.
12. **2011**: Dr. Ng noted the motor vehicle accident of March 29 -- Mr. Kandola saw him the following day complaining of upper back and neck and aching pain. The doctor noted reduced range of movement, neck and back sprain, but no change to the lower back pain. He prescribed Flexeril, stretches and to keep warm. In attendance on April 1, Dr. Ng noted increased spasm in the neck and back and decreased range of movement and poor effort due to pain amplification behaviour. Dr. Ng advised Mr. Kandola keep active and prescribed Flexeril and stretches. Dr. Ng noted ongoing complaints on April 8 regarding the right upper trapezius but found it very difficult to assess range of movement due to pain amplification behaviour and his observation that the plaintiff was "able to move quite well

**316**  Dr. Ng saw Mr. Kandola 190 times between from January 1, 2000, to the time of the March 2011 accident. He saw him a further 58 times thereafter.

**317**  In summarizing the reports, Dr. Ng said that there were ongoing complaints from December 2002 to 2008 regarding low back complaints and complaints about the left leg and general complaints about chest and scalp pain. Further, generally speaking Dr. Ng agreed that from January 2009 to the March 2011 motor vehicle accident Mr. Kandola continued to complain of low back pain with similar complaints and similar findings (including findings that Mr. Kandola's leg size remained the same, meaning there was no atrophy). He agreed prior to March 2011 Mr. Kandola's complaints were primarily regarding his low back with pain radiating into his legs but after the accident there were complaints of other pains, as well as low back pain. As to the low-back pain he did not detect any change. Asked if he asked about Mr. Kandola's daily activities, he said he could not remember.

**318**  He also noted chest pains in 2010, which complaints resulted in two trips to the emergency room.

**319**  Asked if Mr. Kandola continued to have the same complaints through the time he was his doctor, Dr. Ng said the low-back pain changed to include claims of side pain, and as well as upper back, chest and abdominal complaints, but he found these to be subjective as he could find nothing on physical examination. Asked if there was any change in presentation Dr. Ng said that previously Mr. Kandola came in once a month complaining that his back and chest but after the accident it was one-two times a month and regarding pain in different places.

**320**  Asked about his inspecting of these changes, he said he could not detect them on his examination as Mr. Kandola's pain behaviours made examination very difficult.

**321**  He agreed in cross-examination that he noted his impression that the plaintiff was experiencing global pain were his impression as of March and April 2014, and that those complaints were more widespread than pre-accident.

**322**  With respect to not providing CL 19s, he said he did not think the forms were appropriate as Mr. Kandola's wandering complaints would not fit the form.

**323**  Dr. Ng said he had never been asked for a report regarding any improvement in Mr. Kandola's back complaints either for Workers' Compensation Board or for CPP.

**324**  Regarding Mr. Kandola's mental health, Mr. Kandola stopped seeing Dr. Manjunath in 2011 and did not start seeing Dr. Harrad until 2014, through a referral made in 2013. He agreed he spoke with Mr. Kandola about seeing a psychiatrist as early as of September 2002. Mr. Kandola was not keen at that time.

**325**  On re-examination Dr. Ng said as to the ongoing depression complaints he simply continued Dr. Manjunath's prescription. He did not remember providing any office samples to Mr. Kandola.

**326**  He did not know the reason Mr. Kandola stopped seeing him.

***Dr. C.N. Manjunath***

**327**  Dr. Manjunath is a psychiatrist with privileges at Surrey Memorial Hospital.

**328**  He began seeing Mr. Kandola on October 19, 2006. His last note is taken June 7, 2011.

**329**  At his initial consultation, Dr. Manjunath found Mr. Kandola to be having a major depressive episode and depression secondary to chronic pain in large part due to not working after a significant injury in July 2000 and subsequent back surgery.

**330**  He placed him on Effexor and then followed him up on a regular basis through 2007, noting he remained quite depressed, anxious and hopeless, for which Dr. Manjunath kept him on Effexor. In 2008 he saw him February, May, August and September and noted ongoing complaints and no changes to his pain reports and low mood.

**331**  In reporting to Dr. Ng in February 2009 he noted the same repetitive problems of chronic pain, depressed mood, helplessness, exhaustion and lack of motivation. He continued the plaintiff on Effexor and prescribed Remeron to help with sleep.

**332**  These were followed up by visits in September 2009, where Mr. Kandola said he was doing better but his back was hurting with no improvement. He was still feeling depressed and reported being angry, crying, sad and hopeless and worried about his finances and reduced sleep. Dr. Manjunath continued with Effexor and further prescribed Lyrica.

**333**  No changes were reported at visits in November December 2009.

**334**  The note of February 17, 2010, noted the rear-end accident and while no serious injury was noted, Dr. Manjunath recorded a fear of driving and ongoing complaints of sadness and hopelessness and anger.

**335**  On March 31, 2010, no improvement was noted although Mr. Kandola reported he was trying to work out and was focusing on his physical health. He stated he was tiring easily and could not work more than four hours.

**336**  On May 26, 2010, Mr. Kandola complained of panic attacks, chest tightness, ongoing pain in legs, and poor sleep but the doctor noted less depression. On July 14, 2010, Mr. Kandola began complaining of forgetfulness and continued noting there was no change in pain despite doing physio and some work.

**337**  There were attendances September 15, October 20, and December 18, 2010, with ongoing complaints about memory issues, forgetfulness, lack of sleep, anxiety, fear, and chest pain.

**338**  In 2011 there were attendances on January 19 and March 15 with ongoing complaints of sadness and depression, constant pain, chest pressure, back pain, and difficulty sitting. The note of March 15 recorded Mr. Kandola had begun taking a course for taxi driving.

**339**  On June 7, 2011, another accident was noted and since then complaints of multiple aches and pains, not sleeping well, tiredness and anxiety increased. Effexor was continued.

***Dr. L. Rasmussen***

**340**  Dr. Rasmussen obtained his MD in 1988 and has been practising psychiatry for 22 years. His office is in Kelowna and is a mixed practice of work for insurance companies, the Review Board, medical legal assessments and general consultations. His focus is patients with depression.

**341**  His primary diagnosis of Mr. Kandola was major depression at a moderate level and, given his physical symptoms and the collateral records, a diagnosis of somatic symptom disorder with predominant pain.

**342**  He found Mr. Kandola had somatic symptoms seriously disrupting his daily life which reflected in his persistently high level of anxiety about his health and symptoms and his excessive time and energy devoted to those symptoms. He found a record of persistent pain whose symptoms are present but greater than one would anticipate.

**343**  He found support in the individual risk assessment at pages 9 through 11 of his report, i.e. pain disorder associated with psychological factors, which is another iteration of the somatic symptom disorder with predominant pain.

**344**  It was his opinion the psychological symptoms were pre-existing prior to the March 2011 accident.

**345**  He noted that Mr. Kandola had been seeing Dr. Manjunath before and after the March 2011 accident until June of 2011. There was no change to his depressive symptoms or in his Effexor prescriptions, which were refilled in May and August of 2011. In October 2011 Dr. Ng increased the Effexor which took the patient through January 2012, but no refills were prescribed until he began seeing Dr. Harrad in October 2013, when he continued on with Effexor and other antidepressants. He says there was little change in the depressive symptoms post-accident.

**346**  He noted in Dr. Manjunath's report of February 9, 2000, the statement "because of the chronic nature of [Mr. Kandola's] illness and only a partial response to supportive counselling and antidepressants, I believe his prognosis is very guarded". He interprets this to suggest the somatic disorder was pre-accident.

**347**  With respect to ongoing treatment, he felt Mr. Kandola would benefit from seeing a psychologist to help him manage his pain and to stop hyper-focusing on it but noted he had been seeing Dr. Harrad for more than 18 months and he deferred to Dr. Harrad.

**348**  He agreed chronic pain could be found in Dr. Ng's reports, as did Dr. Jaworski, but the psychological help would be a challenge as the counsellors sought to stop Mr. Kandola's focus on his pain, to accept the situation, and to seek benefits from treatment

**349**  In cross-examination he agreed pain would appear real to a person suffering somatic pain disorder and that treatment was needed. He agreed it was not imaginary but a real experience for the sufferer.

**350**  He agreed being able to assess function before and after the accident would be valuable in that he had been obliged to assess Mr. Kandola on the records provided to him. He agreed that would not necessarily give him the insight of the people living with Mr. Kandola.

**351**  He agreed he was not finding malingering or a factitious disorder.

**352**  In terms of psychiatric assistance it would depend on how amenable Mr. Kandola was as he may not understand how this would help; that the issue was whether the psychologist could alter Mr. Kandola's mindset, and that several sessions would be typical to see whether some progress could be made as it would require a "buy in" by Mr. Kandola to have some effect. That might be difficult with Mr. Kandola and could well require the therapist needing 20 sessions.

**353**  With respect to going to a multidiscipline pain clinic, Dr. Rasmussen noted that there had been a prior referral before the accident which was not followed through on and thus the referral to a psychiatrist may be more beneficial.

**354**  He also questioned whether the medications were effective given the fluctuation post-accident i.e., after stopping seeing Dr. Manjunath and before seeing Dr. Harrad.

**355**  Dr. Rasmussen expressed some difficulty forming his opinion as he found Mr. Kandola was not an accurate historian. He speculated that he was seeing a psychologist pre-accident, weaned himself off his medications post-accident, and there would be resulting mood fluctuations which Mr. Kandola might or might not recall.

**356**  He conceded his notes recorded Mr. Kandola undertaking daily light activity pre-accident. He agreed it would be important to record pre-accident activity in terms of both exercise, sleeping habits, and cognitive problems and he did not know why he did not reflect that in his report.

**357**  As to considering the effect of the 2011 accident on the somatic disorder it was put to Dr. Rasmussen that Mr. Kandola said he was in more pain, he was a lot more focused on the symptoms, and there had been an adverse effect on his relationships. Dr. Rasmussen did not consider that these statements were necessarily the somatic disorder as he initially had more physical problems.

**358**  Dr. Rasmussen agreed the somatic symptoms worsened post-accident and affected Mr. Kandola's relations with his family. If the car accident had caused soft tissue injuries that were imposed on the pre-existing physical and psychological problems, and soft tissue injuries were no longer a factor, it was part of the somatic picture and therefore the somatic pain presentation would be greater.

**359**  Dr. Rasmussen agreed a somatic complaint would reflect multiple pain complaints, and it was possible to have somatic symptoms without physical injury.

**360**  He agreed an effect of a somatic condition would be a reduced level of function.

**Plaintiff's Argument**

**361**  The plaintiff submits that though he had issues with a pre-existing low back injury and depression, he had made significant improvement before his March 2011 accident.

**362**  Liability was conceded regarding the first accident. As to the second accident, reliance was placed on the fact the defendant could not see within three car lengths of the back of the truck and that Mr. Kandola had not expected the truck to backup. Mr. Kandola argues these facts put Mr. McDonald in contravention of the *Motor Vehicle Act*. The defendant's evidence on the issue of liability was not addressed.

**363**  The plaintiff argues it was after his March 2011 and January 2015 accidents where Mr. Kandola's subsequent physical and mental health declined. Submitting the March 2011 accident caused an annular tear in his neck, he states that what was previously simply low back pain had now become global pain with active psychological factors after the March 2011 accident. He likewise states he was not outwardly depressed and there were no apparent deficits in his cognition or memory before that accident. These issues have resulted in him becoming anti-social and fixated on his pain, depressed and lessened in his cognitive abilities. The second collision, in the words of the plaintiff, made that bad situation worse.

**364**  The plaintiff submits the evidence of Dr. Nikolakis, Dr. Jaworski, Dr. Harrad, Dr. Sheik, and Dr. Rasmussen suggests the neck injury has caused the pain he complains of in his hands and arms. This progression is confirmed, he submits, by the MRI of the C-spine revealing a C 6-7 annular tear with right posterior lateral disc protrusion at C6-7 and possible C7 nerve root compression.

**365**  Progression is also seen in terms of the degeneration of the L5-S1 foraminal stenosis but it seems of little effect to the low back. In terms of causation more specifically, they determined the neck injury is related to the first motor vehicle accident.

**366**  Dr. Jaworski concluded the effect of the car accident has led to a more generalized complaint of pain i.e. that the neck and back pain is now added to a low back chronic pain situation, giving rise to a chronic pain disorder.

**367**  While surgery is not contemplated with a neck injury, it is possible that it may be considered with the low back injury, but that may not be related to the car accident. Dr. Nikolakis, however, stated that the back symptoms were exacerbated by the first car accident.

**368**  Dr. Harrad noted it was evident that Mr. Kandola had been suffering from depression since 2000, and while there is some betterment after 2007, the depression had become more severe after March 2011.

**369**  The doctors were divided in their prognosis for improvement. Dr. Nikolakis stated his prognosis for his neck pain was "guarded", requiring serial follow up, and "optimistic"/"very good" for his low back pain if he under a surgical lumbar fusion and "lifelong" otherwise. Dr. Harrad indicated there would be a lifetime need for antidepressant medication.

**370**  For each point requiring experts, Mr. Kandola submits the evidence of his experts should be preferred as they maintain active clinical practices and played a role in treating him, rather than making a single assessment of him from his records.

**371**  With respect to damages, he outlines the evidence he was going to the gym and doing an almost daily workout, involved in his children's activities, doing outdoor house maintenance and providing some help to his wife indoors, and that he had an active social life with his large family. He had also made some attempts at finding employment as a security guard and taxi driver, and in 2009 had actively helped his brother Gurmail in the construction of his house.

**372**  Reliance was placed on Ms. Kandola's evidence as to the help the plaintiff provided around the house and to the children prior to 2011, as well as their ability to go for walks in the neighbourhood, to host social gatherings, his good mood. To the extent he was still participating in psychiatric treatment and taking antidepressants, these issues were not apparent to her prior to the March 2011 accident.

**373**  The plaintiff's son, Jaskamal Kandola, gave largely similar evidence. He testified to his father's assistance to him throughout his childhood, the assistance he provided in the home, and the assistance he provided to his uncle's house building. Jaskamal's evidence was further that their relationship has drastically changed due to his father's negative complaining attitude. He too was unaware that his father had been seeing a psychiatrist.

**374**  Gurmail, the plaintiff's brother, spoke well of Mr. Kandola's assistance in helping build the house and by his description, being able to do rather heavy labour, including building retaining walls in the garden made of wooden beams weighing 80-100 pounds, assisting in the construction of the retaining wall, building window wells for exterior windows and planting trees weighing 50 to 60 pounds. He said that Mr. Kandola managed all this working at his own pace.

**375**  As well, he noted his brother's assistance to him once he moved into his house, in terms of helping wash his car or mow the lawn. He noted Mr. Kandola was able to do house maintenance like trim trees and mow his lawns.

**376**  Gurmail Kandola also has noticed a change in Mr. Kandola being no longer social or friendly.

**377**  In terms of compensation, the plaintiff sought non-pecuniary damages of $125,000; loss of past earning capacity of $20,000; loss of future earning capacity of $55,000; special damages of $6,500; future care costs, including various aspects of house maintenance, in the amount of $69,450; and loss of housekeeping capacity of $7500, totalling $280,950.

**Defendants' Argument**

**378**  The defendants submit the primary issues are the liability for the second accident and the quantum of damages. They concede the plaintiff was injured in the accidents but dispute the severity and duration of the plaintiff's injuries, and secondly that his pre-existing conditions were symptomatic, remain symptomatic, and comprise a substantial part of the plaintiff's claim.

**379**  Regarding liability, the defendants submit Mr. Kandola conceded in cross-examination that the defendant Mr. McDonald's truck had backup alarm and lights activated. They further contend his allegation that the vehicle moved suddenly and very quickly -- at 25-30km/hour -- is in contradiction to the detailed evidence of Mr. McDonald and lack of damage to the vehicles. They submit Mr. McDonald had done everything he could to alert other drivers that he intended to back-up, and that Mr. Kandola was either fully or contributorily negligent and should be responsible for all or a portion of his injuries.

**380**  Regarding the extent of the plaintiff's injuries, the defendants submit the issue is primarily one of credibility and reliability. Generally, the defendants suggest the plaintiff is understating his pre-accident symptoms in this trial (to which they rely on Dr. Ng's records) and exaggerating his post-accident symptoms both to experts retained after the accident and to the court. For the latter, the plaintiff's claimed injuries have few if any objective signs; to the extent objective examinations were done, the plaintiff demonstrated exaggerated pain responses and behaviours suggesting those tests were unreliable. As well, the defendants pointed to the recent video surveillance of Mr. Kandola at the shopping centre where over a lengthy period he showed no restriction in his ability to stand, stoop, squat, and walk. Doing so, he contradicted his complaints to his doctors as to there being no improvement of his symptoms. In addition they submit his rather histrionic behaviour in the courtroom belied certain aspects of the medical evidence. Further, Mr. Kandola's claims were belied and contradicted by his behaviour in court.

**381**  The defendants submit that Mr. Kandola was receiving substantial CPP and Workers' Compensation Board benefits for employment disability and yet sought to rely on the gratuitous payment from his brother for work done in 2009 on his brother's house to establish his claims for past and future loss of earning capacity. The defendants pointed to the contradiction between claiming the ability to work but failing to report actual work to institutions providing disability payments, noting that when a claimant puts forward one story when it benefits him financially to do so and presents a different and contradictory version when it is in his financial interest, there can be little reliance on his evidence.

**382**  They also point to the multiple contradictions in Mr. Kandola's evidence both at examination for discovery and at trial; his description of his pre-accident state of health contrasted with his medical records; his claim he had a mood improvement yet he continued to see a psychiatrist and take antidepressant medication; and the ongoing use of pain medication from his doctors pre-accident. They also stress that Mr. Kandola (1) presented himself as fully disabled to the CPP Review Tribunal in September of 2008; and (2) continued his complaints to his doctors while working on Gurmail's house between January and August 2009. The fact that he did so was indeed only revealed a few weeks before trial.

**383**  To the extent that family members gave evidence of Mr. Kandola's life activities, the defendant submits their familial relationship should affect the assessment of the evidence.

**384**  The defendants also suggest that Mr. Kandola's seeking a new family physician and new psychiatrist after the accident suggests he had little interest in comparing the pre-accident medical history to his current complaints.

**385**  Regarding those expert reports, the defendants submit that the basis for Dr. Jaworski's opinion that the plaintiff developed a chronic pain disorder is equally applicable to Mr. Kandola's situation prior to the first accident, i.e. his ongoing chronic complaints of low back pain and the subsequent more generalized complaints were a further iteration of his pre-existing issues.

**386**  As to Dr. Harrad's assessment of a relapse in depression occurring with the second accident and requiring lifelong treatment with antidepressant medication, they argue Dr. Harrad acknowledged relying solely on the plaintiff's self-reporting that his depression was in remission after he had been treated by Dr. Manjunath. They submit this was contrary to the history of treatment for depression by Dr. Ng and Dr. Manjunath and the ongoing reliance on anti-depressants. They rely on Dr. Rasmussen's opinion Mr. Kandola was suffering from an ongoing major depression at a moderate level and somatic symptom disorder with predominate pain before March 2011

**387**  The defendant's concede Dr. Nikolakis' assessment of Mr. Kandola's neck was not contested but that neck surgery was not anticipated. With respect to the low back pain the defendants suggest that was pre-existent and that the anticipated surgery at the L5-S1 joint would have been required with or without the accidents.

**388**  In terms of assessing non-pecuniary damages, the defendants emphasized Mr. Kandola's pre-existing symptomatic low back and depression that have been ongoing since 2002 and suggest that an award of $40,000-$50,000 is appropriate.

**389**  Further, the defendants submit the plaintiff has not proven an entitlement for lost earnings, past or future. In so doing, they pointed out he had not worked since 2003 and since then have been receiving Workers' Compensation Board and CPP disability since 2005. In seeking employment he had done little other than complete a job hunting program; taking a course to become a security guard which he was not able to pass and working for a few days before stopping; taking a course to become a taxi driver which he failed due to language issues; and then sought to say he was working in 2009 for his brother and looking at an automotive course in 2010. To the extent his brother paid him or would have paid more, they submit this is irrelevant to the issue of whether the plaintiff had lost a real and substantial possibility of income as a result of the accident.

**390**  Regarding the costs of future care, the defendants conceded some three months of ongoing physiotherapy and massage might be appropriate; that a psychologist's attendance for ten sessions for cognitive behavioural therapy could be appropriate and there would be some nominal amounts owing on the medication.

**391**  It was noted that plaintiff had already undergone 150 physiotherapy and 29 massage therapy treatments since the first accident (presumably the special costs agreed on) but there had been no medical assessment of ongoing need or benefit. In sum, the defendants allowed $1,000-$4,000 could be awarded.

**392**  Otherwise, the defendants submit he had previously been referred to and cancelled appointments at multi-discipline pain management facilities and counselling for chronic pain, and that there was thus evidence of a pre-accident need for these injuries. Further, given the plaintiff's unemployment, occupational rehabilitation did not seem appropriate. As to the medications claimed, the defendants submit the plaintiff was prescribed these for pain and psychiatric symptoms well prior to 2010 and their use was not precipitated by the accidents. Similarly, the plaintiff participated in aqua therapy swimming programs prior to the accident.

**393**  Regarding loss of housekeeping capacity, the defendants submit this claim likewise relied on the plaintiff's reporting of what he could and could not do (and was likewise contradicted in trial and by the surveillance video) and was otherwise reliant on inadmissible supporting documentation.

**394**  Finally, the defendants submit Mr. Kandola failed to mitigate by failing to attend the pain management counselling and care in 2006 and 2014 on the referral of Dr. Ng and Harrad respectively. They submit general damages should thus be reduced 15%.

**Discussion and Rulings**

**Liability January 2015 Accident**

**395**  The plaintiff points to the several statutory provisions in the *Motor Vehicle Act*:

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

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

...

**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

...

**168** Except as provided by the bylaws of a municipality or the laws of a treaty first nation, a driver must not turn a vehicle so as to proceed in the opposite direction

1. unless the driver can do so without interfering with other traffic, or,
2. when he or she is driving
3. on a curve,
4. on an approach to or near the crest of a grade where the vehicle cannot be seen by the driver of another vehicle approaching from either direction within 150 m,
5. at a place where a sign prohibits making a U-turn,
6. at an intersection where a traffic control signal has been erected, or
7. in a business district, except at an intersection where no traffic control signal has been erected.

**169** A person must not move a vehicle that is stopped, standing or parked unless the movement can be made with reasonable safety and he or she first gives the appropriate signal under section 171 or 172.

...

**171** (1) ... if a signal is required a driver must give it by means of

1. his or her hand and arm,
2. a signal lamp of a type approved by the director, or
3. a mechanical device of a type approved by the director.

...

**193** The driver of a vehicle must not cause the vehicle to move backwards into an intersection or over a crosswalk, and must not in any event or at any place cause a vehicle to move backwards unless the movement can be made in safety.

**396**  Though the *Motor Vehicle Act* provides guidelines, rather than a complete framework for assessing fault, these provisions suggest a high standard of care on Mr. McDonald. After interpreting these same provisions, Madam Justice Griffin outlined the standard of a vehicle backing up in *Araujo v. Vincent,* [*2012 BCSC 1836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2X1-00000-00&context=):

[34] It is clear that backing up a vehicle poses greater risks than driving forward, because of the fact that visibility is impaired and because typically the driver will have been facing forward, looking in front, and not looking behind prior to the decision to reverse. When facing forward, a driver sees people or objects approaching from the side and can anticipate that they might be passing in front of the vehicle suddenly or even when they disappear from view, such as a running dog, a cyclist, or a small child, but the same cannot be said for what is happening towards the rear of the vehicle. A driver does not have rear peripheral vision to alert him to approaching objects.

[35] A reasonable and prudent driver foresees the possibility that something might have crossed into the vehicle's reverse path, unnoticed by the driver. A reasonable and prudent driver understands this and only backs up a vehicle after taking time to look behind. A reasonable and prudent driver considers the circumstances of where the vehicle is and makes an assessment of how much time is needed to look around to make sure nothing has crossed into the vehicle's path.

**397**  With this standard in mind, Mr. Kandola must show Mr. McDonald could have avoided the accident with the exercise of a reasonable care and skill: *Lowe v. Greyhound Canada Transportation Corp.*, [*2008 BCSC 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-2093-00000-00&context=); *McStravick v. Metzler*, [*2012 BCSC 1685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2NP-00000-00&context=).

**398**  In an effort to complete the turn into the garden supplies store, Mr. McDonald developed a procedure to park then reverse backwards into the eastside store location by backing across the northbound lanes of traffic. In his view it was safer than trying to come northbound, pass the entrance and then back in, but he conceded that that is the process he has used since the accident.

**399**  Mr. Kandola's position is that he was parked behind the truck at a distance of approximately three car lengths before it backed into him at 25-30 km/h. Approaching at that speed, he said he either had no time to do anything except toot his horn (though he suggests he did so several times) before the collision occurred.

**400**  I found none of his evidence on this issue credible.

**401**  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).

**402**  Mr. McDonald detailed, and I accept, that he is a careful and fastidious driver. He said he had stopped for one-and-a-half to two minutes in a turning lane with his emergency flashers on and had put the vehicle into reverse which in turn activated a "beeping" alarm before reversing. He had checked his rear view mirrors, could see the concrete median some 3 car lengths behind him, and did not see Mr. Kandola's vehicle. He then released his foot from the broke to let the vehicle move backwards, accelerating from a standstill to something in the nature 8 km/h.

**403**  After beginning his turn, it was within a matter of two seconds he heard Mr. Kandola's horn and the sound of the collision.

**404**  In my view, this story is far more likely on the evidence.

**405**  First, the pictures showing the very minor damage to the front of the Toyota bear no resemblance to a 25-30 km collision.

**406**  Second, Mr. McDonald said he could see back behind his vehicle approximately three car lengths or some 45 feet. I accept he checked before beginning to reverse. The plaintiff must have been closer to the truck than he claims -- a fact further enforced by the short time between beginning the turn and the perhaps 8 km collision, the fact Mr. Kandola was only able to toot his horn, and the resulting minor damage to Mr. Kandola's vehicle. The sum of this evidence is that Mr. Kandola was close behind the truck and in the blind zone behind it.

**407**  Mr. Kandola conceded he knew the advisory that if he could not see the mirrors of a truck the driver of that truck could not see him.

**408**  Waiting the amount of time he did to complete his turn, the fact is there was time for someone to move in behind Mr. McDonald and get into the blind spot behind his truck. He said he did look but could not have seen Mr. Kandola's Toyota. The one other factor not covered in the evidence on my review is that he did not signal his intent to turn left, rather than going right and south, as Mr. Kandola said he surmised. Otherwise, in my view Mr. McDonald took sufficient care otherwise in completing the maneuver. The accident was then caused greater part by Mr. Kandola's approaching behind him without leaving sufficient room between himself and the truck when it was indicating its intention to back up.

**409**  As per s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, when a plaintiff contributes negligently to causing his or her own injury, the court must determine relative degrees of fault. The correct inquiry is whether the plaintiff failed to take reasonable care for his or her own safety and whether that failure was one of the causes of the accident: *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at para. 27.

**410**  The court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each. Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at paras. 45-46; *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at para. 24.

**411**  When I weigh these factors, I find the greater ***negligence*** falls on Mr. Kandola. Mr. McDonald did everything he reasonably could do indicate his intention to reverse and ensure he could do so safely, save for indicating the left turn he ultimately intended to complete. The appropriate apportionment of liability in this case is 75% to Mr. Kandola and 25% to Mr. McDonald.

**Duty to Mitigate**

**412**  Every plaintiff has a duty to mitigate his damages by taking all reasonable measures to reduce his or her damages, including undergoing treatment or undertaking treatment programs. in order to serve to reduce damage, the burden is on the defendant to prove that the plaintiff failed to fulfil that duty and that such reasonable conduct would have reduced or eliminated the loss: *Fox v. Danis*, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=); *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 202.

**413**  *Chiu v. Chiu,* [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=) at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

**414**  Applied to this case I am not convinced the plaintiff has failed to mitigate his damages. Mr. Kandola had the opportunity to attend a pain clinic in 2014 at the recommendation and referral of Dr. Harrad. Evidence was led that he cancelled a similar appointment in 2006. However, no evidence was led as to the extent this would have reduced the plaintiffs damages.

**Damages**

**415**  Prior to the accident in 2011 Mr. Kandola plainly was still suffering the consequences of his low back injury and surgery in 2002 and ongoing depression reflected in the treatment notes of his doctors.

**416**  On balance, the evidence establishes injuries to his neck and some aggravation to his back from the March 2011 accident. This in turn led to aggravation of his pre-existing depression and a continuation on a wider basis of his chronic pain complaints.

**417**  It is not so clear what changed with the circumstances around the second collision.

**418**  The ongoing notes of Dr. Ng through 2012, where his patient is complaining of global pain while contradicted by the full range of movement noted by the doctor, was a conundrum both for the doctor and for the court.

**419**  Little medical attention was provided for the motor vehicle accidents of February 2009 and February 2010.

**420**  Subsequent to his March 2011 accident, Mr. Kandola's new treating physicians attending on him without a full prior history showing ongoing pre-accident complaints of low back pain and accompanying complaints of pain in the posterior and anterior legs and his depressed state. In effect, he presented half a picture.

**421**  The difficulties that faced the doctors and the court is the hypochondriac, pain amplifying or even bizarre behaviour of Mr. Kandola. It was evident in court, as it was to the doctors, that Mr. Kandola's complaints of pain bear no relationship to his otherwise healthy appearance and physical ability as reflected in the doctor's examinations (or attempted examinations), the video surveillance (acknowledging the limits of such surveillance as described in *Tambosso v. Holmes*, [*2015 BCSC 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G51S-00000-00&context=)) and my observations of him in court. His lack of truthfulness, and indeed patent disregard for it, made the trial difficult for all the participants.

**422**  Though there were other issues with his credibility, some discussed above, I will address one in particular: his work on his brother's home. Though at the time of trial Mr. Kandola argues his work for his brother demonstrated a recovery from his injuries and a coming ability to return to work, he made no reference to it to any of his doctors or in his examination for discovery. Indeed, at the same time this work was being done, the plaintiff continued to see Dr. Ng with complaints similar to those he had been having since his original 2000 injury and the surgery for it. This rendered a consideration of the issues difficult, but more directly it called into question his credibility both with respect to his testimony of his capacity and mood before the March 2011 accident and the extent of the change in those things after it.

**423**  Mr. Kandola must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus: Farrant v. Laktin,* [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at para. 9.

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

**425**  What Mr. Kandola is entitled to is damages for the change that has occurred to him in terms of his neck and back injury and the additional and chronic symptoms of his somatic pain disorder.

***Non-Pecuniary Damages***

**426**  Mr. Kandola describes his injury as multifaceted: he outlines his organic injury to the C6-7 disc, soft tissue injury, a somatic symptom disorder and suggests the accidents significantly aggravated his depression. He testified he is in horrible pain which has rendered him disabled and further reduced his capacity just as he was recovering it. He says this has caused him significant distress and stresses his relationships with his family.

**427**  The defendants submit Mr. Kandola had pre-existing injuries which already rendered him disabled, and while admitting the first accident aggravated symptoms somewhat, contest the recovery he described and the damage done, and contest any marked increase in those symptoms after the second accident.

**428**  Considering the evidence, the injuries sustained before March 2011 can be separated from the previous low back injury and chronic pain and depression. I find Mr. Kandola suffered a neck and upper back injury, his low back pain was exacerbated, and his chronic pain worsened or became more widespread and is described since the second accident as a somatoform disorder. I find the second accident caused a relatively small exacerbation of all the pre-existing complaints. While these accidents have gone to further reduce his capacity, I am not convinced they drastically changed his lifestyle to the extent claimed, with specific regard to his continuing receipt of disability and other benefits.

**429**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases: *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at paras. 188-189; *Andrews v. Grand & Toy Alta. Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at paras. 243-44. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites*.

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

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

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

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

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

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

**432**  The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) by McEachern C.J. (recently quoted with approval in *Edmondson v. Payer*, [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=) at para. 2). In referring to an earlier decision, he said:

In *Butler v. Blaylock*, [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=), decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**433**  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=), The Court of Appeal also discussed the principles behind the reduction of compensation to reflect the possibility that a latent disability would have manifested itself on its own in the future. Such conditions were acknowledged to be part of the plaintiff's original position in that case, and the court determine such a weakness might cause or contribute to the loss claimed. This weakness was relevant to the assessment of damages to the extent that the court determined a contingency should be accounted for in the award: at paras. 35 and 48.

**434**  Mr. Kandola's counsel provided the following cases for their submission he is entitled to non-pecuniary damages of $125,000: *Pinch v. Hofstee*, [*2015 BCSC 1888*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H7P-6RS1-JGBH-B26Y-00000-00&context=); *Bruno v. Diamzon*, [*2014 BCSC 1270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B15D-00000-00&context=); *Hosseinzadeh v. Leung*, [*2014 BCSC 2260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4TJ-00000-00&context=); *Redmon v. Krider*, [*2015 BCSC 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0N2-00000-00&context=).

**435**  With respect none of these cases involve a pre-existing back injury and I found them less helpful to that extent.

**436**  Defence counsel also provided cases regarding ongoing chronic pain. These cases include: *Hunt v. Ugre*, [*2012 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MS-00000-00&context=); *Cheung v. Kambox*, [*2009 BCSC 1160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6280-00000-00&context=); *Zaluski v. Verth*, [*2015 BCSC 1902*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H84-1CC1-F4GK-M4NB-00000-00&context=); and *Matias v. Lou*, [*2015 BCSC 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60N3-00000-00&context=).

**437**  In *Hunt*, the plaintiff, a 58 year old male was involved in two motor vehicle accidents and sustained soft-tissue injuries, particularly to his back. The plaintiff had a number of pre-existing conditions, including neck and back pain, leg and groin pain, arm numbness, and difficulties sleeping. Madam Justice Dardi concluded Mr. Hunt suffered from a psychiatric condition such as a pain disorder, major depressive disorder, or somatoform disorder, but that it was not clear developed as a result of the accidents. Otherwise, Dardi J. determined he suffered from soft-tissue injuries from which he gradually recovered and was left with residual symptoms, which themselves healed to episodic discomforts. She awarded $40,000 in non-pecuniary damages.

**438**  In *Cheng*, the plaintiff, a 30-year-old customer service representative, was suffering from soft tissue injuries. She had been involved in prior motor vehicles accidents and causation was at issue. Mr. Justice Meyers determined her physical symptoms were aggravated by the accident, and escalated what was chronic pain into chronic pain syndrome. Finding there was no drastic change of lifestyle from the accident, non-pecuniary damages were set at $45,000.

**439**  In my view, the assessment of non-pecuniary damages in this case must consider his pre-existing injuries and conditions as I have outlined them and the extent to which they have been aggravated by the 2011 and 2015 accidents. Considering all of the above, including the relevant contingencies, I award the plaintiff $55,000 for the first accident and $2,500 for the second accident after deducting for contributory ***negligence***.

***Past and Future Loss of Earning Capacity***

**440**  Compensation for past loss of earning capacity is based on what the plaintiff would have earned but for the injury sustained: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=) at para. 49.

**441**  Similarly, 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?: *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=).

**442**  The initial inquiry dictated by the case law is whether there is a substantial possibility of future income loss before one embarks on assessing the loss: 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=); *Amini v. Kania*, [*2014 BCSC 1671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8T-89T1-JNCK-22VK-00000-00&context=) at para. 64. If so, the plaintiff is to be put into the position he would have been in had the accident not occurred: *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 paras. 181-86; *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.

**443**  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.

See also *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=) at para. 40.

**444**  If appropriate, 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.

**445**  The evidence suggests Mr. Kandola made very little effort to obtain other employment up to the time of the accident in March 2011.

**446**  Mr. Kandola outlines what appears to be an improving physical and medical situation from 2006 when he was unable to last more than a few days at a rather sedentary job as a security guard nor pass the examination for a taxi driver in 2008. He argues that by 2010 or 2011 he began thinking about getting a job doing minor automobile repairs, a consideration based in his practice of changing the oil and otherwise maintaining his family's vehicles.

**447**  He detailed in his examination-in-chief that he could make $2,400 before his WCB benefits were effected, and $5,000 before his CPP benefits were affected.

**448**  For his capacity to work, Mr. Kandola primarily points to the work he did for his brother Gurmail in constructing his house from March through August 2009, which if correctly described involved quite a bit of real labour. As well counsel point to mowing the lawn, trimming hedges, cleaning gutters and painting the interior of his house.

**449**  However, I have nothing before me to indicate any inclination to find employment from the fall of 2009 when Gurmail's house was completed to the spring of 2011.

**450**  Likewise I have not been provided any opinion or assessment of what may have been Mr. Kandola's potential work capacity. He did not make any mention of any improvements to his treating physicians. Rather, he stayed and has stayed on CPP disability and WCB compensation from the time of his 2000 accident.

**451**  The plaintiff suggests that I take one-half of the $10,000 gift that was made by Mr. Kandola's brother reflecting the work that was done by Mr. Kandola in 2009 i.e. $5,000 "as it is within the exemption and CPP would not call back benefits".

**452**  In my view, I am not to find a real and substantial possibility of a future event leading to an income loss when I have not seen any substantial effort made prior to March 2011 of obtaining employment. Mr. Kandola had settled into a comfortable situation where he could do as he pleased and live within the income he was deriving monthly from CPP and WCB. He continued to regularly see Dr. Ng and Dr. Manjunath in 2009 and complain of pain and depression. If he was as able as his brother says in 2009, he was quite capable of returning to the workforce yet he chose not to for over 17 months. Similarly, despite his stated intention to take courses in automotive repair he did not enroll in or commence studies despite two The reality as I see it was he had no intention of seeking gainful employment, and I find no basis for a possible loss of income claim.

***Future Care***

**453**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Gignac v. Rozylo*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 29-30.

**454**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable, both in the sense of being required and being costs that, on the evidence of the experts in the relevant field of expertise, the plaintiff will be likely to incur: *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; *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. 157-158.

**455**  The plaintiff claimed for the costs of future care a multi-discipline pain management program at $14,500; counselling for 24 sessions at $4,400; occupational therapy at $750 and physiotherapy at $10,000.

**456**  As noted by Dr. Sheik in his report of August 19, 2015, possible treatments for Mr. Kandola's condition could include:

1. a lumbar spine L-5, S-1 fusion which will be covered by MSP;
2. a multi-discipline pain management program consultation, a referral which had already been sent to the Jim Pattison Clinic and which would be covered by MSP;
3. counselling for chronic pain management ;
4. occupational rehabilitation consults; and
5. ongoing physiotherapy.

**457**  Dr. Jaworski indicated the plaintiff needed a multi-discipline pain management program with a focus on cognitive behavioural therapy in general treatment mobilization and continued psychiatric treatment.

**458**  Dr. Harrad indicated the plaintiff would require lifelong anti-depressant medication.

**459**  Dr. Nikolakis said that there may be a requirement for cervical facet blocks but those were not presently required and there was more likelihood of the requirement for the L-5 S-1 fusion. Dr. Zarkadas believed the plaintiff should participate in physiotherapy and massage therapy for six months.

**460**  Dr. Rasmussen agreed the psychological treatments should continue but noted he had already been seeing Dr. Harrad.

**461**  For the reasons that follow, I am not convinced the costs outlined can be established as medically necessary or likely to be incurred.

**462**  First and as noted by the defendant, a number of the treatments included in this head of damage by the plaintiff are already provided under medical health coverage.

**463**  Secondly, with respect to the multi-discipline pain management program which is available in the public system, a referral had really been put through by Dr. Sheik in August 2014 but apparently not taken up by Mr. Kandola who advised Fraser Health on May 13, 2015, he no longer needed the appointment as he wanted to speak to Dr. Harrad. A pre-accident appointment for chronic pain management was also cancelled by Mr. Kandola. This, together with the various medical assessments of amplified pain behaviour which were well illustrated in court, give me substantial doubt about the efficacy of such treatment or Mr. Kandola's intent to avail himself of a program such as a multi-discipline pain program.

**464**  Third, given the plaintiff's occupational history and his failure to prove any likelihood of his intention to return to employment, there is no basis for the occupational rehabilitation consultation as submitted.

**465**  Fourth and as to the medications, those had been provided both before and after the accidents within the public system and pre-dated and post-dated the accidents. To the extent they are not covered by within the public system, I cannot determine on a balance of probabilities that any more than a nominal additional amount are medically necessary as a result of either the March 2011 or January 2015 accidents.

**466**  Similarly and with respect to the gym or swimming programs claimed, those had been utilized before the accidents to varying degrees.

**467**  Finally, and with respect to the future care claims generally, what had passed without real comment was the fact that the plaintiff had already undergone 150 physiotherapy and 29 massage therapy sessions since March 2011 with no medical evidence as to the efficacy of the use of these programs. In my view, this lack of result is properly considered in determining the medical necessity of the programs to the extent the plaintiff seeks them.

**468**  Having raised many of these issues, the defendants conceded some three months of physiotherapy and massage therapy might assist as well as ten sessions of cognitive behavioural therapy and a nominal ongoing medication allowance. They submit the range of damages should be between $1,000 and $4,000.

**469**  In my view, the amount should be slightly higher. With reference to the rates provided by Legacies Health Centre, the Scottsdale Physiotherapy Clinic, Chuck Jung & Associates, and the pharmacy receipts provided, and my assessment of the plaintiff's actual injuries, the treatments they require, and his likelihood to pursue them, $7,500 will be awarded to the plaintiff for the costs of his future care.

***Loss of Housekeeping and Home Maintenance Capacity***

**470**  Mr. Kandola makes several claims for services he argues he can no longer perform as a result of the accident. These include house painting costs of $5,800; medication of $5,000; cleaning costs of $1,534; car washing costs of $2,630; lawn-mowing costs of $13,154; hedge trimming costs of $3,562; vehicle maintenance costs of $2,639, and house pressure washing costs of $5,481.

**471**  In addition a separate claim was made for loss of housekeeping capacity in the amount of $7,500.

**472**  The onus is on the plaintiff to establish a real and substantial possibility that he will not be able to perform all of his usual and necessary household services, and as such will be required to hire someone perform such services or have someone provide them gratuitously: *Hartnett v. Leischner*, [*2008 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2WW-00000-00&context=) at para. 109.

**473**  To meet his burden, Mr. Kandola indicated that he had painted the inside of his house, washed his cars and provided basic vehicle maintenance, and done exterior work such as mowing the lawn and hedge trimming, pressure washing and gutter cleaning.

**474**  As well, his Ms. Kandola said that he provided some help around the house cooking the odd meal and helping with dishwashing and the like.

**475**  I have a number of difficulties in assessing this aspect of the plaintiff's claim.

**476**  First, Mr. Kandola did not provide a report detailing the costs of this care or useful evidence of housekeeping costs, be they estimated or incurred. Save for two minor car receipts, various pieces of paper put forward would seem either undated or of very recent vintage and were hardly supportive of a claim for housekeeping. These deficient receipts included an undated house painting estimate, driveway and roof washing estimates, a carwash bill, an undated bill for hedge trimming allegedly done two-three weeks prior to trial and other grass cutting/hedge trimming bills, as well as a bill for someone pressure washing the gutter. A number of these were without charge and for which he said Dr. Harrad had him sign a form, and some were not documented. When challenged on some of these receipts (e.g. the painting estimate of $5,800), a long non-answer would follow.

**477**  Second, none of the plaintiff's experts testified he could not do or had difficulty doing the house work or maintenance described.

**478**  Further, there is no indication that the assistance to Mr. Kandola could not be done in the ordinary course by Ms. Kandola. What is of further concern to me is the evidence of the plaintiff's son who said that he had not assisted in helping his father with such minor tasks such as washing the car or mowing the lawn because, according to his testimony, he was tired when he came home from his work and weightlifting. To hear this evidence from a healthy man in his early 20s living rent free on the largesse of his parents was frankly amazing. I have similar concerns toward Mr. and Ms. Kandola's daughters, who did not give evidence. I say this mindful of what was said in *Midgley v. Nguyen,* [*2013 BCSC 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=) at para. 345, namely that the court should have a robust appreciation of household realities within a family and an understanding of the normal give-and-take that is not necessarily part of the family life.

**479**  Finally, and in accord with my concerns with the plaintiff's credibility around the extent of his physical limitations, I have difficulty accepting his abilities are as limited as he claims. With respect to the house maintenance and housekeeping costs, I had a great deal of evidence of Mr. Kandola's difficulties performing these tasks in the home after the 2000 accident and little convincing evidence the plaintiff's efforts were improving before the 2011 accident or have lessened since it. Likewise, the plaintiff's evidence as to what he could not do was contradicted by the surveillance video (squatting, pushing, bending and reaching) and there was no indication that the plaintiff could not do these chores on his own time, with breaks.

**480**  In light of these issues, I do not see a proper foundation laid before me for a loss of housekeeping capacity. To the extent that Mr. Kandola says he is not able to enjoy doing these things, I have taken into account in his non-pecuniary damages award.

**Summary**

**481**  In sum I award Mr. Kandola $57,500 in non-pecuniary damages, future care costs of $7,500, and special damages as agreed of $6,500.

**482**  If the parties are not agreed on costs they may set a date before me to make submissions at their earliest convenience.

R. CRAWFORD J.

**End of Document**

[***Langley v. Heppner, [2011] B.C.J. No. 231***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

G. Barrow J.

Heard: October 19-23, 26-28, 30, 2009; supplementary written

submissions, March 12, 2010.

Judgment: February 14, 2011.

Docket: 37396

Registry: Vernon

**[2011] B.C.J. No. 231** | 2011 BCSC 179 | 197 A.C.W.S. (3d) 641 | 2011 CarswellBC 235

Between Ryan Cassidy Langley, Plaintiff, and Nancy Heppner and Daryl Beauregard, Defendants

(106 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Arm injuries — Action by plaintiff for damages for injuries sustained in a 2003 motor vehicle accident allowed — The defendant was 80 per cent liable and the plaintiff 20 per cent — The defendant failed to signal her intention to pass in advance and she also failed to perform a shoulder check — The plaintiff had suffered an injury to his shoulder and neck and resulting thoracic outlet syndrome — The plaintiff's damages were assessed at $55,000 in non-pecuniary damages, $23,000 in lost past wages, $25,000 in lost future earning capacity, $12,933 for cost of future care, and $1,584 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Non-pecuniary loss — Action by plaintiff for damages for injuries sustained in a 2003 motor vehicle accident allowed — The defendant was 80 per cent liable and the plaintiff 20 per cent — The defendant failed to signal her intention to pass in advance and she also failed to perform a shoulder check — The plaintiff had suffered an injury to his shoulder and neck and resulting thoracic outlet syndrome — The plaintiff's damages were assessed at $55,000 in non-pecuniary damages, $23,000 in lost past wages, $25,000 in lost future earning capacity, $12,933 for cost of future care, and $1,584 in special damages.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Motor vehicles — Liability of driver — Action by plaintiff for damages for injuries sustained in a 2003 motor vehicle accident allowed — The defendant was 80 per cent liable and the plaintiff 20 per cent — The defendant failed to signal her intention to pass in advance and she also failed to perform a shoulder check — The plaintiff had suffered an injury to his shoulder and neck and resulting thoracic outlet syndrome — The plaintiff's damages were assessed at $55,000 in non-pecuniary damages, $23,000 in lost past wages, $25,000 in lost future earning capacity, $12,933 for cost of future care, and $1,584 in special damages.**

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| Action by plaintiff for damages for injuries sustained in a 2003 motor vehicle accident. On the day in question, the defendant was following another vehicle that was travelling on the two-land road below the speed limit and she decided to pass it. However, when she pulled into the oncoming lane, she failed to notice the plaintiff's motorcycle, which was immediately abreast of her as the plaintiff had decided to pass both vehicles. The defendant struck the plaintiff's motorcycle and forced it into a ditch where the plaintiff crashed. Each party claimed the other was entirely responsible for the accident. The plaintiff claimed he was not speeding, that he had no reason to hurry, that he had his high beams on, and that the defendant did not signal an intention to pass. The plaintiff sought $80,000 in non-pecuniary damages.  HELD: Action allowed.  The respective duties of drivers in passing situations were to be determined by the circumstances of each case. The defendant had activated her turn indicator almost at the same time she began to pass. The defendant did not see a signal. As far as the defendant knew, there were no vehicles behind her. She did not signal her intention to pass until she ascertained there was no oncoming traffic. She acknowledged she did not perform a shoulder check before moving into the oncoming lane. The court was not satisfied on the balance of probabilities she checked her mirrors before beginning to pass. On the defendant's own account, she accepted responsibility for the accident right after it happened. An appropriately alert driver would have noticed the plaintiff's presence before the first physical contact. The defendant breached her duty to use reasonable care by failing to signal in advance and in failing to look behind her to determine if she could pass safely. She was liable for the accident. As for the plaintiff, a reasonable person would have foreseen the distinct possibility that a driver who had for some distance followed a vehicle traveling well below the posted speed would take advantage of the first opportunity to pass. To pass at the speed he did without first determining whether the defendant was also going to pass required him to take extra care to bring his presence to the defendant's attention. He failed sound the horn, make eye contact with the defendant, or simply wait until it was reasonable to conclude she was not going to pull out. He was in breach of his duty to take reasonable care for his own safety. The defendant was 80 per cent liable and the plaintiff 20 per cent. The plaintiff suffered bruises and abrasions, a sore back which was asymptomatic by the time of trial, and an injury to his right shoulder and neck. He was entitled to $23,000 for lost past wages. He had thoracic outlet syndrome as a result of the motor vehicle accident. His functional abilities would improve in some respects, although not to a significant degree. The plaintiff was awarded $55,000 in non-pecuniary damages. The injuries foreclosed the possibility of the plaintiff becoming an electrician. However, he earned nearly as much money in his current job at the mill. If the mill closed, he would require alternative employment. Overall, he was entitled to $25,000 for lost earning capacity. Cost of future care were assessed at $12,933, and these included a structure exercise program, yard work and maintenance, and drugs. Special damages of $1,584 were awarded for physiotherapy, a chiropractor, gym charges and medicine purchases. Costs were awarded on scale B. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 155*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GG-00000-00&context=), s. 157(1), s. 157(2), s. 158, s. 159, s. 170(1), s. 170(2)

**Counsel**

Counsel for the Plaintiff: J. Cotter and M.F. Russmann.

Counsel for the Defendants: K.D. Watts.

[Editor's note: A correction was released by the Court August 17, 2012; the change has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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| **G. BARROW J.** |

**1**   On October 2, 2003, just before 2 p.m., the plaintiff was driving his motorcycle eastbound on Bella Vista Road near Vernon. The defendant, Nancy Heppner, was also eastbound on Bella Vista Road. She was following another vehicle that was travelling 10 or 15 kilometres below the speed limit. The plaintiff decided to pass both vehicles. At about the same time the defendant also decided to pass. As she pulled into the oncoming lane, the plaintiff was immediately abreast of her. She struck his motorcycle, forcing him into the ditch where he lost control and crashed.

**2**  Both liability and damages are in issue.

**Liability**

**3**  On the day of the accident both the plaintiff and the defendant had driven westbound on Tronson Road, where it parallels the northern shore of Lake Okanagan. They both turned left on Bella Vista Road which begins at a "T" intersection with Tronson Road. Bella Vista Road is a paved two-lane secondary road. Initially it tracks generally north as it winds up the hill that borders the lake. After about one-half of a kilometre it begins to track gradually west. It remains windy and continues to climb, albeit more gently, for another one-half kilometre. At about one kilometre from its inception at Tronson Road the grade moderates and the road straightens out. Between Tronson Road and the point where Bella Vista Road levels and straightens, the two lanes on it are separated by a single solid yellow line. In the straight stretch the lanes are separated by a single broken yellow line. The posted speed throughout the course of Bella Vista Road is 50 kilometres per hour.

**4**  October 2, 2003 was a sunny day. The roads were bare and dry. The defendant, who lives on Tronson Road, was on her way to work when the accident happened. She was driving her spouse's 1994 Toyota pickup truck. The box of the pickup truck was fitted with a canopy. The plaintiff had been looking at a lakeshore house on Tronson Road that he and some of his friends were considering renting. When the accident happened, he was on his way home where he planned to change and carry on to work for a scheduled afternoon shift. He was driving his 600 cc racing-style Yamaha motorcycle. Neither the plaintiff nor the defendant had been drinking or were otherwise impaired.

**5**  The defendant, who entered Bella Vista Road ahead of the plaintiff, was following a minivan up the hill and through the curves. The van was travelling below the posted speed - by all accounts about 40 kilometres per hour. When the defendant reached the straight stretch, but before the point at which the lane marker changed to a broken line, she pulled out to pass the van.

**6**  When the plaintiff turned onto Bella Vista Road there was no traffic ahead of him. About half way up the hill he caught up to the defendant and the minivan. He remained behind them until they reached the straight stretch when he too decided to pass. He was almost abreast of the driver's door of the defendant's pickup when he saw her begin to pull into his lane. He testified that he had no time to either complete or abort his passing manoeuvre. All he was able to do was pull as far to the left as possible, but even with that he was unable to avoid the collision.

**7**  The point of contact between the plaintiff's motorcycle and the truck was near the left front wheel well, just in front of the driver's door. The collision forced the plaintiff into the ditch. The front brake lever, which is normally attached to the right handlebar, was broken off in the collision with the truck. In part because he was unable to brake and in part because of the terrain, the plaintiff lost control of his motorcycle and was thrown a considerable distance. The land on both sides of Bella Vista Road in the vicinity of the accident was undeveloped. The plaintiff came to rest on his back, some distance above the road in the natural grass vegetation. While he was injured, he was fortunate not to be more seriously hurt or killed.

**8**  Most of the foregoing is not seriously in dispute.

**The Position of the Parties**

**9**  Each party maintains that the other was entirely responsible for the accident. The plaintiff argues that he followed the defendant with his lights on for a considerable distance. When he ascertained he could pass safely, which included determining that the defendant was not going to pass the slow-moving vehicle that it was following, he signalled his intention and began to execute the manoeuvre. He said the defendant did not signal. He denied that he was speeding prior to the accident and argues that there was nothing he could have done to avoid the collision once he became aware the defendant was going to pass also.

**10**  The defendant argues, at least implicitly, that the plaintiff was not behind her as she wound her way slowly up Bella Vista Road. She said she regularly checked her rear-view mirrors and saw no one. She said that upon reaching the straight stretch she again checked behind her, saw nothing, activated her turn signal, and then proceeded to pull into the oncoming lane to pass. She argues that I should reject the plaintiff's account of the accident and conclude that he was speeding and was otherwise careless.

**The Law**

**11**  With one exception, the parties do not disagree on the applicable legal principles. The plaintiff's claim is framed in ***negligence***. As a general rule, a person is negligent when he or she fails to take reasonable care to avoid doing harm to another person in circumstances where he or she owes that other person a legal duty to take care (see generally *Basra v. Gill* [*(1994), 99 B.C.L.R. (2d) 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S3HD-00000-00&context=) (C.A.)). As to the standard of care and the relationship between the standard of care and, for example, the provisions of a statute, Major J. on behalf of the unanimous court 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=) wrote at paragraph 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.

**12**  There are several sections of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* which deal with the obligations on motorists when overtaking or being overtaken by another vehicle. Section 157(1) prescribes how a driver is to execute a passing manoeuvre and how the driver being passed is to behave when being passed. It provides as follows:

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

1. must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
2. must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.
3. Except when overtaking and passing on the right is permitted, a driver of an overtaken vehicle,
4. on hearing an audible signal given by the driver of the overtaking vehicle, must cause the vehicle to give way to the right in favour of the overtaking vehicle, and
5. must not increase the speed of the vehicle until completely passed by the overtaking vehicle.

Section 158 of the *Act* has no application to the circumstances of this case. Section 159 describes the duty, for purposes of the *Act*, on a driver passing another vehicle on the left. It provides:

**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.

**13**  Finally, s. 155 prescribes the legal significance of various kinds of dividing lines that appear on highways. Section 155(1)(c) provides that if a highway is marked with:

one single line, broken or solid, the driver of a vehicle must drive the vehicle to the right of the line, except only when passing an overtaken vehicle.

Section 170(1) provides:

If traffic may be affected by turning a vehicle, a person must not turn it without giving the appropriate signal under sections 171 and 172.

Subsection 170(2) provides that when the *Act* requires that a signal be given it must be given "continuously for sufficient distance before making the turn to warn traffic". Section 171 simply provides that signals can be made either manually or by a mechanical turn indicator. Section 172 deals with left hand drive vehicles.

**14**  The point of departure between the parties, at least on the law, is as to the relative duties of drivers in a passing situation. The plaintiff argues that the law is as set out in *Samograd v. Collison* [*(1995), 17 B.C.L.R. (3d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=); [*19 M.V.R. (3d) 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=) (C.A.). Mr. Watts, on behalf of the defendant, argues that *Samograd* is wrong to the extent it is inconsistent with *Ottawa Brick & Terra Cotta Co. v. Marsh*, [*[1940] S.C.R. 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1MH-00000-00&context=); [*[1940] 2 D.L.R. 417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1MH-00000-00&context=) (cited to D.L.R.).

**15**  In *Samograd*, as here, the plaintiff was riding a motorcycle and pulled out to pass two vehicles. The second vehicle the plaintiff intended to pass turned left in front of him. Finch J.A. (as he then was) discussed the relative obligations of drivers in passing situations. He held that it is wrong in law to conclude that in all cases the overtaking driver is charged with the greater obligation to ensure the manoeuvre can be completed safely. He noted that there were no provisions in the *Motor Vehicle Act*, nor any general legal principles that support that view. The correct approach is to assess the drivers' respective obligations based on the circumstances that each of them faced. It may be that the passing driver has a greater obligation or it may be that the driver being passed does. Neither result, however, is preordained.

**16**  As noted, the defendant argues that *Samograd* is inconsistent with *Ottawa Brick & Terra Cotta Co.*, a case that was not referred to in *Samograd*. In *Ottawa Brick & Terra Cotta Co.* Hudson, J. wrote at p. 427:

The onus is heavily on the driver of a motor vehicle attempting to pass another from the rear to excuse himself from responsibility for a collision with a car ahead.

Mr. Watts argues that this is a binding statement of law, as binding today as it was in 1940. I am unable to agree. In *Ottawa Brick & Terra Cotta Co.* each of the five judges who heard the appeal gave reasons. Only Hudson J. referred to the overtaking driver having a greater duty or an onus to excuse his or her conduct. Whatever else *Ottawa Brick & Terra Cotta Co.* may stand for, it cannot be said that Hudson J.'s *obiter* comment represented the court's view on the issue.

**17**  In summary, the respective duties of drivers in passing situations are to be determined by the circumstances of each case.

**Analysis**

**18**  While there are some conflicts in the evidence, there are not many; and those that do exist are not particularly significant. I will deal with them as necessary in the course of dealing with the issue of liability generally.

**19**  Only the plaintiff and the defendant testified about how the accident happened. In general, I found them both to be honest witnesses who related what they now believe to have happened.

**20**  The plaintiff testified he was not in a hurry, and there is no reason to doubt that statement. He had ample time to drive to his parents' residence, where he was then living, change and carry on to work. He said that after he caught up to the defendant and the vehicle the defendant was following, he followed at a distance of two or three car lengths through the last few turns prior to where the road straightens out. He said that he typically drove with his high beam lights on, and he thought he had them on on the day in question. He said that when he pulled out to pass, the defendant did not have her turn indicator on and she had given no other indication of an intention to pass.

**21**  The defendant said that she indicated her intention to pass by turning on her signal, and that it blinked three or four times before she began to pull into the oncoming lane.

**22**  I am satisfied that the defendant activated her signal almost at the same time that she began to pass. I reach that conclusion for several reasons. First, I accept the plaintiff's evidence that he did not see a signal and that had there been one he would have seen it. Second, while the defendant may typically signal, even if there are no vehicles behind her, as far as she knew there were no vehicles behind her on the day in question and thus no need to signal much in advance of actually beginning to pass, if there was a need to signal at all. Finally, the defendant knew there was a straight stretch that might afford an opportunity to pass. She did not know whether there was oncoming traffic until moments before she began the manoeuvre. Both the plaintiff and the defendant started their passing manoeuvres on the single solid line. The defendant thought that doing so was illegal and, as she put it, she "jumped the gun". I am satisfied that she did not decide to pass and did not signal her intention to pass until she ascertained that there was no oncoming traffic. As soon as she reached that conclusion, she signalled and almost simultaneously began to pass.

**23**  The defendant acknowledges that she did not do a shoulder check before moving into the oncoming lane. She testified in chief that she checked both her windshield-mounted and door-mounted rear-view mirrors before beginning to pass. I am not satisfied on a balance of probabilities that she did. First, on cross-examination it was suggested to her that she checked only her windshield-mounted mirror. She testified that she "believed" that she looked in her side mirror, but could not specifically recall doing so. In addition, she was asked on examination for discovery to describe what she did before she began to pass. She said:

I was following the van, and when I came up to where the dotted line was, I could see it was safe, no vehicles were coming from the front. I did check my rear-view mirror. I did not see anyone behind me. And I went, put on my signal light and went to pull out to pass ...

Later in her examination for discovery the defendant explained that she uses the phrase "rear-view mirror" to describe both the interior and side-mounted mirrors. I accept that she uses the phrase in that manner, but note that she used the word in the singular. Next, the plaintiff was there to be seen. Although he was riding a motorcycle and thus may have been less visible than a car, he was there and he had his headlight on.

**24**  There is another aspect of the evidence that is of significance to the issue of whether the defendant checked her side-mounted mirror. It is also an area in which there is some conflict in the evidence. The plaintiff testified that immediately after the collision, and while he was lying on his back waiting for medical assistance, a female, who he could not identify, said to him words to the effect that she was sorry, that the accident was her fault, that she did not check her mirrors, and that she had no idea that the plaintiff was behind her when she began to pull out to pass. The defendant testified that she spoke to the plaintiff in the circumstances he described. She testified that she did tell the plaintiff that the accident was her fault, that she had not seen him, and that she was sorry. She testified in chief that she did not "recall" saying that she did not check her mirrors. On cross-examination she said both that she did not "think" that she said anything about her mirrors, and that it was not possible that she would have said such a thing. I think it more likely than not that the defendant did tell the plaintiff that she had not checked her mirrors. First, it is consistent with the other things that she acknowledged saying. Second, it is odd that, if she knew then that she did check her mirrors, she is unable to now say categorically that she has never said to the contrary.

**25**  There is another aspect of the exchange between the plaintiff and the defendant in the immediate aftermath of the accident that is of some significance to the issue of liability generally. According to the defendant she was driving below the speed limit, she signalled her intention to pass in advance of beginning the manoeuvre, checked both of her mirrors, and, when she saw nothing, she began her passing manoeuvre. I recognize that in the aftermath of an accident involving potentially very serious injuries, people do not reflect carefully on what they say. Nevertheless, on the defendant's account she did nothing wrong, and yet she accepted full responsibility for the accident right after it happened. I do not place a lot of weight on this evidence, but neither do I discount it entirely.

**26**  One final aspect of the evidence is significant. The defendant did not see the plaintiff until his motorcycle came into contact with her pickup truck. As earlier noted, I am satisfied that the plaintiff's motorcycle first contacted the defendant's pickup truck just behind the left front wheel well. It seems to me that an appropriately alert driver would have noticed the plaintiff's presence before the first physical contact, albeit not long before.

**27**  On the basis of all of the evidence I am satisfied that the defendant, in failing to signal sufficiently in advance to warn following vehicles, and in failing to carefully look behind her to determine whether she could pass safely, was in breach of her duty to use reasonable care. That failure caused the accident and thus she is liable.

**28**  Before turning to the question of whether the plaintiff is also liable, I will deal with some of the inferences Mr. Watts invited me to make but which I am unable to draw. First, he argued that given the speed the plaintiff said he thought he was travelling and the speed the defendant was probably travelling, the accident could not have occurred as the plaintiff described. The plaintiff testified that he was at the mid-point of the defendant's truck when he noticed that she was beginning to encroach on the oncoming lane. He thought he was doing about 75 kilometres an hour at that point and that the defendant was likely doing about 40 kilometres an hour. Mr. Watts converted these speeds, using an internet conversion site, to feet per second and argued that in the time the plaintiff said it took for the defendant to cross into his lane he would have been well past her, given their speed differential. This argument depends on a number of unproven assumptions. Two are worthy of note. First, the speed estimates given by the plaintiff, and the defendant for that matter, are just that - estimates. No one was paying particular attention to their precise speed. Second, there is reason to conclude that the speeds of both vehicles were changing, and likely accelerating. The uncertainties that these variables inject into the analysis make any conclusion as to the relative positions of the vehicles based on this analysis unreliable.

**29**  Next, the defendant points to the damage on the pickup truck and argues that it is not consistent with a sideswipe collision such as that described by the plaintiff. That is not an inference I am prepared to draw without some expert evidence.

**30**  Finally, the defendant argues that the position of the defendant's motor vehicle, after she brought it to a stop, suggests that she did not encroach on the oncoming lane significantly, and certainly not as significantly as the plaintiff said she did. She stopped her vehicle with her front wheels "barely over the centre line". As with the argument based on relative speeds, this proposition depends on a host of assumptions that have not been proven, including most significantly the post-impact movements of the defendant's vehicle.

**31**  Finally, there was evidence about a dip in the road just before the point where both drivers decided to pass. Several days after the accident the defendant returned to the scene in an effort to understand how the accident could have happened. She stood near where the accident occurred and watched traffic approaching from the direction she and the plaintiff had been driving. She noted that cars briefly disappeared from her view as they went through the dip in the road. Like the other arguments, this argument depends on, among other things, where the defendant was standing relative to the motor vehicle accident and whether she was higher or lower than a driver would be if seated in a vehicle. Moreover, the defendant was familiar with the road. She drove it daily. It is odd that she would not have, prior to the motor vehicle accident, noticed such a significant topographical feature. I am not satisfied that the dip in the road is significant in relation to any of the issues raised by this proceeding.

**32**  The next issue was whether the plaintiff was contributorily negligent; that is, whether he exercised reasonable care for his own safety, and if not, whether his lack of care contributed to the accident.

**33**  In his argument, Mr. Cotter, on behalf of the plaintiff, made reference to *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=); [*43 M.V.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.). Legg J.A., at paragraph 14, adopted the proposition that a plaintiff is not bound to guard against every conceivable eventuality, but only against those eventualities that a reasonable person ought to have foreseen as being within the ordinary range of human experience. This proposition is apt to the matter at hand. I am satisfied that a reasonable person would have foreseen, as a matter of ordinary human experience, the distinct possibility that a driver, such as the defendant, who had for some distance, followed a vehicle that was travelling well below the posted speed, would take advantage of the first opportunity to pass. The defendant argues that faced with such a situation the plaintiff had an obligation to take reasonable steps to ensure that his presence was known to the defendant. The need to do so was all the greater because the plaintiff was riding a motorcycle. Rather than do that, the plaintiff passed at a speed substantially in excess of the posted limit and without first determining whether the defendant might also elect to pass.

**34**  The plaintiff testified that he thought he was in fourth or fifth gear (his motorcycle had six forward speeds). On examination for discovery he said he would ordinarily be in third gear if he was travelling at 40 kilometres per hour. He had been climbing a hill and only doing only 40 kilometres per hour prior to the accident. He did not testify that he shifted gears, but did say that one reason he thought he may have been in fourth or fifth gear was because he knew he did not have the ability to accelerate quickly once he became aware that the defendant was also passing. Whatever the plaintiff's initial speed, he estimated that he had accelerated to approximately 75 kilometres per hour by the point the defendant collided with him. Thus, on his own evidence, he was substantially in excess of the speed limit and travelling at almost twice the speed of the defendant. This circumstance added to the risk of a manoeuvre that had some risk to begin with.

**35**  More significantly, I am satisfied that the plaintiff passed at the first opportunity that either he or the defendant had to do so. He testified that once he crested the hill, such that all that lay before him was a straight gently inclining piece of road, he determined that neither the defendant nor the vehicle in front of the defendant was speeding up. He said that he saw no indication the defendant was going to pass, and as a result he decided to pass both vehicles.

**36**  The situation the plaintiff faced on cresting the hill was one of uncertainty. The lead motor vehicle was travelling below the posted speed limit and had been doing so for some time. The defendant had not had an opportunity to pass and the plaintiff knew that. The accident happened just where the solid line changed to a broken line. The plaintiff began his manoeuvre a considerable distance before that point. I am satisfied that both drivers, almost simultaneously, took what they perceived to be the first opportunity to pass. The fact that the defendant had made no indication of an intention to pass when the plaintiff decided to do so is not determinative of whether the defendant posed a risk to someone in the plaintiff's position. That is so because the plaintiff did not wait until the defendant had a reasonable opportunity to decide whether to pass. To pass at the speed he did without first determining whether the defendant was also going to pass required the plaintiff to, at a minimum, take extra care to bring his presence to the defendant's attention. He could do that by sounding his horn, by making eye contact with the defendant, or by just waiting until it was reasonable to conclude that the defendant was not going to pull out. He did none of these things and was in breach of his duty to take reasonable care for his own safety.

**37**  As to apportioning liability, I find that the defendant's ***negligence*** was significantly greater than that of the plaintiff's. She failed to signal her intention to pass sufficiently in advance of doing so to warn other drivers, and failed to keep a proper lookout prior to initiating her passing manoeuvre. I apportion liability 80 percent to the defendant and 20 percent to the plaintiff.

**Damages**

**A. The Plaintiff's Injuries: Diagnosis, Prognosis and Mitigation**

**38**  The plaintiff is seeking general damages, an award for past income loss, an award for loss of future earning capacity, damages for loss of housekeeping capacity, future care costs, and special damages.

**39**  As noted above, the accident was significant. I am satisfied that the plaintiff was catapulted approximately 60 feet after he lost control of motorcycle. He landed on his back. He did not lose consciousness as a result of the collision. He was taken to the hospital by ambulance. X-rays were taken but they were negative, and the plaintiff was released later that evening. His mother picked him up, and after stopping at the police station to provide a statement she drove him home.

**40**  Before turning to the specifics of the plaintiff's injuries, three general matters are worthy of note. First, and again as earlier noted, I found Mr. Langley to be a credible witness. He gave his evidence in a straightforward manner. When appropriate, he readily admitted when he was in error. He was neither defensive nor evasive in cross-examination and appeared to pay no attention to whether his answers might help or hurt his case. I am satisfied that he simply tried to describe events according to his memory of them. One illustration of this was his evidence about a video that the defendant commissioned of a lacrosse game. Mr. Langley was not playing in that game but he said it was representative of the games he did play in. He was anxious to explain all that was going on during the game in what was a genuine desire to assist everyone's understanding. He did not attempt to overstate the pain he experienced or exaggerate his injuries. His presentation in court mirrored his presentation to the various health professionals who have assessed or treated him. Dr. Travlos, a physical medicine and rehabilitation specialist, assessed Mr. Langley twice at the request of his lawyer. In his August 14, 2006 report, he described Mr. Langley "as a very straightforward, 25-year-old male". There is no suggestion by either Dr. Latham, Mr. Langley's general practitioner, or Dr. Laidlow, another physical medicine and rehabilitation specialist, that Mr. Langley was anything other than candid and forthcoming. Further, Mr. Langley has had three functional capacity evaluations by three separate physiotherapists. Two of those evaluations were done at the request of his lawyer; the third was done at the request of the defendants' lawyer. In all three evaluations, a variety of techniques were used to determine whether the plaintiff was giving full effort and whether the pain he complained of tracked the experience of others with similar injuries. Arlana Taylor assessed the plaintiff at the defendants' request. Under the heading "Reliability of Pain and Disability Reports Findings", in her September 7, 2007 report, she wrote:

Regarding Mr. Langley's evaluation, overall test findings, in combination with clinical observations, I identify Mr. Langley's subjective reports of pain and associated disability to be both reasonable and reliable. At no time did Mr. Langley exhibit any excessive pain behaviours.

**41**  The second general finding is that the plaintiff has a high tolerance for pain. He is prepared to endure significant pain and discomfort rather than live a life of relative inactivity. Two injuries unrelated to the motor vehicle accident illustrate this point. The plaintiff has worked at the Tolko saw mill in Lavington since June 2002. In August 2003, he was feeding boards into a planer. His hand was drawn into the rollers and his middle and ring fingers were crushed. He did not miss time from work as a result. After the motor vehicle accident, Mr. Langley fell while playing indoor lacrosse. Although he instantly felt pain and went to the bench, he attempted another shift before his leg gave out. He had fractured his patella to such a degree that it had to be surgically repaired.

**42**  Third, the plaintiff is generally hard working. His friend, Jeremy Lee, and his common-law spouse, Ashley Compton, both of whom I found to be straightforward and honest witnesses, described Mr. Langley as being physically strong and enthusiastic in his recreational activities. He is a person whose natural inclination is to work hard whether around the home, on the playing field, or at work. Since the motor vehicle accident, Mr. Langley has had difficulty moderating this tendency, sometimes to his detriment.

**43**  Turning to Mr. Langley's injuries more generally, he suffered a number of bruises and abrasions which resolved unremarkably. His low back was sore, and although it remained sore and painful for a considerable time following the accident, it was asymptomatic by the time of the trial (six years post-accident). His most significant and persistent injury is to his right shoulder and the right side of his neck.

**44**  Mr. Langley saw Dr. Latham on October 8, 2003. Dr. Latham noted "marked tenderness" in Mr. Langley's right shoulder and spasming in the lower lumbar area of his back. He prescribed Naproxen and recommended Ibuprofen. He also suggested that Mr. Langley pursue a course of physiotherapy. On October 22, 2003, almost three weeks after the accident, Dr. Latham observed "extensive bruising over the right shoulder and rotator cuff". He found that the range of motion in Mr. Langley's shoulder was limited in a number of directions. He also found that there was "considerable restriction" in all planes of his cervical spine. By December 2, 2003, the doctor noted "obvious crepitus" - that is audible crackling - in the shoulder area. Over the next two months, Dr. Latham noted that Mr. Langley's right shoulder muscles were wasting. He referred him to Tim Cooper, a physical fitness trainer, in an effort to avoid further deconditioning. As to his willingness to pursue the program recommended by Mr. Cooper, Dr. Latham wrote in his May 30, 2004 report:

It was apparent that Mr. Langley was motivated to recover and he has been compliant and energetic in pursuing his exercise schedules. Fortunately, this young man is fairly muscular and fit and his compliance with the program has been excellent.

**45**  By February 2004, Dr. Latham noted that while Mr. Langley's condition in an overall sense was improving, his shoulder was "fairly slow" returning to function. On March 5, 2004 Dr. Latham advised Mr. Langley that he should begin gradually returning to work, doing light duties for part days for at least two weeks. Mr. Langley, in fact, did return to work and although his duties were modified, he found that he was limited in his ability to fulfill even those duties. Dr. Latham concluded that as of the end of May 2004, Mr. Langley was still "unable to do any heavy work above the right shoulder". He thought that condition might continue for another four to six months. Ultimately, however, he was of the view that Mr. Langley would make a full recovery.

**46**  I digress to address the question of past wage loss. Mr. Langley was off work from October 2, 2003 until March 5, 2004. He worked half days between March 5 and March 22, 2003. The parties have agreed that his past wage loss during this period was $23,000. The defendant does not agree, however, that it was necessary for Mr. Langley to be off work for as long as he was. Given Dr. Latham's evidence, the plaintiff's own evidence, and his generally industrious attitude, I am satisfied that it was reasonable for him to be off work until March 5, 2004. It follows that I am satisfied that he is entitled to damages in the amount of $23,000 for past wage loss.

**47**  By July 2005, Mr. Langley was still experiencing pain in his right shoulder. It was limiting the range of motion in the joint. Thus, almost two years after the accident and in spite of Mr. Langley's high level of physical strength and conditioning at the time of the accident, and in spite of his diligent pursuit of an exercise regime, and in spite of the 49 physiotherapy treatments he had attended, he was still experiencing significant limitation and pain.

**48**  I earlier made reference to a knee injury that Mr. Langley suffered playing lacrosse. This was a serious injury. He was off work as a result of it for six months, and it was a full year before he was able to run again. In the spring of 2006, some eight months after his initial surgery, he underwent arthroscopic surgery to have the joint debrided. Thereafter, it healed more quickly. The knee is now completely healed. The only lingering effect is that, if Mr. Langley strikes the knee where the titanium screws that were used to repair the joint are located, it is quite painful. Otherwise, the knee is healthy and fully functional.

**49**  In June 2006, Mr. Langley was still complaining of pain in his right shoulder. By December of that year, he reported to Dr. Latham that it was aggravated by lifting and during cold weather.

**50**  Dr. Travlos is of the view that the plaintiff's symptoms are the result of a combination of thoracic outlet syndrome and myofascial pain in the shoulder. Mr. Watts does not disagree with Dr. Travlos' diagnosis. He argues, however, that to the extent the plaintiff suffers from the syndrome, it is the manifestation of a pre-existing condition unrelated to the motor vehicle accident. Dr. Travlos testified that thoracic outlet syndrome affects the nerves and blood vessels that serve the shoulder and to a lesser degree the arm. He said that there are typically a constellation of symptoms, including numbness, pain, tingling and occasionally weakness. One symptom that may be diagnostic of the condition is tingling or numbness in the hand or fingers. The first reference to that symptom in the medical records subsequent to the motor vehicle accident is in Dr. Travlos' report of August 14, 2006. Mr. Langley testified that he experienced the symptom prior to that; in fact, he noticed it within months of the accident, but it was not a concern to him until he became more active. Counsel for the defendant argues that Mr. Langley's evidence is a "fabrication" and that given the time between the accident and the first reference in the medical records to numbness and tingling, it is unlikely that thoracic outlet syndrome is the product of the accident.

**51**  I am satisfied on a balance of probabilities that the plaintiff has thoracic outlet syndrome and that it is a result of the motor vehicle accident. First, Dr. Travlos is of that opinion. In his evidence and in his August 2006 report, he was alive to the fact that Mr. Langley had complained of numbness and tingling in both hands, and sometimes in only his right hand, intermittently prior to the motor vehicle accident. Dr. Travlos had access to all of Mr. Langley's medical records. He concluded that while Mr. Langley was at risk of developing the syndrome, he had not developed it prior to the accident. In particular, he wrote (at p. 5):

It is, therefore, my opinion that although he probably was at some risk of developing such symptoms, he would not likely have developed these symptoms in the absence of his accident of October 2, 2003.

**52**  Second, there is no expert evidence that directly contradicts Dr. Travlos' opinion in this regard. Dr. Laidlow wrote in his December 2, 2004 report, "the Neer and Hawkins-Kennedy tests for thoracic outlet were negative". Dr. Travlos testified that the Neer test is intended to assist in diagnosing shoulder impingement but not nerve or blood vessel issues. He also testified that the Hawkins-Kennedy test is designed to diagnose tendonitis, not thoracic outlet syndrome. I accept Dr. Travlos' opinions on the diagnostic purpose and utility of the tests Dr. Laidlow administered. Further, Mr. Langley was examined by Dr. Jones, a neurologist, and by Dr. Froh, whose area of expertise was not revealed in evidence, at the request of counsel for the defendants. Neither of these doctors testified, nor were reports from them tendered.

**53**  In addition to the above, I accept the plaintiff's evidence that after the motor vehicle accident he became aware of numbness and tingling as he became more active. He testified that he notices it whenever he does an activity that requires him to elevate his arms over his head. I accept that for the first 6 to 12 months after the accident he did little activity of that kind. Further, I accept that he was experiencing pain in his neck and shoulder to a significant degree and that was the focus of his attention. Thus, as he became more active and his other pains subsided, the numbness and tingling became both more pronounced and more apparent. I accept that Mr. Langley did not report numbness and tingling to Dr. Latham prior to June 2006 when he noted it. Dr. Latham is a careful historian and would likely have made note of such a symptom had it been reported. On the other hand, I also accept that Mr. Langley is not one to complain about symptoms he regards as relatively insignificant, and I accept that he regarded the intermittent numbness and tingling in his hands as relatively insignificant until it became more pronounced. Finally, Dr. Travlos' evidence is that numbness and tingling, if secondary to thoracic outlet syndrome, should be apparent within two and a half years. In spite of that, he remains of the view that Mr. Langley's symptoms are the result of the accident. That is so for at least two reasons. First, thoracic outlet syndrome can arise in a delayed manner. It can take months to evolve. When that is how it develops, it often begins with pain in the shoulder that slowly, and over time, extends down the arm. Second, not everyone who meets the diagnosis experiences the full syndrome; in some cases, some symptoms are, I infer, more apparent while others may not be present at all.

**54**  In summary, I am satisfied that Mr. Langley has thoracic outlet syndrome and that it is a consequence of the serious trauma that his shoulder suffered in the accident.

**55**  The other injury the plaintiff suffered is to his low back. This injury was mechanical in origin. It was significantly painful for Mr. Langley for some time following the motor vehicle accident. By August 2006 it had moderated. He reported to Dr. Travlos that he experienced pain in his low back at least monthly and that the occurrences lasted for two or three days. He explained that bending backwards or doing activities that involved repeated twisting aggravated the pain. He told Dr. Travlos that as long as he avoided such activities "the pains are well controlled".

**56**  Dr. Travlos wrote in his August 14, 2006 report:

It is probable that Mr. Langley could improve upon his back pain with regular exercise in the gym. It is probable as well that his pre-accident level of conditioning helped reduce the back pain and his current relative deconditioning and reduction in exercise since this accident is contributing to back pain. Mr. Langley has tried to increase his activities, but the recurrent nature of his shoulder pain has limited his ability to achieve the same degree of exercise he was doing before. Indeed, he noted that despite being right hand dominate, his right hand is not as strong as his left.

**57**  When Mr. Langley saw Dr. Travlos a year later he reported that his back pain had improved. His low back had not, however, returned to its pre-accident condition. Mr. Langley testified that by the time of the trial his low back pain had further subsided. His evidence is consistent with his report to Sheila Branscombe in August of 2009. He told her that his low back pain had "significantly decreased". Her functional capacity testing revealed that Mr. Langley's "pain and functional limitations were almost exclusively related to his right shoulder/arm and his neck pain". Given all of the foregoing, I am satisfied that Mr. Langley suffered a mechanical injury to his low back. That injury caused reasonably significant pain for several years. By the summer of 2007 it had moderated, and by the summer of 2008 his low back pain had returned to its pre-accident condition.

**58**  Mr. Langley's right shoulder and right neck pain are the most significant consequence of the accident. I accept that he is always in some degree of discomfort in these areas. His level of discomfort increases when he becomes fatigued, but it is most seriously aggravated when he does any activity that involves lifting his right arm to or above shoulder level.

**59**  As to the affect of these injuries on the plaintiff, I am satisfied that for the first six months after the accident they were significantly debilitating and limited him to generally sedentary activities. Mr. Langley had just turned 23 years old when the accident occurred. He led a physically active life. He devoted most of his recreational time and activity to sports. In the winter he enjoyed snowboarding and ice hockey. He could do neither in the winter following the accident. I accept that his injuries were significantly painful during that first winter and the forced inactivity was emotionally difficult.

**60**  Mr. Langley has had quite a number of injuries in his life. Some have been work related, but most are due to the aggressive manner that he liked to play various sports. In the spring of 2004 he thought that the injuries he suffered in the motor vehicle accident would heal in much the same way that all of his other injuries have healed. When his injuries remained symptomatic, first for months and then for years, he felt considerable frustration.

**61**  Mr. Langley's right shoulder injury has affected his recreational pursuits. He gave up soccer and took up indoor lacrosse in the summer of 2003. He played in a senior men's league. In the summer of 2004 he returned to the game, and played although he was in pain. He thought then that his pain would subside, and he was prepared to put up with it for the enjoyment that he derived from the game. Nevertheless, he played in fewer games and played less time in the games that he did participate in. In addition, he changed his style of play. In lacrosse, and perhaps in other sports, prior to the motor vehicle accident Mr. Langley regarded himself as a player with limited skills but substantial enthusiasm. He enjoyed the physical aspect of the game. He played aggressively. He was unable to continue playing in that way after the accident. He returned for the 2005 lacrosse season, but his knee injury cut that season short. In 2006 his knee injury still would not permit him to play. By 2007 Mr. Langley could play lacrosse, but he chose not to because his shoulder was still painful and he had reluctantly come to the conclusion that that would always be the case. In all likelihood he will not play lacrosse again.

**62**  After the accident Mr. Langley tried snowboarding. He fell, and although he did not injure his shoulder when he fell, he realized that he might well do so if he fell again. He has since given up snowboarding.

**63**  Mr. Langley continues to play ice hockey. He plays in a non- or low-contact league. He plays vigorously, however, so much so that in 2009 he injured himself when he fell trying to beat an icing call.

**64**  In addition to organized sports, Mr. Langley is no longer able to enjoy a casual or pick-up game of baseball or football with his friends. He is limited in his ability to carry out renovations in the first home he has ever owned. My impression is that while all of the foregoing are important limitations or losses for Mr. Langley, his greatest worry is about the future and whether he will be able to work in the kinds of jobs that he is both trained for and suited to. While I will deal with the issue of future earning capacity separately and later in these reasons, I accept that Mr. Langley's concern about that matter is part of the pain and suffering he experiences.

**65**  Before turning to the amount of damages Mr. Langley is entitled to as a result of these injuries, two related matters raised by Mr. Watts need to be addressed. First, Mr. Watts argues that Mr. Langley's symptoms have not plateaued; that is, they will continue to moderate. Second, he argues that Mr. Langley has failed to reasonably mitigate his losses.

**66**  Plaintiffs have a duty to take reasonable steps to mitigate their losses. It is the defendant, however, that bears the burden of proving a failure to mitigate.

**67**  Mr. Watts argues that Mr. Langley has failed to mitigate his losses in that he has not followed the medical recommendations of Dr. Travlos and perhaps others. In addition, he argues that Mr. Langley has not participated in some of the physical exercises recommended by some of the doctors. In particular he points to Dr. Latham's suggestion that Mr. Langley might benefit from an acquacise program, and Dr. Laidlow's suggestion that Mr. Langley might benefit from attending physiotherapy with Robert Powls.

**68**  As to the pursuit of exercise programs, Mr. Langley testified that he went to four sessions with Mr. Cooper on the recommendation of Dr. Latham. He said that Mr. Cooper showed him various exercises, which he then did on his own. He did them both at home and at a gym that he joined for various lengths of time on several occasions. He testified that he intermittently stopped doing some of the exercises when he found that his shoulder became sorer as a result. After his pain subsided he returned to them. I have no doubt that Mr. Langley pursued exercises as recommended and did so vigorously and diligently. On the specific issue of acquacise, Mr. Watts argues that there is no evidence that Mr. Langley participated in such a program. That is so, but there is no evidence that he did not. Given that lack of evidence, it cannot be said that the defendant has established a failure to mitigate on that basis.

**69**  In terms of physiotherapy, the evidence establishes that Mr. Langley has attended at least 50 physiotherapy sessions. In addition he has taken a number of massage therapy treatments, including deep tissue massage. He stopped attending physiotherapy when he stopped receiving significant benefit from the treatments. There is no basis to conclude that the physiotherapist that Dr. Laidlow recommended would provide a different form of therapy than the assistance Mr. Langley was receiving from the physiotherapy sessions he did attend.

**70**  Finally, the defendant argues that Mr. Langley has not taken medications recommended by Dr. Travlos. Dr. Travlos recommended four medications: Neurontin, Lyrica, Tegretol, and Botox. None of these medications, even if taken, would address the underlying problem that Mr. Langley experiences; rather, they may give rise to "better pain management". As I understand Mr. Langley's evidence, he did try Lyrica. He took that medication for about two weeks. He stopped taking it because it depressed his cognitive level, or as he put it, it left him feeling "cloudy". Given that the purpose of the medication is to relieve pain, and given that Mr. Langley suffers pain primarily when either working or attempting vigorous physical activity, it is not unreasonable for him to not take the medication. As to Botox, Dr. Travlos himself acknowledged that the treatment is "a little controversial". Further, he noted that it has been effective in only approximately 30 percent of the patients who have taken it. There is no evidence as to the risk of the therapy.

**71**  On all of the evidence, I am not satisfied that the defendant has established that Mr. Langley has failed to reasonably mitigate his losses. It may be that Mr. Langley would benefit from participation in a professionally supervised exercise regime. Given the fact that he has been, and to a considerable extent remains, physically active, and given that he received instructions from Mr. Cooper, and continues to follow those instructions, I am not satisfied that at least until now further supervised exercise would have materially altered Mr. Langley's pain and functional experience.

**72**  The defendant's argument that Mr. Langley's injuries have not plateaued rests on the assertion that he has not properly mitigated his losses and on the results of two functional capacity evaluations. Ms. Phillips prepared a functional capacity evaluation in August 2007. Among other things, she tested Mr. Langley's strength. She found that he could lift 57 pounds from floor to waist on an occasional basis. She also found that he could lift 47 pounds from waist level to shoulder height on an occasional basis. Ms. Branscombe carried out similar testing a year later, in August 2009. She found that Mr. Langley could lift 90 pounds safely both from floor to waist and from waist to shoulder height. By any measure this is a significant improvement. Although Mr. Branscombe mooted the possibility that it may be explained by a decrease in Mr. Langley's low back pain or an increase in his leg strength following recovery from his knee injury, I am not persuaded that either of these possibilities explain the improvement entirely. I am satisfied that Mr. Langley's functional abilities will improve in some respects, although not to a significant degree.

**B. Non-Pecuniary Damages**

**73**  Turning to the question of quantum, the plaintiff argues that an award of non-pecuniary damages in the range of $80,000 is appropriate. In support, Mr. Cotter points to the general approach 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=), and the specific awards made in *Cimino v. Kwit*, [*2009 BCSC 912*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0D3-00000-00&context=); *Mattu v. Fust*, [*2009 BCSC 624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2B0-00000-00&context=); and *Durand v. Bolt*, [*2007 BCSC 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-242B-00000-00&context=). Mr. Watts argues that an award in the range of $35,000 to $45,000 is appropriate, citing *Smith v. Wirachowsky*, [*2009 BCSC 1434*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B23T-00000-00&context=); *Driscoll v. Desharnais*, [*2009 BCSC 306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XH-00000-00&context=); *Joyce v. Dorvault*, [*2007 BCSC 786*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21FK-00000-00&context=); *Wery v. Toulouse*, [*2006 BCSC 823*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1DW-00000-00&context=); and *Verhnjak v. Papa*, [*2005 BCSC 1129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B141-00000-00&context=).

**74**  In *Stapley*, Kirkpatrick J.A. listed some of the factors that influence an award of non-pecuniary damages. They include: the age of the plaintiff, the nature of the injury, the severity and duration of pain, the extent of disability, the degree of emotional suffering, the loss of or impairment to the enjoyment of life, the impairment of family and other social relationships, the impairment of physical and mental abilities, and the loss of lifestyle. She cautioned that in assessing these various factors plaintiffs are not to be penalized for their stoicism (para. 46). Mr. Langley was 23 years old at the date of this accident. He suffered significant bruises and abrasions, but they resolved unremarkably. He suffered a reasonably painful mechanically-based low back injury that persisted over a period of four and one-half years, albeit with diminishing levels of pain. His most significant injury is to his right shoulder. It was significantly painful initially, and while the pain moderated over time it remains a nagging injury today. The pain associated with this injury is not insignificant, but of greater concern is the limitation it places on Mr. Langley's function. He can still play many of the sports he formerly enjoyed, but not in the fashion he would prefer to. Some sports are not open to him. Any activity that involves a significant overhead use of his arms is beyond him and will be beyond him permanently. This is so notwithstanding that his physical strength may continue to improve. The ongoing pain and the limitations on his recreational activity are the source of some degree of loss of enjoyment of life and some emotional distress. His family and other relationships have been affected, but not to any significant extent. All of this is so in spite of the fact that Mr. Langley has a reasonably high tolerance for pain and is inclined to not permit it to limit his activities unless absolutely necessary.

**75**  In *Cimino*, Dillon J. awarded a 44-year-old plaintiff who suffered from thoracic outlet syndrome $85,000 in non-pecuniary damages. Ms. Cimino, however, was in continual daily pain. She took synthetic morphine every day. Without that medication she would be unable to function by noon. Her right-sided weakness was so significant that she could not hold a jug of water (paras. 15 and 16). Dillon J. found that the plaintiff's condition was permanent and would continue to require daily doses of various kinds of pain medication in order for the plaintiff to function both personally and at work.

**76**  In *Durand*, Davies J. awarded a 45-year-old plaintiff $75,000 in non-pecuniary damages. Again, Ms. Durand's injuries were more serious than Mr. Langley's. Like Mr. Langley, Ms. Durand was stoic and uncomplaining. She needed to continue to work, but doing so in the face of her permanent injuries, consumed virtually all her energy. She was unable to carry grocery bags and had difficulty performing relatively minor physical tasks such as wringing out clothes (paras. 56 and 57). Her situation was not expected to improve.

**77**  The injuries suffered by the plaintiff in *Mattu* are not particularly comparable to those suffered by Mr. Langley.

**78**  As against the foregoing cases, in *Smith* the 29-year-old plaintiff was awarded $30,000 in non-pecuniary damages. Halfyard J. detailed the plaintiff's injuries at paragraph 86. He found that her acute problems lasted for, at most, six weeks and that by six months she had resumed most of her former activities.

**79**  In *Driscoll*, the 45-year-old plaintiff suffered low back and right shoulder pain which, like Mr. Langley, reduced his capacity for repetitive overhead reaching and lifting (para. 101). At trial, some five years after the accident, Mr. Driscoll still suffered from pain, sleep disturbance, and restrictions on his activities. Gray J. described him as "stoic" and "inclined to push through pain until it becomes intolerable". Although the nature of Mr. Driscoll's injuries differ in some respects from Mr. Langley's, the way they impacted his life is similar to the way that Mr. Langley's injuries have impacted his life. Mr. Driscoll was awarded $55,000 in general damages.

**80**  In *Verhnjak*, a 55-year-old plaintiff was awarded $40,000 in non-pecuniary damages in 2005. Although her injuries were permanent, their affect on her life was less significant than in the case of Mr. Langley. That is so in part because Ms. Verhnjak was 55 years old, and whatever recreational pursuits she enjoyed they were not significantly affected by her injuries.

**81**  In view of all of the foregoing, an appropriate award for non-pecuniary damages is $55,000.

**C. Loss of Future Earning Capacity**

**82**  Mr. Langley was an average student in high school. He graduated in 1998. Following graduation he obtained a job at a cedar mill in Enderby. Mr. Langley had a number of jobs in that mill including piling lumber, running a chop saw, and operating a fork lift. Although he liked the work he and his father thought it would be worth acquiring a trade, so in September 2001 he began a ten-month pre-apprenticeship program at B.C.I.T. This was in preparation for becoming a journeyman electrician. He successfully completed the program in June 2002 and returned to Vernon in search of an apprenticeship. He was unsuccessful. He learned through a friend that the Tolko mill in the Vernon area was hiring. He applied and was hired, first at the planer mill and more recently at the saw mill. He continues to work full time at the Tolko saw mill in Lavington now. His income has steadily increased over the years. In 2003 he earned approximately $42,500. His most successful year prior to trial was 2007 during which he earned approximately $62,000. In 2008 his income was $60,000.

**83**  The lumber industry has experienced difficulty in the past several years. The mill in Lavington is not unionized but the company follows local union rules relating to seniority. Several years ago the saw mill stopped operating a graveyard shift. When that happened those workers were either laid off, or if they had sufficient seniority they moved to the day or afternoon shift and displaced the more junior workers on those shifts. Mr. Langley survived that process. He testified that if it becomes necessary to lay off another shift, rather than do that the company will simply close the mill because it cannot be economically run at that level of production. Given this, and given Mr. Langley's seniority, he is not at risk of being laid off unless the mill closes entirely.

**84**  During the summer months Mr. Langley works as a "floater" at the mill. He fills in on a variety of jobs, both to cover vacations and to assist where production demands dictate. During the rest of the year he works on the trim saw. That job is reasonably physically demanding. He stands beside a conveyor belt which carries lumber from one type of saw to the trim saw. The lumber that passes before his position is generally between 8 and 20 feet in length and of various thicknesses. In general Mr. Langley has three tasks. First, he ensures the lumber is sitting or lying flat on the conveyor belt so that it can be fed into the trim saw. Second, lumber that is less than 6 1/2 feet in length is thrown out. Mr. Langley watches the lumber and pulls off the conveyor belt lumber that is too short. Third, lumber that is more than 20 feet in length has to be cut before it is fed into the trim saw. Mr. Langley pulls off longer pieces of lumber and cuts them using a circular or radial arm saw which is behind his work station. This is one of the most physically demanding jobs in the mill. Mr. Langley acknowledged in his evidence that when it is busy and there is a lot of wood to be discarded or cut his shoulder is quite sore by the end of the day. There are, however, quiet days and those days do not cause him any significant discomfort. He is not required to work on the trim saw, however it is the highest paying job that his seniority entitles him to and he has decided to put up with the pain in exchange for the higher pay.

**85**  Mr. Langley likes the people that he works with, and generally likes his job. It pays very well, given the limited skills it requires. It is not the job that Mr. Langley saw for his future, but it is a job that he chose and I am satisfied he will continue to work for Tolko as long as the mill continues to operate. I think it more likely than not that he would have done so even if the accident had not happened.

**86**  Mr. Langley remains interested in working as an electrician. He is now of the view, however, that work of that kind is beyond his physical abilities. His shoulder and neck pain is significantly aggravated when he is required to lift his right arm above his shoulder or to work in a forward-reaching posture. These are both postures that he thinks are common for electricians. He is understandably concerned that if an apprenticeship becomes available otherwise than through Tolko, and if he discovers he is physically unable to meet the demands of the job, he will be in a precarious position. He is interested in pursuing an apprenticeship within the mill, either leading to qualification as an electrician or, more likely, as a millwright. There have been three millwright apprenticeships available in the mill over the past several years. Mr. Langley has applied for all of them and passed the test each time. He has been interviewed for the positions but thus far has not been successful. That is entirely due to his seniority. Mr. Langley has some general idea of the kind of work that a millwright does. He believes that he will be physically able to do most jobs generally expected of a millwright, although some tasks may be beyond his physical capacity.

**87**  Mr. Langley's base pay is $24 an hour. He is a qualified first aid attendant, and receives an additional 85 cents an hour as a result. When he works afternoon shift he receives a shift differential. He testified that residential journeymen electricians earn between $27 and $32 an hour. Commercial journeymen electricians have the prospect of earning somewhat more than that.

**88**  The law on the issue of loss of future income earning capacity was recently summarized by Garson J.A. 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=). From a review of the authorities, she identified two principles that are to guide the assessment of damages under this head:

1. a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and
2. it is not a loss of earnings, but, rather, loss of earning capacity for which compensation must be made.

At paragraph 32 she wrote:

A plaintiff must always prove ... that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* [*[1990] B.C.J. No. 1158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=), or a capital asset approach, as in *Brown*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=). A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment ...

(emphasis in original)

The plaintiff in this case argues that because of his injury he is unable to pursue a career as an electrician. He argues that but for the accident he may well have sought out an apprenticeship position. In the alternative he argues that if the mill closes he almost certainly would have sought out an apprenticeship position. It is his position that either there was a substantial possibility he would have pursued one or the other of these courses of action, but they are now both foreclosed to him.

**89**  The defendant argues, firstly, that the evidence does not establish that Mr. Langley is incapable of doing the tasks typically required of electricians. In the alternative, the defendant argues that there was not a substantial possibility that Mr. Langley would pursue a position as an electrician in any event.

**90**  As earlier noted, I am not satisfied that there was, prior to the motor vehicle accident, or is now, a substantial possibility of Mr. Langley leaving his employment at Tolko to pursue an apprenticeship elsewhere. Mr. Langley had worked in a mill for several years following completion of high school. Immediately after finishing his pre-apprenticeship program he returned to mill work. It pays only just less than what he could earn as a journeyman electrician.

**91**  As to advancement within the mill, I am not satisfied that the injuries that Mr. Langley suffered in the motor vehicle accident will preclude him from pursuing an apprenticeship as a millwright. He thinks that he is able to meet the physical demands of that position, and there is no evidence to conclude otherwise.

**92**  I am satisfied that there is a real possibility of the Tolko mill closing within Mr. Langley's working lifetime. Should that occur, I am satisfied that but for his injuries he would have pursued an apprenticeship leading to qualification as an electrician. The issue that remains is whether work of that kind is now beyond his physical abilities. Further, even if he can do some or even many aspects of that kind of work, the question is whether he is at a competitive disadvantage because of his physical limitations.

**93**  The occupational therapists who have assessed Mr. Langley have reached different conclusions as to his functional ability to perform the tasks typically performed by electricians. Ms. Phillips is of the view that Mr. Langley is functionally unable to perform that job; Ms. Taylor concluded that he is. It is not necessary to address or resolve all of the issues that underlie these differing opinions. That is so because even on Ms. Taylor's assessment I am satisfied that some, and perhaps many, electrician jobs are beyond Mr. Langley's abilities. The Dictionary of Occupational Titles is an accepted reference that identifies the various activities generally required for particular jobs. It also identifies the frequency that those activities must be performed. There are nine postures involved in performing electrician-type work. Only two of them are required "frequently". One of those is "reaching". Frequently, in this context, it means that the activity is required between one-third and two-thirds of the time. The other seven activities typically involved in performing electrician work are only required occasionally (less than one-third of the time).

**94**  Ms. Taylor had Mr. Langley perform a number of physical tasks which are intended to mimic or replicate the kinds of physical activities that might be required in a work environment. Part of the assessment involves measuring or quantifying the pain that specific activities give rise to. That in turn forms part of the overall assessment of functional ability. Ms. Taylor found that Mr. Langley met the physical requirements of electrician's work in all categories except "reaching forward". That is a frequent working posture of an electrician. Mr. Langley did not have the functional capacity to work in that posture because by his own report his pain was "visibly disabling". Within a half hour of completing the test intended to measure Mr. Langley's tolerance to such working postures his pain had subsided to the point where it was just below disabling pain. The day after the first day of Ms. Taylor's functional capacity testing she spoke with Mr. Langley. He had worked a full seven and one-half hour shift following that first day of assessment. He told her that his pain was "visibly disabling". After the second day of functional capacity testing his pain had returned to its baseline level.

**95**  There are two aspects of Mr. Langley's testing and the results which bear emphasis. First, as earlier noted, all occupational therapists who subjected Mr. Langley to these kinds of tests concluded that he gave full effort. Further, he is not one to readily admit pain and by all accounts has a high threshold for pain. Second, the tests are necessarily at best limited approximations of real life job demands. I am satisfied that Mr. Langley would be unable to tolerate prolonged overhead work even with frequent breaks.

**96**  To return to the broader issue, I am satisfied that Mr. Langley is foreclosed from many typical electrician positions. No doubt the specific requirements of electrician's jobs vary. Some, and perhaps most, jobs in the electrician field would be beyond Mr. Langley's abilities.

**97**  Mr. Langley's situation is not amenable to the first of the two approaches described by Garson J.A. in *Perren*; rather, his situation is better suited to the second approach she identified. That approach involved a consideration of the four points noted in *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.). Those four considerations are 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.

As was noted by D. Smith J. in *Letourneau v. Min*, [*2001 BCSC 1519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61HG-00000-00&context=) the quantification of loss of future earning capacity, particularly under the second approach described by Garson J.A. has been variously described as "arbitrary", "judgmental" and "crystal ball gazing" (at para. 60). Frequently the award is a multiple or fraction of the plaintiff's annual salary, the precise multiple or fraction being influenced by, or a reflection of, the chance that the future event leading to an income loss will occur (*Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 17). In summary, I think there is a real and substantial possibility that the mill where Mr. Langley works will close during his working life. If that happens he will have to secure alternative employment. He may also have pursued an electrician apprenticeship within the mill. He remains capable of doing many of the physical aspects of electrician's work but not all of them. Although his disability is reasonably narrow, it is such that it will put him at a competitive disadvantage in the way characterized in *Pallos*. In view of all of the foregoing, I assess his damages under this head at $25,000.

**D. Cost of Future Care**

**98**  Ms. Phillips has priced the costs of various aids and medications that Mr. Langley may require based on the various medical reports in evidence. Those items are:

1. medications;
2. kinesiologist's services;
3. gym pass;
4. vocational testing and follow up;
5. yard work; and
6. home maintenance.

**99**  The defendant argues that no award should be made for a gym membership because Mr. Langley used fitness clubs prior to the accident. I acknowledge that Mr. Langley intermittently did have a membership in a gym before the accident, but I am satisfied his need now is greater and will continue. I am also satisfied that he would benefit from a supervised exercise program. I recognize that he has had that kind of assistance in the past. He took advantage of it. He would benefit from a further structured exercise program. I am satisfied that the one-time cost associated with these two matters is $950.

**100**  A vocational assessment may also be necessary. That will depend, however, on whether Mr. Langley finds himself in the position of having to test the employment market. That is far from certain. I consider that $1,200 is an appropriate award reflecting as it does my rough assessment of the likelihood that Mr. Langley will incur the expense.

**101**  As to yard work and home maintenance, Ms. Phillips has estimated an annual expense of $288 and $300 respectively. I am satisfied that some yard maintenance work is now beyond Mr. Langley's abilities (overhead work such as pruning and forward-reaching work). I consider that eight hours of paid assistance per year is sufficient to compensate him for this loss. I value that assistance at $25 an hour, or $200 a year. I am also satisfied that Mr. Langley's injuries will require him to engage outside general labour assistance for some home maintenance activities, such as painting, some renovations, and other overhead-reaching activities. I accept Ms. Phillips' estimate that ten hours a year is reasonable. The cost of this labour, however, I value at $25 an hour. The annual cost of these two services is $450. I estimate that Mr Langley will require this assistance until age 70. The present value necessary to provide these services over that period is $9,700.

**102**  The most significant claim under this head relates to medications, and specifically Naproxen, Ibuprofen, and Lyrica. Mr. Langley has resisted medication to this point. He tried Lyrica but did not continue with it because of the effect it had on his cognitive abilities. That was several years ago. There is no basis to conclude that Mr. Langley will take that drug in future, notwithstanding Dr. Travlos' recommendation. I am satisfied, however, that the cost of Naproxen and Ibuprofen is properly recoverable. The present value of the annual cost of those drugs is $1,083.

**103**  I am not satisfied that an award for loss of housekeeping capacity, beyond the compensation noted above, is appropriate.

**E. Special Damages**

**104**  The special damages claimed are $1,584. They include the limited medications that Mr. Langley has purchased ($249), 52 physiotherapy attendances ($885), one visit to the chiropractor ($120), and various gym charges and two natural medicine purchases ($330). I am satisfied that all of these amounts are properly recoverable.

**Summary**

**105**  In conclusion, I find Mr. Langley is entitled to general damages in the sum of $55,000; past wage loss of $23,000; loss of future income earning capacity of $25,000; cost of future care of $12,933; and special damages of $1,584, all to be adjusted to reflect his degree of responsibility for the accident.

**106**  Unless there are matters about which I am unaware the plaintiff is entitled to costs at Scale B.

G. BARROW J.

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Correction

Released: August 17, 2012

Reasons for Judgment of Mr. Justice Barrow dated February 14, 2011 have been edited as follows:

On the front page M.F. Russmann has been added as Counsel for the Plaintiff.

**End of Document**

[***Mar v. Young, [2009] B.C.J. No. 1830***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62DV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J.K. Bracken J.

Heard: March 2-6 and 13, 2009; March 26 and 27, 2009 by

written submissions.

Judgment: September 14, 2009.

Docket: No. 07-2677

Registry: Victoria

**[2009] B.C.J. No. 1830** | 2009 BCSC 1251 | 2009 CarswellBC 2477 | 181 A.C.W.S. (3d) 83

Between Len Kim Mar, Plaintiff, and Robert Gordon Young, Defendant Subject to Rule 68

(64 paras.)

**Case Summary**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Loss of profits — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Affecting mobility — Action by plaintiff for damages for motor vehicle accident injuries allowed in part — Evidence demonstrated thoracic and lumbar spine injuries; while plaintiff 60-70 per cent recovered, would likely have pain for some time — Plaintiff could engage in most pre-accident activities, with pain — $50,000 awarded for non-pecuniary loss — No past loss of income, since plaintiff earned more in months after accident — Plaintiff could only do sedentary work, which somewhat limited his competitiveness, so $30,000 awarded for future loss of income — $8,208 awarded for special damages and $7,500 for future cost of care, for rehabilitative treatments.**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Action by plaintiff for damages for motor vehicle accident injuries allowed in part — Evidence demonstrated thoracic and lumbar spine injuries; while plaintiff 60-70 per cent recovered, would likely have pain for some time — Plaintiff could engage in most pre-accident activities, with pain — $50,000 awarded for non-pecuniary loss — No past loss of income, since plaintiff earned more in months after accident — Plaintiff could only do sedentary work, which somewhat limited his competitiveness, so $30,000 awarded for future loss of income — $8,208 awarded for special damages and $7,500 for future cost of care, for rehabilitative treatments.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Contributory *negligence* — Proof of — Duty of care — Motor vehicles — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed in part — Liability at issue — Plaintiff passenger in wife's vehicle — Wife in heavy traffic and began moving on green light, but had to brake suddenly when vehicles in front of her suddenly stopped — Defendant had just changed lanes and was unable to stop in time — No evidence that plaintiff's wife braked improperly or unnecessarily for circumstances — Wife could not have been expected to anticipate or prevent vehicles in front of her from suddenly stopping — Defendant 100 per cent liable.**

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| Action by the plaintiff for damages for injuries suffered in a motor vehicle accident. The plaintiff was a passenger in his wife's vehicle, in heavy traffic. His wife began moving on a green light, but had to brake sharply when the vehicles in front of her suddenly stopped. The defendant had just changed lanes and was unable to stop in time, rear-ending the wife's vehicle. The plaintiff suffered neck, back and hip pain. The defendant argued that the wife was also liable for stopping so suddenly. The plaintiff was a professional engineer and had been working as a consultant, attempting to start an information technology company. The plaintiff was still able to work 10-14 hour days but argued his injuries had reduced his past and future earnings. The plaintiff estimated that his injuries were only 60-70 per cent healed. The defendant argued that the plaintiff had suffered mild injuries and was greatly overstating them.  HELD: Action allowed in part.  The evidence demonstrated that the plaintiff had suffered thoracic and lumbar spine injuries. Since he was still experiencing pain four years after the accident, it was likely he would continue to do so for some time. The plaintiff was now able to carry out most of his pre-accident activities, but with pain. The plaintiff was awarded $50,000 for non-pecuniary loss. The plaintiff's income in the months following his accident was actually higher than it had been in the months preceding the accident. His earnings as a consultant fluctuated and there was no evidence the accident had reduced his earnings, so no award was made for past loss of income. However, the plaintiff was limited to sedentary work, which would reduce his competitiveness as a consultant until he was fully recovered. The plaintiff was awarded $30,000 for future loss of income. The plaintiff was awarded $8,208 for special damages and $7,500 for cost of future care for his prescribed rehabilitation and therapy. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, RSBC 1996, CHAPTER 38, s. 144(1)(a), s. 144(1)(b), s. 162(1)

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)(1)

**Counsel**

Counsel for the Plaintiff: D.A. Acheson, Q.C. and K.D. Duncan.

Counsel for the Defendant: S.J. Harper and K.M. Birney.

**Reasons for Judgment**

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| **J.K. BRACKEN J.** |

**1**   The plaintiff seeks damages for injuries he received in a motor vehicle accident that occurred on July 29, 2005 on the Island Highway near Nanoose, British Columbia. The plaintiff was a passenger in the front seat of a 1999 mini-van driven by his wife Ms. Kerry Readshaw. She had suddenly stopped their vehicle behind a line of traffic when it was struck from behind by the defendant's vehicle. The force of the accident pushed their vehicle into the car ahead causing damage to the front of their vehicle. The vehicle that struck them was a full sized pickup truck and the accident caused such significant damage to the plaintiff's vehicle that it was written off rather than repaired. The defendant submits that some liability for the accident should be apportioned to Ms. Readshaw.

**2**  The plaintiff says that the injuries he received in the accident are serious and long lasting. He claims that his injuries have caused a loss of enjoyment of life generally and have interfered with his ability to earn income and to work efficiently. He claims damages for pain and suffering and loss of enjoyment of life as well as damages for past loss of opportunity respecting his business. He also claims a loss of future earning capacity, cost of future care, special damages and costs.

**Apportionment of liability**

**3**  The plaintiff and his wife and children were travelling north in the curb or right lane of a four lane highway between Nanaimo and Parksville, British Columbia. Ms. Readshaw was driving in a line of heavy traffic that had stopped at a traffic light, but was moving again after the light had changed to green. Without warning, the line of traffic ahead suddenly stopped. Ms. Readshaw applied the brakes sharply and came to a stop behind a sport utility vehicle that was immediately ahead of her. After she had stopped the plaintiff immediately turned partway around in his seat to check on their children and as he did so the defendant's vehicle collided with the rear of the plaintiff's vehicle. The force of that accident pushed the plaintiff's vehicle into the vehicle ahead.

**4**  The defendant admits some liability for the accident, but submits that some of the liability for the accident should be apportioned to Ms. Readshaw pursuant to s. 4(1) of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*. Ms. Readshaw has a separate outstanding action against the defendant arising out the same accident and she is not a party to this action. However the parties submit that on the authority of *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=) (B.C.C.A.), where the issue of fault has been properly raised in the pleadings and dealt with in the evidence and submissions, it is not essential that Ms. Readshaw be named as a party to this action. I accept that submission.

**5**  The defendant, Mr. Young, testified that he had just completed a lane change from the centre lane to the curb lane and was checking his left side view mirror when his wife called out to him and said "brake lights". He looked forward and immediately applied the brakes as he saw that the plaintiff's vehicle, directly ahead of him had come to a sudden stop. He was unable to stop his vehicle in time and his vehicle collided with the rear of the plaintiff's vehicle. The defendant submits that Ms. Readshaw should share some of the liability for the accident. He submits that if she had been driving in a safe and prudent manner she would not have had to stop so suddenly leaving the defendant no chance to stop safely behind her.

**6**  The defendant has referred to s. 144(1)(a) or (b) and s. 162(1) of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 38*. Section 144 of the *Motor Vehicle Act* deals with driving without due care and attention or without reasonable consideration for others. Section 162(1) makes it an offence to follow another vehicle more closely than is reasonable or prudent. The defendant says that stopping so suddenly in traffic constitutes ***negligence*** on the part of Ms. Readshaw.

**7**  The defendant relies in part on *MacDonald v. Hemminger*, [1985] B.C.W.L.D. 2265, [1985] B.C.D. Civ. 2890-01. In that case the defendant was found negligent for making a sudden stop without warning for the purpose of making a left turn into the driveway of a shopping centre. The trial court found liability to be 20 per cent to the defendant and 80 per cent to the plaintiff who had collided with the rear of the defendant's vehicle. The Court of Appeal maintained a finding of ***negligence*** against the defendant, but reduced liability to 40 per cent. Taggart, J.A., stated that liability should properly have been apportioned 80 per cent to the plaintiff who was the following driver, and 20 per cent to the defendant, but apportioned on a 60/40 basis "... out of deference to the view of the trial judge who saw and heard the witnesses."

**8**  *MacDonald v. Hemminger* was a case where the sudden stop was not necessitated by any emergency or by conditions of heavy traffic. It was simply the choice of the defendant to make a sudden and unexpected stop. The court noted that there was a more appropriate entrance to the shopping centre that did not require a sudden stop. While the court acknowledged the plaintiff's submission that under most circumstances drivers are entitled to assume that traffic will continue to flow as it had immediately prior to the accident, that is not always the case as "... emergencies constantly arise and for those emergencies all drivers must be prepared."

**9**  In the circumstances of this case, the plaintiff was driving in heavy traffic that had collected closely one behind the other as a result of having stopped at a traffic light. The traffic had just begun moving when it suddenly and unexpectedly stopped again. It is not realistic to expect that in the confines of heavy traffic that a driver must be capable of anticipating events beyond their control so as to at all times be able to bring her vehicle to safe and controlled stop.

**10**  There is no evidence in this case to suggest that Ms. Readshaw stopped for any improper reason, or that she could have anticipated the stoppage of traffic ahead of her. She acknowledged in her evidence that the flow of traffic seemed slow, but there was nothing to suggest that it would come to a sudden and unexpected stop.

**11**  While all drivers must conform to the rules set out in the *Motor Vehicle Act* and must keep a reasonable and prudent distance behind the vehicle ahead, the traffic was just beginning to move forward after a stop and it was not unreasonable or negligent for Ms. Readshaw to move forward with the flow of traffic. The fact that she had to brake sharply when the vehicle immediately ahead of her made a sudden and unexpected stop does not constitute ***negligence*** on her part and I apportion 100 per cent of liability for the accident to the defendant.

**Background**

**12**  The plaintiff, Mr. Mar, is a professional mechanical engineer who was 40 years old at the time of the accident. He worked for about 10 years as an aircraft maintenance engineer repairing aircraft. He then obtained a Bachelor of Engineering degree specializing in mechanical design, computer aided design and computer aided manufacturing (CAD/CAM), at the University of Victoria, graduating in 1992. Following graduation he worked as a mechanical design engineer for ASA Automation Systems Associates Ltd. of Sidney, British Columbia until 2000 when he became the senior mechanical design engineer at JDS Uniphase Corporation/SDL Optics Ltd., in Central Saanich, British Columbia. He and his wife purchased a home in Central Saanich where they still live.

**13**  In 2002, JDS Uniphase closed its operations in Central Saanich. The plaintiff says that he was offered a position in California with the company, but he did not accept the position as he preferred to remain on Vancouver Island. He received a severance package from JDS Uniphase and he felt that it was an appropriate time to start his own business, something he had wanted to do for some time. He started his business under the name E-Data Solutions and offered his services as a consultant in the field of mechanical engineering and in the area of information technology, particularly the administration of CAD/CAM systems.

**14**  He obtained some work as a consultant that provided a reasonably steady source of income, but the area he felt was likely to be most profitable was the area of information technology, particularly the installation, modification and administration of document control systems such as CAD. He used a known software program called DB Works and he testified that he installed the program and adapted it to the specific needs of his clients, mostly small to medium sized businesses. He said that the modifications that he made when it was installed improved the program, particularly in an engineering environment.

**15**  He had installed the program successfully for some clients and he felt that the product as he had installed and modified it had worked well. He felt that the business was growing and that he would obtain more clients who would retain him to install the program in their businesses and that he would also be able to profit from the sale of additional licences of the software to his existing clients as their own use of the program expanded. He continued to do normal mechanical engineering work at the same time as he was trying to develop the software side of his business.

**16**  His overall business seemed to grow reasonably steadily and while his income had dropped drastically in the first year after leaving JDS Uniphase, the following years showed some improvement although his annual income did not come close to what he had been earning. While he was working to build up his consulting business he was injured in the accident on July 29, 2005.

**Nature and extent of injuries**

**17**  The plaintiff says that he received the injuries to his back, neck and hips in the accident. He testified that before he was injured he was happy and energetic. He was a hard worker both at his profession and at home. He was active in recreational activities, involved as a father to his small children and he performed home and yard maintenance and did mechanical work and maintenance on his vehicle. He had numerous hobbies and he had no difficulty in performing home renovations or participating in outdoor activities such as canoeing and camping. He enjoyed excellent health and was rarely sick.

**18**  Following the accident he said that he experienced daily pain in his upper and lower back, neck and shoulders that progressively got worse over time. He went to his family doctor and received anti-inflammatory and pain medication and he had physiotherapy. He also commenced a program of active rehabilitation under the direction of a trainer at a local recreation centre. He continued that regimen of treatment through 2005 and most of 2006. In 2007, he commenced massage therapy and tried acupuncture, even though he has an aversion to needles. He also received chiropractic treatments and participated in an exercise rehabilitation program.

**19**  As he was not improving he was referred by his family doctor to Dr. McKean, a physical medicine and rehabilitation specialist, who specialized in the field of sport medicine and musculoskeletal injuries. Changes were made to his exercise and therapy regimen and he noticed some improvement as a result. He reached a point where he had recovered to perhaps 60 or 70 per cent of normal, but he says that has not progressed beyond that point. He testified that he still has significant pain that has affected his physical abilities in all aspects of his life. He also testified that he has suffered cognitive problems and depression that have led to difficulties in his relationships with his wife and children and have interfered with his ability to concentrate on his work or to work efficiently.

**20**  The plaintiff's evidence is that he has constant nagging pain that prevents him from doing many of his pre-accident activities. He says that the quality of the time he spends with his family has been affected by his inability to engage in most of the physical activities that he used to enjoy. He says that he is unable to assist his wife with household chores or attend to the tasks he normally did on his own such as yard maintenance, house repairs and renovations and mechanical work on his vehicles. His wife, Ms. Readshaw confirmed the plaintiff's evidence and gave similar evidence respecting his restricted abilities. She described many incidents over the past 4 years where the plaintiff clearly displayed signs of significant pain when he has attempted some of the physical activities he did easily before he was injured.

**21**  The plaintiff also called two of his long time friends as witnesses. Mr. Kane Kilbey has known the plaintiff since they were in high school together. They have remained in contact and frequently socialize together with their wives and families. He said that the plaintiff was always the one others in their circle of friends looked to for assistance with home projects or for assistance repairing their motor vehicles. He said that there is a significant difference between the plaintiff's ability before he was injured and his condition since he was injured. He described a lack of energy, loss of interest in physical sporting activities and an inability to participate fully in camping outings that the families enjoy together. He says that the plaintiff moves more cautiously and stiffly and is less flexible.

**22**  Similar evidence was given by Michael Gaube who is also a long time friend. He said that contrary to past practices where the plaintiff usually helped others with projects around their houses, after he was injured the plaintiff needed help from others to complete the projects he had started around his own home. He said that while the plaintiff still has the same easy going personality, he seems to tire more easily and is not as active as he used to be.

**23**  The plaintiff also testified that the pain he experiences has caused him to be irritable and impatient. He said that he is less patient around his children and that his relationship with his wife has been adversely affected. He said that he has had difficulty concentrating at work and he has become forgetful. As to any claim of cognitive difficulties that the plaintiff has, I note that there is no evidence to connect any psychological or cognitive problems to the injuries he received in the accident. No doubt there is some interference in concentration when someone is experiencing pain, but the evidence does not support any causal connection between his injuries and his cognitive problems.

**24**  The medical evidence presented consisted of a review of the clinical notes of Dr. Henderson, the plaintiff's family doctor. Dr. Henderson was not called as the expert allowed under Rule 68 of the Rules of Court and his evidence was limited to confirming the dates of appointments and the notes made respecting the plaintiff's description of his injuries.

**25**  Dr. McKean testified as an expert witness as a medical practitioner who specializes in the field of physical medicine and rehabilitation. She has been a practicing physician since 1996 and a specialist since 1999. She saw the plaintiff on February 14, 2007, May 9, 2007 and November 19, 2008. She reviewed the notes and records of other medical professionals who had treated the plaintiff.

**26**  On physical examination of the plaintiff, Dr. McKean noted that the plaintiff had normal posture of the spine with good mobility. She noted that he had some mild stiffness of the cervical spine, but had no complaints of neck pain with movement. He did complain of some pain in the mid back when flexing or extending the cervical spine. He complained of significant pain in the lumbar spine and the mid thoracic region. She noted that X-Rays of the thoracic and lumbar spine that were done in August, 2005 were normal and a bone scan done in April 2006 was essentially normal other than some mild arthritic changes in the lower thoracic region.

**27**  Dr. McKean was of the opinion that the plaintiff was having persistent problems and associated pain in the mid thoracic spine and lower lumbar spine. She referred to this as "mechanical spine pain" and distinguished that type of pain from pain that is normally associated with soft tissue injuries. She said that mechanical spine pain originates in the tissues that are part of the spine itself and not the muscle or soft tissue that surround the spine. These tissues lay quite deep under the skin and provide support for the spine itself. Dr. McKean said the fact that the plaintiff was partly turned around in his seat when the accident occurred was significant and likely increased the effect of the injuries.

**28**  As to a prognosis, Dr. McKean is of the opinion that the plaintiff should continue with his program of walking and exercise and if and when he is able he should consider returning to a more strenuous gym workout. She also believes that the pain that he was experiencing at the time of her last examination was caused by the injuries he received in the accident of July 29, 2005 as he was pain free and healthy prior to that time. She also recommended that he try acupuncture treatments again and perhaps some pain injections that he felt had helped him earlier in his treatment.

**29**  She said that he should be able to continue his work as an engineer, but that he will be limited by how long he will be able to sit at one time and the number of hours that he will be able to work. She was of the opinion that but for the injuries, he would likely be able to work more effectively and efficiently and that he would be able to work longer hours without persistent back pain. Dr. McKean is of the opinion that the plaintiff had improved since her initial assessment in February 2007.

**30**  The plaintiff was referred to Dr. Wahl for an independent medical examination on July 31, 2007. Dr. Wahl is an experienced specialist in Orthopaedic surgery. He reviewed the available medical reports and medical images available at that time and noted that the only objective finding was an early degenerative change and a small right sided disc bulge at L5SI of the plaintiff's lower back. Dr. Wahl believed that that finding was not likely related to the plaintiff's injuries from the accident.

**31**  Dr. Wahl noted that the force of the accident was significant and that there was considerable damage to the plaintiff's vehicle. He noted that the partly turned position the plaintiff was in at the time of the impact may have denied him protection of his spine by the seat back or headrest of the seat he occupied. In his physical examination of the plaintiff, Dr. Wahl found that the plaintiff appeared comfortable and that he was able to rise from a sitting position easily and normally and that his gait was normal. He said that there was a mild limitation of rotation to the right of the plaintiff's cervical spine, but that there were no findings of tenderness in that area. He noted what he referred to as mild pain along the thoracic spine and no other significant findings on physical examination.

**32**  In his report and his evidence at trial, Dr. Wahl was of the opinion that the plaintiff has experienced a mild to moderate disability that has been quite slow in resolving. Dr. Wahl is optimistic that the plaintiff will continue to improve over time provided he continues to work at rehabilitation. He believes that active rehabilitation rather than passive treatments such as massage are preferable for maximum recovery. He felt that the disability had been mild to moderate only and noted that the plaintiff has been able to work throughout the disability period. It is Dr. Wahl's opinion that the absence of any objective findings supports an expected "good to excellent" prognosis with an expected significant or even a full recovery.

**33**  As observed by Dr. Wahl and confirmed in the evidence at trial, the plaintiff was able to continue working after the accident. His position at JDS Uniphase had ended when that company closed its local operations and he had chosen to stay in the greater Victoria area and start his own business. Later, he accepted a position with Hydroxyl Systems Ltd. in Victoria as a mechanical engineer. He also continued his efforts to establish his own business while working full time for Hydroxyl. The evidence is that he often worked very long days extending through 10 to 14 hours a day at times and on one occasion at least, he admitted to working for a continuous 24 hour period in order to complete a rush project. While he said he suffered considerable pain as a result of such long days, he did perform them.

**Non-pecuniary damages**

**34**  The defendant submits that the plaintiff's suffered a mild to moderate injury that he is overstating as much more serious and disabling than it really is. The defendants say that there is no objective finding that supports the extent of the injury that the plaintiff is reporting. The defendant says that the appropriate range of non-pecuniary damages is $20,000 to $30,000. The defendant relies on *Tong v. Sidhu*, [*2009 BCSC 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3VB-00000-00&context=) that he says is a case with a similar fact pattern. The defendant also relies on a series of other cases such as *Densch v. Kirkpatrick*, [*2007 BCSC 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S433-00000-00&context=); *Duley v. Friesen*, [*2007 BCSC 1723*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21WF-00000-00&context=); *Krogh v. Swann*, [*2005 BCSC 761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0NN-00000-00&context=); *Moore v. Cabral*, [*2006 BCSC 920*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1P3-00000-00&context=); *Schulmeister v. Furmanak*, [*2004 BCSC 1484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0FT-00000-00&context=) and *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=).

**35**  The plaintiff submits that the principles 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=) sets out a list of common factors that courts should consider in assessing non-pecuniary damages. The plaintiff further submits that an award of damages must reflect the impairment of the plaintiff's ability to enjoy his life as fully and actively has he had previous to the injuries. *McKelvie v. Ng*, [*2000 BCSC 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1X2-00000-00&context=).

**36**  The plaintiff submits that the award for non-pecuniary damages in this case should be much higher than the range suggested by the defendant and counsel referred to a number of cases: *Prevette v. Cusano*, [*2001 BCSC 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X327-00000-00&context=); *Kahle v. Ritter*, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=); *Kerr v. Macklin*, [*2004 BCSC 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3SK-00000-00&context=); *Klein v. Dowhy*, [*2007 BCSC 1151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3VB-00000-00&context=) and *Harnett v. Leischner,* [*2008 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2WW-00000-00&context=).

**37**  On all of the evidence I conclude that the plaintiff suffered injuries to his thoracic and lumbar spine and that while his condition has improved he has not yet fully recovered. The physical examinations conducted by Dr. Wahl and Dr. McKean indicate that the plaintiff has good range of motion of his neck and hips, but that he still has pain in his mid and lower back. Both doctors testified that the plaintiff says that his pain and discomfort prevents him from carrying out his normal day-to-day activities of work and recreation, but the doctors disagree on his prognosis. Dr. McKean considers it quite possible that the plaintiff will continue to experience some pain that will affect him for the foreseeable future. Dr. Wahl is more optimistic and believes that there will at least be significant improvement and possibly full recovery.

**38**  I find that the plaintiff still experiences pain 4 years post accident and it is likely that he will do so for some time to come. It is clear from the evidence that he can carry out many of his normal activities, but not without some pain. He has limited many of his activities somewhat and says that he is still prevented from participating in others. There is no supportive objective medical evidence other than the disc bulge and early degeneration in the lumbar spine that Dr. Wahl considered to be within the normal range for the plaintiff's age. The plaintiff has been able to continue working, at times for long periods at a time, but he has experienced pain and discomfort and says that he must get up and move around and stretch at frequent intervals to ease his discomfort. Former co-workers corroborate his evidence on his work related limits. He purchased an expensive chair for use when he is working at his computer, but while it helps him, it does not completely eliminate pain and discomfort.

**39**  The defendant noted that the plaintiff seemed to move easily and without obvious pain while he was in the courtroom. I agree that the plaintiff seemed to have a reasonable range of flexibility when rotating from his hips and he could move his arms easily. That does not seem inconsistent with the observations of both Dr. McKean and Dr. Wahl, but both note that the plaintiff continues to complain of pain in the mid to lower back. The plaintiff testified that he still experiences some pain in that part of his back and his wife and friends corroborate his evidence. There is no evidence before me to contradict that evidence. No doubt the injuries have taken some time to resolve, but I accept that the plaintiff still has some pain and discomfort from the injuries caused by the accident.

**40**  While each of the cases referred to above were cited as cases that had similar fact patterns, as it was stated in *Tong v. Sidhu*, above, no two cases are exactly alike and in the final result each case stands on its own facts. In this case I find that the plaintiff's injuries are more serious than the range suggested by the defendant. The injuries have lasted with diminishing disability for 4 years and will likely continue to affect the plaintiff for a considerable period of time to at least some degree.

**41**  The plaintiff has a sedentary job and to some extent that is an advantage as he is not likely to be exposed to the need for any hard physical labour in the course of his work. However, he will likely spend the majority of his working life sitting at a desk working on a computer. The impact of even mild pain or discomfort in his back will be a problem that will affect his concentration and ability to focus on his work. He will have to take frequent short breaks from his work to compensate. He will be at least somewhat limited in his recreational and home maintenance activities, although I accept Dr. Wahl's view that the impact of his injuries will likely diminish over time as his condition improves and his disability lessens.

**42**  On all of the evidence, it is my view that an award of $50,000 is appropriate for non-pecuniary damages.

**43**  The plaintiff also claims economic losses that arise from his injuries. He claims a past and future loss of income earning capacity as an engineer. I will deal first with the claim for past loss of capacity.

**Past loss of income earning capacity**

**44**  As already discussed, the plaintiff was in the early stages of developing his own business operating under the name of E-Data Solutions. He saw the marketing of the software DB Works as the central part of that business and he hoped to build on the small client base that he had already developed before the accident and to expand the number of clients and the use of the software by existing clients. He said that prior to the accident he was easily able to work very long days and take on engineering work to supplement the E-Data business, but that after he was injured he was not able to work as hard or as effectively. He says that he lost income as a result.

**45**  His income tax returns show that he was earning a salary at JDS Uniphase in the range of $75,000 to $90,000 per year. When he left that position his income dropped significantly. His income increased to $46,765 in 2004, dropped again in 2005 to $24,710 and then rose to the $80,000 range after he commenced work at Hydroxyl Systems Ltd. After his employment at Hydroxyl Systems ended, he commenced work in his own business and was able to work at that business both before and after the accident. Indeed, the defendant notes that the plaintiff's income in the 5 months post-accident was actually higher than his income in the 7 months prior to the accident.

**46**  The plaintiff had a contract at the Neptune Canada Project to install DB Works. The installation did not go well and the plaintiff claims that the problems with the installation can be attributed to his injuries, in particular his inability to concentrate and focus on problems. Neptune Canada operated its computers using Oracle database systems. The plaintiff could not get DB Works to function properly on the Neptune Canada system. He made many attempts to solve the problem, including communicating with the technical support service of DB Works and with others who are knowledgeable about the use of the programs. No one was able to provide a suitable answer. Eventually Neptune gave up on the project and went back to a less complicated system that works well and is still in use.

**47**  The defendant submits that the plaintiff had never installed DB Works in an Oracle system before and the problems were unrelated to his injuries. The plaintiff had access to technical support from the developer of the program and they were not able to solve the problems either. I do not accept that the plaintiff's injuries were the source of that problem.

**48**  The plaintiff had not developed the systems part of his business to the point where it was fully established. He had hoped that part of his business would provide significant income, but that had not happened by the date of the accident. On all of the evidence, I am not able to find that the plaintiff's injuries caused any past loss of income, nor can I find that there was a substantial possibility that the plaintiff suffered any past loss of income earning capacity due to his injuries. In the result, the claim for past loss of income earning capacity is dismissed.

**Future loss of income earning capacity**

**49**  I turn now to the claim for future loss of income earning capacity. The plaintiff submits that prior to being injured he could and did work long hours and had access to a variety of available engineering work. There is no evidence of poor job performance or job loss due to poor performance prior to the accident. The evidence supports the conclusion that he was a hard worker and a competent worker. He was able to obtain work as an employee and as a consultant. The first difficulty he seems to have experienced in his profession was at Hydroxyl Systems when he was fired from his job, although there was no indication that his work performance was lacking. Later, in a small consulting contract for another company, there were some minor corrections required in work that he performed, but again, there is no indication that he was incapable of the work, although he claims that his inability to concentrate due to the discomfort of his injuries was the source of those errors.

**50**  The plaintiff argues that due to the pain and discomfort he experiences in his work that his ability to extend his daily work hours to take advantage of an opportunity or simply to work longer hours and handle a higher volume of work has been diminished. He submits that in the result he is less able to earn income and his future capacity to earn income is thereby diminished. He also submits that in the closely knit group of professional engineers in the Greater Victoria area that it is common knowledge that he has been injured and as a result he may not have as many opportunities for work.

**51**  The law in this area is well established. The often quoted passage of Dickson, J. in *Andrews v. Grand & Toy Alberta Ltd*., [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 251, sets out the task of the court in determining what the plaintiff's prospects and potential opportunities were prior to being injured. The law is also clear that it is not compensation for a loss of earnings that is awarded under this head of damages, but a loss of earning capacity. If a loss of future income earning capacity is found to exist then there is the added problem of trying to value the loss.

**52**  The test to be applied is whether there is a substantial possibility that the plaintiff will earn less in the future as a result of his injury or whether he will continue to earn to his full potential, but will do so with pain and discomfort. If the latter, then the court must compensate him in non-pecuniary damages; if the former, then he is compensated for a loss of future earning capacity in addition to the award under the head of non-pecuniary damages.

**53**  The decision of Finch, J. in *Brown v. Golaiy*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) provides guidance. At para. 8 of that decision the court stated:

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.

**54**  The defendant has pointed out that the plaintiff made an implied threat to Hydroxyl Systems when he was notified that his employment was ended. When Hydroxyl Systems gave him his notice it was anticipated that the plaintiff would work out the notice period. However, when he was told he was being fired from his job he said words to the effect that he could do a lot of damage to the company computer systems during the notice period. As a result, his employment was ended immediately, his access to the computer system cut off and he was escorted out of the building. The plaintiff attributes his reaction to the stress of his job ending combined with the stress of his injuries. I do not accept that reaction was injury related, but I do accept that it was likely to have an adverse effect on his ability to get work in the Victoria area and for some period of time will likely impact on his ability to find work.

**55**  Having said that, I do find that the plaintiff has been rendered less capable overall from earning income. His profession is, for the most part, a sedentary one. Other than occasional field trips he is most often required to perform his work sitting at a desk and working on a computer. It is not likely that any easier work will ever be available to him and it is likely that the discomfort caused by his injuries will affect him for the foreseeable future at least. That is the opinion of Dr. McKean and it seems to be the plaintiff's experience so far.

**56**  I also find that the plaintiff is less marketable as a consultant as a result of the injuries and the knowledge in his professional community that he suffers from those injuries. The plaintiff has lost the ability to take advantage of all of the job opportunities that might otherwise have been open to him and as a result he is less valuable to himself as a person capable of earning income in a competitive labour market.

**57**  The plaintiff is not likely to be completely pain free for a considerable period of time in his prime earning years. It cannot be said that he will never be pain free, but the substantial likelihood is that he will have to endure some pain and discomfort for the foreseeable future. While the pain and discomfort he is likely to experience will not prevent him from working full-time, he will not be able to take on the volume of work that he had taken on in the past and that he would have continued to do in the future. There are no other less onerous types of work that he can do and I find that his future earning capacity has been diminished.

**58**  The valuation of that loss is not easy to determine. It requires a certain amount of prediction based on known facts. There is little doubt that the plaintiff will continue to work as hard as he can. That is what he did pre-accident. It was established through cross-examination of the plaintiff that even after he was injured and through what were no doubt the most intense periods of pain, he continued to work long days. It was suggested to him that his billing records show several days when he worked longer than 10 or 12 hours a day, as well as one day when he worked 24 hours in a 24 hour period. As already noted, he said that he paid a price in additional pain for that effort, but it illustrates a personality that will continue to work hard even with discomfort.

**59**  I find that the value of the plaintiff's diminished future income earning capacity is $30,000. I acknowledge that this is a value that is to some extent an arbitrary one, but in my view, it is supported by the facts established in evidence.

**Special damages**

**60**  The plaintiff has also made a claim for certain special damages. This claim consists of expenses that the plaintiff has paid for various treatments such as physiotherapy, rehabilitation programs, medication, acupuncture, massage and other types of ameliorative or rehabilitative programs. There is also a significant expense for a special chair designed to support the plaintiff at his work station and to ease his discomfort. The defendant disputes the majority of these claims as not medically necessary.

**61**  The course of treatment followed by the plaintiff was almost entirely recommended by medical professionals and not by his law firm as suggested by the defendant. I find that the expenses he has incurred are expenses for which he is entitled to be compensated. I include in this category the special chair that will no doubt last for several years. The plaintiff claims the amount of $9,384.45 in this category. My arithmetic puts the total somewhat lower at $8,208.45, a figure I obtained by adding up the various schedules in the material presented at trial. This may be an error on my part, but I expect the parties should be able to settle that amount based on my comments, but if they cannot, the matter may be spoken to.

**Cost of future care**

**62**  Finally, the plaintiff seeks $10,000 as an award for future care to cover the cost of future treatment such as physiotherapy and active rehabilitation or passive pain relief treatment. I am satisfied that the plaintiff is likely to need such treatment in the immediate future, but I expect that the need will diminish over time. I award the plaintiff $7,500 for future care.

**Summary**

**63**  The plaintiff is awarded damages and expenses as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $50,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future loss of income |  |  |
|  | earning capacity | $30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages (subject |  |  |
|  | to adjustment) | $8,208.45 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care | $7,500.00 |  |

**64**  The plaintiff is entitled to Court Order interest and costs.

J.K. BRACKEN J.

**End of Document**

[***Mattson v. Spady, [2019] B.C.J. No. 1304***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WKX-G2H1-JPGX-S2RB-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J. Winteringham J.

Heard: April 1-5, 8, 10-11, 2019.

Judgment: July 12, 2019.

Docket: M158734

Registry: Vancouver

**[2019] B.C.J. No. 1304** | [*2019 BCSC 1144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XS5-37N1-FJTD-G2HR-00000-00&context=)

Between Jennilee Mattson, Plaintiff, and Suzanne Spady, Defendant

(225 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Head injuries — Headaches — Fibromyalgia or chronic pain — Considerations impacting on award — Degree of impairment — Age of claimant — Determination of damages for injuries arising from motor vehicle accident — Plaintiff was awarded $150,000 in non-pecuniary damages and $1,350,000 for loss of future earning capacity — Plaintiff's most significant injury was chronic pain involving her neck, upper trapezius, shoulder and scapula and headaches — She was 30 at time of accident — Plaintiff's prognosis for full recovery was guarded — She would be restricted in her day-to-day activities — Impact of her condition was significant, resulting in reduced work hours, nominal participation in extracurricular activities and inability to attend to home responsibilities.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Extent of incapacity — Loss of earning capacity — Non-pecuniary loss — Determination of damages for injuries arising from motor vehicle accident — Plaintiff was awarded $150,000 in non-pecuniary damages and $1,350,000 for loss of future earning capacity — Plaintiff's most significant injury was chronic pain involving her neck, upper trapezius, shoulder and scapula and headaches — She was 30 at time of accident — Plaintiff's prognosis for full recovery was guarded — She would be restricted in her day-to-day activities — Impact of her condition was significant, resulting in reduced work hours, nominal participation in extracurricular activities and inability to attend to home responsibilities.**

|  |
| --- |
| Determination of damages for injuries arising from a motor vehicle accident. The plaintiff was stopped at a red light when her vehicle was struck from behind by the defendant's. The plaintiff's most significant injury was chronic pain involving her neck, upper trapezius, shoulder and scapula and headaches. She was 30 at the time of the accident. She worked as a kinesiologist before and tried to maintain her hours after, but reduced them and doctors did not think that she could continue to work as a kinesiologist. She was highly active before.  HELD: The plaintiff was awarded $150,000 in non-pecuniary damages, $71,750 for past loss of earning capacity, $1,350,000 for loss of future earning capacity, $370,296 for cost of future care and $15,935 in special damages.  The plaintiff's prognosis for a full recovery was guarded, although further treatment might provide some improvement. She would be restricted in her day-to-day activities. The impact of her condition was significant, resulting in reduced work hours, nominal participation in extracurricular activities and inability to attend to home responsibilities. The earnings approach assessment of loss of future earning capacity was preferable. The plaintiff would be able to return to work at 60 per cent capacity, but not as a kinesiologist. The most probable alternative employment was as a recreational consultant. The assessment relied on a calculation of full-time employment to age 65 as a kinesiologist less residual earning capacity. The award for cost of future care included amounts for massage therapy and physiotherapy. |

**Counsel**

Counsel for the Plaintiff: A.K. Khanna, C.L. Khanna.

Counsel for the Defendant: R.G. Dempsey, C.R. Anninos.

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**VI. SUMMARY**

**Reasons for Judgment**

|  |
| --- |
| **J. WINTERINGHAM J.** |

**I. OVERVIEW**

**1**  In January 2014, Jennilee Mattson was stopped at a red light on Mt. Lehman Road in Abbotsford. Her Honda Accord was struck from behind by a GMC SUV driven by the defendant. Just before impact, Ms. Mattson had turned her head to the right, her torso twisted, with her right arm extended to reach for an apple in her bag. The impact was severe and the resulting injuries for this young, highly active professional woman altered the course of her life.

**2**  Though liability is not in dispute, the quantum of damages very much is.

**3**  Ms. Mattson was 30 years old at the time of the accident, living with her soon to be husband and ten-year-old stepson, Khamrin. She was the primary income earner for the young family and was enjoying success as a kinesiologist, balancing her day-to-day professional obligations with her family and maintaining her own intense exercise regime.

**4**  At trial, Ms. Mattson presented with ongoing headaches and severe pain to her neck and shoulder. A significant issue at trial was the cause of an unusual condition called "scapular winging" discovered by the plaintiff over a year after the accident. The parties dispute the cause of her current physical and psychological condition. In particular, the defendant takes the position that her current condition is not caused by the accident but by an intervening event.

**5**  The defendant agrees that Ms. Mattson is entitled to non-pecuniary damages and damages for loss of past earning capacity, minimal future loss of earning capacity, some future care costs and special damages. The defendant raises issues of pre-existing condition, divisibility, contributory ***negligence*** and failure to mitigate.

**6**  The most significant dispute between the parties relates to the plaintiff's loss of future earning capacity. Here, the defendant says the plaintiff is entitled to no more than $90,000 - over $1 million less than the amount claimed by the plaintiff.

**7**  In these reasons, I will provide an overview of the evidence relevant to the issues to be determined. I will then conduct a credibility assessment and set out my findings of fact. I will then turn to an assessment of the damages claimed.

**II. EVIDENCE**

**A. Background Facts**

**8**  Ms. Mattson was born on June 22, 1983, and was 30 years old at the time of the accident. She was 35 years old when she testified at the trial and had delivered her second child a few weeks before.

**9**  Ms. Mattson grew up in Langley with two sisters. The family is close and her parents live in the same house where she grew up. As children, the family was incredibly active, with the girls engaging in athletics, camping, music, kayaking trips and hiking the West Coast Trail. Ms. Mattson was her high school's grade 12 athlete of the year and participated in soccer, basketball, volleyball, track and field, cross-country running and softball. She played the flute in the concert band, the trumpet in the jazz band and sang in the concert and jazz choirs. She played piano and was the worship team leader at her church. She graduated with honours from high school, received a citizenship award and graduate of the year award, along with numerous subject awards. She attended Trinity Western University ("TWU") and received the president's scholarship award for excellence in leadership and academics as an incoming student.

**10**  At TWU, Ms. Mattson started in the pre-med program but transferred to the kinesiology program, from which she graduated (in 2006) with "great distinction", obtaining a degree in Human Kinetics with a minor in Biology.

**11**  In January 2007, she began working as a kinesiologist at HealthX Physical Therapy ("HXPT") and had been working there for seven years at the time of the accident. At HXPT, she ran the occupational rehabilitation group WorkSafe B.C. programs between 8:30 a.m. and 2:30 p.m. Her clients ranged from construction workers to nurses and Ms. Mattson was responsible for their physical rehabilitation so they could return to work. There is no dispute that this was a physically demanding job as she would typically demonstrate the various lifts/moves and then help her clients with simulations. She was also involved with active rehabilitation patients and workplace ergonomic assessments. Ms. Mattson was responsible for the growth of the active rehabilitation program and her salary increased commensurate with the number of clients she brought into the clinic.

**12**  Kyle Hutchison, who is now Ms. Mattson's husband, operated a juice bar at the gym. They were friends for several years and at one point, she helped him rehabilitate after an injury. Their relationship developed and Mr. Hutchison and his ten year old son, Khamrin, moved into Ms. Mattson's townhome, which she had purchased several years earlier. They were married in April 2015.

**13**  In terms of household responsibilities, Mr. Hutchison did the grocery shopping, cooking and kitchen cleanup. Ms. Mattson was responsible for cleaning the home. She took great pride in maintaining the interior of the home, including cleaning the walls, floors and laundry. She also loved to garden and took care of the flower beds and flower pots. Mr. Hutchinson described the immaculate home she kept.

**14**  Khamrin lived with them full-time. In addition, the couple wanted to have two children and planned for Mr. Hutchison to stay at home with the children (operating a home-based business) while she would work full-time. About a year before the accident, Mr. Hutchison sold the juice bar and started working on a business plan to purchase the franchise rights for Reflex Supplements in Abbotsford (where he would start), North Vancouver and Richmond. Ms. Mattson was also an owner of the franchises, but her involvement was to be limited to administrative tasks requiring no more than ten hours per week.

**15**  Before the accident, Ms. Mattson had budgeted well. Her only debt was the mortgage. Her past T4s were tendered at the trial and showed a young woman in her mid-twenties making regular RRSP contributions. She was frugal and testified that she did not like to spend extra money on clothes or new cars. The couple paid cash for the three franchises: $20,000 for Abbotsford and $11,000 each for North Vancouver and Richmond.

**16**  There was evidence tendered that prior to the accident, Ms. Mattson was contemplating an application to the police force. She expressed a genuine interest in policing. She had been encouraged by Charlene Vilkas, a police officer whom Ms. Mattson had assisted rehabilitating a work injury, to submit an application. Ms. Mattson had completed the application form but had not yet submitted it at the time of the accident. She thought policing would have the advantage of benefits and pension and, with the four day rotation, she could supplement her income by maintaining rehabilitation clients.

**17**  At the same time, Ms. Mattson described the joy her employment brought to her. She stated, "I love working. It brings me a lot of joy and makes me feel purposeful." She added that she liked contributing to society and to the lives of others.

**18**  Ms. Mattson testified about her pre-accident condition. She said that she had been in a minor car accident four or five years earlier. She experienced some upper back and neck pain and received physiotherapy for a few months. She testified that she did not even make a claim because she expected her injuries would resolve - and they did.

**19**  Before the accident, Ms. Mattson received some chiropractic treatments primarily in response to her extremely active lifestyle. In her closing submission, counsel described her physical activity this way:

Pre-accident Ms. Mattson was extremely physically active. She was an avid and serious runner. She ran 5 times a week and competed in half marathons. She was training for a triathlon prior to the accident so in addition to running she was biking and swimming. She would work out at the gym weight training typically 5 days a week during her break (2:30 p.m. - 4:00 p.m.) and on average be active for 4 hours a day on weekends. Being fit, being outdoors and being social with her friends and husband was a significant part of her life.

She was very active in team sports and played softball, basketball and volleyball. Her enjoyment of the outdoors led her to being involved in activities such as mountaineering, snowshoeing, skiing and kayaking. She was in great shape and had no limitations.

**20**  Ms. Mattson rarely missed a day of work. She testified that she may have taken off a day or two when she had a severe flu. In one instance, she went to work on crutches after suffering an ankle injury while playing basketball.

**21**  At the time of the accident, Ms. Mattson was working in an occupation that she enjoyed and living an active and meaningful life. As the primary wage earner, her family depended on her income. Her commitment to her employment, family and community was reflected in the day-to-day tasks she, and others, described.

**B. The Accident - January 7, 2014**

**22**  The accident occurred after Ms. Mattson had dropped off Khamrin at school and she was on her way to work. The defendant, driving a GMC SUV and distracted by her son's spilt coffee, rear-ended Ms. Mattson's vehicle as it was stopped at a red light. Just before impact, the defendant tried to avoid the collision by veering to the right; however, she still struck Ms. Mattson's Honda Accord and the impact was described as significant. Ms. Mattson felt a severe force through her body. Just before impact, her head was turned to the right, her torso twisted and her arm extended as she reached for an apple in her bag.

**23**  After gathering herself for a few moments, Ms. Mattson made her way to work. She was able to work for part of the day but as the day went on, she knew she needed medical attention. She was experiencing severe neck pain, a headache, shoulder pain radiating into her arm and scapular pain. She went to Valley Centre Medical Clinic. She could not recall whether she was prescribed Tylenol 3's after this consultation.

**24**  Within a few days of the accident, Ms. Mattson went to the emergency room at Abbotsford General Hospital because of severe neck pain and headache. As she described, her neck felt unstable and she was concerned that there were structural issues with her neck. She was prescribed morphine.

**25**  Ms. Mattson, because of her education and work history, had considerable knowledge and expertise when it came to describing her physical condition at any given time. Her precision was helpful in assessing the progression of her injuries.

**C. Injuries and what followed - evidence from lay witnesses**

**26**  What follows is the plaintiff's description of the progression of her condition. I then turn to the non-medical witnesses who testified at the trial: the plaintiff's spouse, her mother, her current employer, two co-workers and a friend.

**27**  Within a few days of the accident, Ms. Mattson saw Dr. Somani, a general practitioner.[**1**](#Forward_fnref_fnr-1) He prescribed medications and recommended massage therapy and physiotherapy, which she started right away. She saw a chiropractor on January 21, 2014, and reported extreme neck pain and tension headaches. She described tightness in her upper trapezius and back and an aching, sharp pain behind the scapula. She testified that at this time, her right shoulder was very sore and she had burning, tingling and numbness in her right arm. The chiropractor did not treat her because he was of the opinion that her injury was too acute.

**28**  Over the next few months, the pain did not subside. In April 2014, Dr. Somani referred Ms. Mattson to Dr. Dhawan, a physiatrist, who was first able to see her on September 18, 2014. Thereafter, Dr. Dhawan took over her care. He administered facet blocks, Botox injections, trigger point injections and a cortisone shot to her right shoulder. He also arranged referrals to other specialists.

**29**  Despite ongoing pain, Ms. Mattson returned to work about two weeks after the accident. She testified that she was receiving some pressure from her employer because the occupational rehab program could not run without her and, more significantly, she could not afford to take unpaid leave.

**30**  Ms. Mattson's lower back pain resolved during the first year post-accident. The balance of her injuries did not. During the first year, she continued with physiotherapy, massage therapy and her active rehabilitation program four to five days per week. She was doing about 20-30 minutes of rehab while on her breaks at work to manage her symptoms. By the end of each day, she was exhausted and was often in tears. Her sleep was interrupted by headaches and often she would only get four or five hours of sleep.

**31**  Ms. Mattson was not able to return to any of the sporting activities she enjoyed before the accident.

**32**  Even with modification, she struggled at work. She could barely use her right arm and if she did, she experienced neck pain and headaches. As such, she was doing everything with her left side and had to rely on her clients to set up the machines and adjust their weights.

**33**  Ms. Mattson described the way she tried to protect her right neck, shoulder and back by doing everything with her left side. In January 2015, she ended up straining her left shoulder at work while lifting a fifty-pound barbell ("Workplace Injury"). This injury required her to increase the use of her right side. Within approximately one month, she experienced increased neck and back pain. She noticed the development of winging of the right scapula.[**2**](#Forward_fnref_fnr-2) In court, Ms. Mattson demonstrated the limited mobility she continues to experience on her right side, including limitations in lifting her arm. She demonstrated in court an unusual "snakelike" movement that she must use in order to raise her arm. Even now, she is unable to fully raise her right arm.

**34**  She also testified about sharp pain she experiences with any right shoulder or arm movement. Use of her right arm triggers more neck pain and headaches.

**35**  Even after modifying her work duties, Ms. Mattson was struggling to manage her workload at HXPT. In the summer of 2015, she was approached by Mr. John Forde, the owner of the Apollo Clinic, who asked her to help him build a kinesiology department. Mr. Forde knew about her injuries but believed she could help him nonetheless. He offered her an annual salary of $100,000.

**36**  In September 2015, Ms. Mattson began working at Apollo Clinic five days per week. In March 2016, on Dr. Dhawan's advice, she reduced her time to four days per week.

**37**  She saw Dr. Andrew Travlos, a physical medicine and rehabilitation specialist, on December 9, 2015. She testified that at this time, her headaches continued to be severe and were constant. She testified that Botox injections had helped minimally for the pain and that she had tried Nortriptyline to help with sleep and depression. Dr. Travlos recommended IMS treatments and physiotherapy focusing on scapular retraining. She then started seeing a specialized physiotherapist, Jeff Brown, for scapular retraining.

**38**  From November 30, 2015 through May 24, 2016, Ms. Mattson saw a psychologist, Dr. Behboodi. She received some counseling regarding pain management techniques, including meditation. She testified it did not provide much improvement with her pain. She stopped seeing Dr. Behboodi because she had used up her 12 sessions authorized by ICBC.

**39**  Despite her ongoing pain, Ms. Mattson and her spouse decided they would proceed with their plan to have children. They did not want to wait any longer because of their ages. Ms. Mattson discovered she was pregnant in January 2016. The pregnancy was described as extremely challenging. Tylenol, the only pain medication available to her, was ineffective. She was nauseous and vomiting, which aggravated her pain. She testified she would get home from work and often be in tears. The pain was excruciating and virtually nothing resolved it. She nonetheless worked four days per week, taking Wednesdays off to recuperate.

**40**  Their son was born on October 3, 2016. Partly on the recommendation of her treating doctors, Ms. Mattson decided to take a one-year maternity leave, although she agreed to return to work for a week in May 2017, to help train a new kinesiologist. This was a fairly light assignment with minimal movement. Despite this, she ended up developing severe pain in her left shoulder and went to the emergency room in the middle of the night for treatment. The following day, she returned to the emergency room because the pain in her left shoulder was so severe. She was given a cortisone injection in the left shoulder. Her father came to help her care for their son for the following two weeks.

**41**  Ms. Mattson returned to work in October 2017, one year after her son was born. Dr. Somani recommended that she try two or three days per week. She started working Monday, Tuesday and Thursday and decreased her patient load to five or six patients per day. Her salary was reduced to $60,000. Again, she performed her tasks by using her left side. She continued to experience difficulties and was losing more function with her right shoulder. Dr. Somani and Dr. Dhawan recommended that she reduce her days of work further. She initially resisted but ended up reducing her schedule accordingly in March 2018 and continued on this schedule until their daughter was born on March 13, 2019, just a few weeks before the trial.

**42**  Mr. Forde has been patient and accommodating to Ms. Mattson as she tries to build the clinic's kinesiology practice. In commenting on Mr. Forde's level of accommodation, Ms. Mattson testified that she does not even bring in enough business to pay her salary.

**43**  Five years post-accident, Ms. Mattson described her ongoing injuries in this way:

1. Neck and headaches - most painful, debilitating;
2. Brachial plexus, upper trapezius and shoulder - this is achy but if she moves her shoulder or arm gets a sharp pain;
3. Right scapula - lots of spasms with sitting or standing. The best is to keep moving; and
4. Right arm - the tingling has resolved but her arm aches.

**44**  Her condition limits her interaction with her children. She described her difficulties breast-feeding and her irritability. She continues to struggle with household chores. Her and her husband have hired people intermittently to help around the house, but are limited by their finances.

**45**  Mr. Hutchison's Reflex Supplements business has struggled. Because of his wife's reduced income, Mr. Hutchison has had to work at the store and draw a salary - something they were warned against doing in the first five years of operating the franchise. Eventually, they gave up the Richmond and North Vancouver franchise rights. The couple has borrowed $55,000 from their parents and their lines of credit are maxed. In addition, they have withdrawn money from their RRSPs.

**46**  Ms. Mattson's injuries were described as unrelenting and unremitting. The impact of her injuries on the life she knew has been devastating.

**47**  Mr. Hutchison compared their life together before and after the accident to illustrate the impact of the accident on his spouse. He said before the accident, they would train together spending two hours per day, five days per week. They would run around Buntzen Lake and then go for a swim. They ran in the Sun Run and she trained for half marathons. In the winter, they would snow shoe. He described his wife as "quite a bit stronger" than him. During cross-examination, he testified that he was unaware of any health issues she may have had and stated she was stronger than most men at the gym. He described her as "amazing, outgoing and the most beautiful person" he had ever met.

**48**  He described the toll of the pregnancies and her challenges as she cares for their children. He testified that when he returned home from work, he would find her breastfeeding Lincoln and usually crouched over in tears. He described her difficulty sleeping and how he needed to give her pep talks to help encourage her at the beginning of the day. He testified that they do not participate in any of their pre-accident activities and described their social life as "nonexistent". Their home is now messy and is a source of disappointment for her.

**49**  Before the accident, the couple had made decisions about employment, childcare and finances to take into account their relative earnings, his wish to be at home with Khamrin and any children they had together, and Ms. Mattson's passion for her work. His involvement with the Reflex Supplements stores worked well with their future plans. Mr. Hutchison spent a year teaching himself about the business before purchasing the franchise rights for the three locations. They understood that they were not to take any money out of the business for the first five years, using any profit to reinvest in further inventory purchases and advertising. Because Ms. Mattson's earnings were significantly diminished after the accident, Mr. Hutchison started to draw a salary from the franchise. He now works at the Abbotsford store seven days per week. Their road is very different from what they envisioned before the accident.

**50**  Kristine Mattson, the plaintiff's mother, testified. She is a retired teacher although continues to work about two days per week.

**51**  Based on the evidence, it is without question that Ms. Mattson was an excellent student, athlete and citizen. Her mother described the physical activities that they shared together, including running, hiking, canoeing, kayaking, skiing and camping. Kristine Mattson described a young woman who, before the accident, was excited about her career, her relationship with Mr. Hutchison and the prospects of starting her own family.

**52**  Kristine Mattson then described her observations of her daughter after the accident. She recalled a vivid memory of going to the townhouse a few days after the accident and seeing her daughter in tears. It was obvious to her mother that she was in excruciating pain but did not want to let her employer down; as such, she was contemplating how to tell him that she could not come into work. The plaintiff's mother has made similar observations over the past five years as she observed her daughter managing extreme pain.

**53**  Ms. Mattson's parents now provide fairly regular childcare to their grandchildren, which Kristine Mattson's testified was not a part of her post-retirement plans.

**54**  Importantly, she described the change she observed in her daughter's personality, from someone who was joyful and spontaneous to someone who is irritable and terse, characteristics that had never been a part of her personality.

**55**  Mr. Forde also testified and described his observations of Ms. Mattson in the workplace. He testified that she is more injured than many of the patients she is working to rehabilitate. He has accommodated Ms. Mattson even though he does not make money from her working two days a week. At the time of trial, Ms. Mattson was on her second maternity leave. Mr. Forde testified that her job will be waiting for her when she returns to work, stating that it is 100% worth having her. As for her ability to work with patients, Mr. Forde testified that he could not recall observing her lift anything at work. He described an incident where she went to pick up her son and Mr. Forde had to take her son from her arms because of the pain he observed in her. He described his observation of her pain as "not a good memory".

**56**  Relevant to Ms. Mattson's future employment, Mr. Forde testified that he expects to sell the clinic in the near future. He stated that he has only two years left on his lease and may very well take steps to sell the clinic at that time.

**57**  Two of Ms. Mattson's co-workers were also called to testify. Kimberly Huff, a physiotherapist and Mr. Perry Maghera, a kinesiologist, both testified about Ms. Mattson's physical condition and the impact on her day-to-day employment tasks. Ms. Huff testified that Ms. Mattson is now much less functional than she was before the accident. Despite her attempts to hide her condition, she presents with pain and mobility restrictions. Mr. Maghera made similar observations of the limitations Ms. Mattson now experiences.

**58**  I end this portion of these reasons with observations made by Ms. Vilkas, a police officer. She described Ms. Mattson's pre-accident personality as exuberant. After the accident, she testified that she is "dampened", like there is a heavy blanket over her. She testified that although Ms. Mattson is not a complainer, it is clear that she is in constant pain.

**59**  Each of these witnesses described a remarkable, athletic, generous, hardworking and professional woman who had very much changed since the accident. This description was relatively unshaken in cross-examination.

**D. Medical Evidence**

**60**  There is no dispute that Ms. Mattson suffered injuries as a result of the accident; most significantly, the injury to her neck, right upper trapezius and shoulder and ongoing headaches. The medical experts, called on behalf of Ms. Mattson (Dr. Travlos and Dr. Dhawan) and the defendant (Dr. Kendall) testified as much. The disagreement between the parties relates to whether (1) the injuries had resolved by the time of the Workplace Injury; (2) the plaintiff's injuries were pre-existing; (3) an intervening act (including her own conduct) caused her current state; and/or (4) she failed to mitigate her damages. The defendant also disagrees that her current condition has impacted her employment to the extent she asserts.

**61**  I will now address the medical evidence. Later in these reasons, I will address the evidence regarding vocational capacity and cost of future care.

**1. *Plaintiff's medical experts***

**a) *Dr. Pankaj Dhawan***

**62**  Dr. Dhawan is Ms. Mattson's treating physiatrist. She has seen him numerous times from September 18, 2014 through October 10, 2018. He has provided her with facet blocks with ultrasound guidance, Botox injections into affected muscle groups, low-dose steroid injections and trigger point injections.

**63**  Dr. Dhawan, in his written report, summarized his opinion as follows:

. . . this young woman was previously completely healthy, asymptomatic and very fit in athletic endeavours as well as her work as a kinesiologist. She was involved in a car accident which was a rear-ending accident on January 7, 2014 when her head was turned to the right and her arm was outstretched to the right reaching for the passenger side seat when she was rear-ended. In my opinion she suffered soft tissue injuries to the right cervical facets with right rotational and extension injury to the neck, and secondary posttraumatic dystonia in the right-sided cervical muscles and shoulder girdle muscles, quite tight since then, which have been described in the body of this report. Cervical MRI has ruled out disc herniation or fracture. Brachial plexus MRI was not very helpful and nerve conduction/EMGs had not been helpful either. Since then she has also developed winging of the right scapula which is thought to now by myself, two different orthopedic surgeons, and a neurologist [being Dr. Syal, Dr. Regan and Dr. Mezei] as an imbalance in the muscles stabilizing the scapula with tightness of the cervical muscles such as levator scapulae, rhomboids, trapezii, and weakness relatively of serratus anterior muscles causing winging of the scapula. As a result of this winging her glenohumeral function is compromised, there is increased stress in the rotator cuff as described by Dr. Syal causing shoulder tendinopathy, and as a result of favouring the right arm which is weak and dysfunctional she has developed overuse tendinopathy of the left shoulder which fortunately has responded well to cortisone injections and physiotherapy.

She has had a decline in her mood due to inability to carry on her work to a full capacity as well as recreational enjoyment, managing her vitamin store, and looking after her growing family. She also has not been able to pursue her previous level of fitness. She has been an excellent patient who is fully motivated and who has complied with all treatments and has tried very hard to stay functional at work, home, and in recreational settings.

. . .

She is functioning at a much reduced capacity; even after her first baby was delivered she could only get back to about 40% capacity it seems, working two to three days a week with a very helpful and accommodating employer. If she were to lose this employment I do not think she would be competitive in the job market to obtain and retain a job as a kinesiologist. She will have to undergo a functional capacity evaluation and a vocational assessment to see what she can do long term. Certainly, her current position as an active kinesiologist is not feasible.

. . .

She will continue to have difficulty with overhead work, repetitive tasks with her right arm, keeping her neck flexed for prolonged periods of time and any throwing motion will not be possible. Lifting even her growing family and children will be difficult and she will have to employ the left arm which may flare-up the left shoulder tendinopathy, requiring treatment.

**64**  Dr. Dhawan testified that Ms. Mattson was having significant difficulties working even two days per week. He is familiar with the work of kinesiologists and knows that they need to be able to lift and demonstrate, either with free weights or on a machine. In his view, she was not functioning as a kinesiologist despite her sympathetic employer. He did not believe she would be able to continue on in her chosen occupation. He was also of the view that she would be able to work two or perhaps three days per week, so long as she had a day off in between and not as a kinesiologist.

**b) *Dr. Andrew Travlos***

**65**  Dr. Travlos, a physiatrist, initially assessed Ms. Mattson on December 9, 2015, and he reported as follows:

Ms. Mattson's clinical records reveal that when she was first seen at Valley Centre Medical Clinic on January 7, 2014, the day of the accident, she was complaining of head, neck, upper and mid-back pains. By January 12, 2014, she also had right arm and sleep problems. She was seen at Proactive Chiropractic on January 21, 2014, complaining of head, neck, upper back, right shoulder and right arm symptoms, along with mid and low back pain. She was subsequently seen by Dr. Somani, her family doctor, with the same ongoing issues and problems. It is my opinion that all of these complaints were a direct consequence of the accident of January 7, 2014.

. . .

The causality of Ms. Mattson's current symptoms is primarily related to the accident of January 7, 2014. As noted above, she developed a constellation of symptoms following the accident that was directly accident-related. These symptoms included symptoms in the right shoulder and down the right arm. With time, it appears in the records that the right shoulder and arm symptoms were much less of a concern until January of 2015 when she injured her left shoulder at work. This resulted in compensation and increased symptoms in the right shoulder, and from that point on the right shoulder became the primary issue relating to her symptoms. It is possible that in the absence of the work injury Ms. Mattson's right shoulder pains would not have flared the way they did. Nevertheless, she was still quite symptomatic and seeking medical attention, and it is my opinion that the work injury simply increased the use of the right upper extremity and shoulder, which triggered the onset of dysfunctional shoulder movements as a result of her motor vehicle accident-related injuries and that those issues have remained through to the present.

. . .

More importantly, Ms. Mattson's shoulder movements are associated with substantial dysfunctional use with almost immediate shoulder blade winging with minimal activities. The degree of winging varies and she is able to alter the winging depending on positions and movements. This type of winging is not due to neurologic weakness. She does not have neurologic structural changes such as long thoracic nerve injury, suprascapular nerve abnormality or dorsoscapular nerve changes. There is no evidence to suggest a C4 abnormality to affect the trapezius muscles, either, and all in all I do not think there has been any injury to the brachial plexus and the winging is not due to neurologic compromise, but is rather an abnormal shoulder movement to accommodate pain."

**66**  Dr. Travlos saw Ms. Mattson again in January 2018. In his second report, he provided the following opinion:

Ms. Mattson was seen for the second time today. I last saw her just over two years ago in December of 2015 for her January 2014 accident. Ms. Mattson continues to complain of fairly similar complaints to when last seen, other than she no longer has any lower back pain, but she does have new left shoulder pain. Her current complaints include the presence of headaches, neck pains, upper back pain, right shoulder girdle pain, and left-sided shoulder pain.

. . .

Ms. Mattson's complaints today are similar to those described in the records and remain ongoing. These symptoms are similar to those that she had when I saw her back in December of 2015. It is my opinion that Ms. Mattson's persistent symptoms today are residual from the effects of the accident on January 7, 2014.

**67**  Dr. Travlos described Ms. Mattson's ongoing neck and right shoulder pain in this way:

Ms. Mattson has soft tissue pains that affect the right side of the neck and the entire right shoulder girdle region. There is a general sense of discomfort to palpation of the entire region, without focal findings of concern such as specific tender points or trigger points. There is no evidence to suggest nerve impingement in the neck or through the thoracic outlet as a contributing cause to these complaints. Movements of the shoulder clearly trigger patterns of co-muscular contraction causing the shoulder and the spine to distort into abnormal positions to accommodate the symptoms. These co-contractions likely trigger pains, and the cycle of persistent pain and scapular dysfunction and dyskinesis persists.

. . .

The bottom line is that Ms. Mattson has pain affecting the right upper body, predominantly around the shoulder, with dyskinetic shoulder movements that are either a direct consequence of an unidentified pain source or self-perpetuating due to abnormal muscle co-contraction and dysfunctional coordination perpetuating the pain through the region. I am unable to find an underlying anatomic lesion that is primarily casual in the symptoms. She essentially has chronic pain of the upper body that is functionally restricting for her. These pains have caused abnormal body movements that are contributing to the pain and perpetuating its presence. When I last saw Ms. Mattson, I was concerned that she may not be able to unlearn the body movements, and this indeed is the case. She continues to have the same issues and ongoing problems, and with the passage now of some four years since the accident it is improbable and unlikely that her situation will materially change. It is my opinion that she has plateaued.

**68**  Dr. Travlos was cross-examined about Ms. Mattson's failure to engage with psychological treatment. The defendant suggests Ms. Mattson's capacity would be improved by 20% if she received psychological treatment, including anti-depressant medications. The defendant relies on this evidence in support of the contention that Ms. Mattson failed to mitigate her damages. I address this submission below.

**2. *Defence medical expert***

**a) *Dr. Richard Kendall***

**69**  Dr. Kendall, an orthopaedic surgeon, examined Ms. Mattson on August 13, 2018. In his report, he expressed uncertainty about the cause of Ms. Mattson's shoulder injury, writing, "Of equal probability is that the shoulder symptoms and winging are unrelated to problems arising from the [accident]." He wrote as follows:

Approximately a year after the accident she injured her left shoulder. While she was recovering from shoulder pain, she started to use her right shoulder more and noticed that she had developed scapular winging. There is no notation of winging prior to this time and it is unlikely that the winging itself was present from the time of the accident in question. In fact, a definite cause of winging remains uncertain although it appears to be an accommodative maneuver for her ongoing, more severe, neck pain. There is no evidence that she had sustained a long thoracic nerve injury, injury to the serratus anterior muscle, or brachial plexopathy or brachial neuritis. This shoulder dyskinesia remains unexplained at this point in time. I note on physical examination today that I was able to get her to engage her normal scapular mechanics during assisted arm elevation. The scapula appears to become dyskinetic when she is trying to achieve an active range of motion.

While the delayed onset of shoulder symptoms remains unexplained it is possible that it may be due learned or protective behaviour and may relate to her ongoing symptoms in the neck. I suspect that her soft tissue injury of the neck and it subsequent pain has led to the associated dyskinesis of the shoulder. However, I do not think that there is a surgical lesion in either the neck and/or the right shoulder. Of equal probability is that the shoulder symptoms and winging are unrelated to the problems arising from the MVC.

. . .

By definition, she likely has chronic pain at this time. Because of the ongoing neck pain and lack of response to any treatment, I would suggest referral to a chronic pain clinic for a multidisciplinary assessment and development of a treatment program for her."

**70**  During his direct examination, Dr. Kendall testified that it was difficult for him to make a connection between the accident and the scapular winging observed a year later. Dr. Kendall was cross-examined about certain assumptions upon which he relied. It was suggested that some of those assumptions were flawed. In her written submission, the plaintiff summarized this aspect of the cross-examination as follows:

Dr. Kendall agreed that his Facts and Assumptions were based on the information set out in the Appendix to his report, which came from his interview notes. In his Appendix Dr. Kendall stated Ms. Mattson "needed to work with her left (non-dominant) arm more than her right as she would have aggravation of the pain in the right". When he was taken to his interview notes he agreed that he had documented "not using right side at work". He agreed the entire right side included shoulder, arm and back.

His Fact and Assumption #6 was that following the accident "she presented with immediate neck pain and lesser pain in the low back". He agreed that he had written "She recalls having significant neck and shoulder pain bilaterally. She had lesser low back pain" in his Appendix. His explanation for not including shoulder pain in his Facts and Assumptions was that he interpreted her complaints of shoulder pain to be pain coming from the neck and upper back or trapezius as opposed to the shoulder itself.

His Fact and Assumption #7 was that following the accident "she was briefly off work before returning to her usual duties". As set out in his Appendix he agreed that she had told him she struggled at work and had to use her left side more than the right. He said he didn't say she returned to modified duties at work because he "couldn't figure out when" she started working modified duties. In the Appendix he also noted "she continued to work in a modified way" before the left shoulder work injury (in January 2015).

His Fact and Assumption #8 was that "Initially, and likely for the first year, she experienced no symptoms referable to the shoulder". He maintained this position while acknowledging he was aware of the following documentation of shoulder symptoms:

MVA History Form filled in by Ms. Mattson at Dr. Workman's (chiropractor) office on January 21, 2014;

1. Presentation to Abbotsford Emergency Room (January 12, 2014)
2. Dr. Somani note of January 31, 2014;
3. Physiotherapy note of October 29, 2014;

Dr. Kendall explained that he did not think Ms. Mattson's shoulder pain was arising from the shoulder. Instead it was consistent with soft tissue injury pain in the neck and back that was radiating into the shoulder.

Dr. Kendall was aware of Dr. Regan's opinion that Ms. Mattson had "R myofascial neck pain, resulting in scapular dysfunction". He agreed he reached a "similar conclusion" where he said "I suspect that her soft tissue injury of the neck and its subsequent pain has led to the associated dyskinesis of the shoulder".

**71**  Overall, Dr. Kendall was "guardedly optimistic" that Ms. Mattson would experience some improvement in her overall condition; particularly, the defendant submits, if she engages in recommended treatment.

**III. CREDIBILITY**

**72**  As is typical in motor vehicle injury cases, Ms. Mattson was required to speak on her own behalf and relay to the court the effects of the accident. This has, of course, placed her credibility and reliability in issue. My factual findings regarding her condition after the accident and her prognosis are based in part on her testimony, self-report and the observations of others, including medical professionals, members of her family and work colleagues. However, in this case there is also a visible scapular abnormality.

**73**  According to her counsel, Ms. Mattson was a straightforward, credible and intelligent witness and the statements she made to medical practitioners were consistent with those contained in the various reports tendered. She was someone uniquely familiar with injury, recovery and rehabilitation due to her occupation and has done all that she can to get better.

**74**  The defendant says the contrary. In the defendant's written submission, the defendant submits:

In this case, the Plaintiff appears to believe that she is physically disabled from working full-time. However, it may be that her self-perception is flawed and that her evidence is not wholly reliable. She may, consciously or unconsciously, overstate the degree of her disability.

It is submitted that the Plaintiff's reliability as a witness is not good. She was not always straightforward or direct on difficult topics. She was resistant to making admissions against self-interest. Her tendency was to emphasize the factors that assist her claims and to de-emphasize those that did not assist. She was equivocal at times under cross-examination.

**75**  The defendant submits that specific portions of the plaintiff's evidence exhibit these flaws and provided examples, including:

1. Post-accident, her employment records do not demonstrate a reduction in work days consistent with the plaintiff's testimony;
2. The plaintiff downplayed pre-existing problems she had with her neck, shoulder, back and left ankle;
3. The plaintiff exaggerated her pre-accident activity level;
4. The plaintiff's evidence regarding severe neck, right shoulder, right arm and low back pain, a very seriously restricted ability to move her right shoulder, and constant neck and right shoulder pain is quite inconsistent with the results of her functional capacity evaluation; and
5. The plaintiff has inconsistently reported the nature, frequency and severity of her injuries.

**76**  The gist of the defendant's submission is that the plaintiff is unreliable and her testimony is in large part inconsistent with what she told medical practitioners.

**77**  According to counsel for the defendant, Ms. Mattson's evidence should be assessed cautiously because of these (and other) inconsistencies in the evidence.

**78**  When assessing the truthfulness of the testimony of any interested witness, I am guided by the words articulated many years ago in *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) at 357:

... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

**79**  The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) 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. 152 (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).

**80**  I agree that where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the court must be careful in examining the evidence and assessing credibility. In this case, there are aspects of Ms. Mattson's condition that are not based solely on subjective reporting.

**81**  Before I turn to Ms. Mattson's credibility, I start with my assessment of the evidence of her spouse, mother and co-workers. The defence did not mount a serious challenge to the credibility of these witnesses. Each of these witnesses struck me as simply describing their observations in a straightforward manner. I accept what each of them said about changes they had observed in Ms. Mattson since the accident.

**82**  Particularly compelling was the evidence of Mr. Hutchison and Kristine Mattson. Both described in detail the grave impact of the accident on Ms. Mattson. Mr. Hutchison described a woman who was one of the strongest people he had ever met, both physically and mentally. He was not describing a person who went for the occasional light jog on the weekends, but rather someone whose entire focus and purpose was centred on physical activity prior to the accident.

**83**  I do not accept the defendant's submission that Ms. Mattson has overstated her pre-accident physical activity. Rather, I find when I compare her testimony to the totality of the evidence presented on this point (including the evidence of Ms. Vilkas), that she, if anything, understated her physical activity. This is consistent with Kristine Mattson's description of the time the two of them shared prior to the accident as well.

**84**  I also find the description these witnesses gave of Ms. Mattson in the years after the accident to be compelling. Again, their credibility was not seriously challenged. Kristine Mattson described it this way:

I have seen a daughter who was joyful and spontaneous [turn into] someone who is very calculated, quite irritable, short . . . and that has never been in her nature.

**85**  These were the words of a mother who was close with her daughter and who had spent considerable time with her since infancy. She knew her daughter well and, in her eyes, her daughter was markedly different since the accident.

**86**  I turn then to my assessment of Ms. Mattson's credibility. Ms. Mattson presented extremely well. She was articulate, calm, dispassionate (although more tearful on her second day of testifying) and who admitted when she did not remember some of what she said during medical visits. However, credibility assessments based solely on strictly positive impressions (or performances) are often incomplete. As such, I have been careful to assess Ms. Mattson's credibility (and reliability) after considering whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. I have thus assessed her evidence based on the totality of the evidence presented, including her presentation to the various health care providers.

**87**  To that end, I found Ms. Mattson to be a thoughtful, intelligent and candid witness. She managed to describe all of her accomplishments without conceit or arrogance. I found her to be matter of fact as she reported her physical condition over time. I am satisfied that her dogged determination has enabled her to maintain some level of employment. Despite severe pain, she has tried to maintain some semblance of her life before the accident by maintaining her employment as best as she is able. I accept her testimony that has been doing whatever she could to manage her ongoing pain. I have considered her reporting to the medical practitioners over the years and specifically, the areas of her testimony identified as inconsistent by the defendant. I am not satisfied whatsoever that her evidence reflects inconsistencies as suggested by the defendant. It is to be expected that her reports of pain will vary over time.

**88**  Similarly, I do not find that she was less than forthright about her pre-accident condition. I have reviewed this part of her testimony and compared it to the statements identified by the defendant as demonstrating ongoing complaints about pre-accident injuries. But for a single record, I find that the records do not reflect any inconsistency between her testimony and the statements contained in the records.

**89**  With respect to that single clinical note, Ms. Mattson was cross-examined about the following notation: "rear-ended previously 3 years ago, ongoing neck pain that is persisting". Ms. Mattson explained her state at the time of the previous accident. She testified that she was training for a triathlon at the time and did not have any physical limitations or restrictions from that accident that impacted her. She said she had gone to the physiotherapist but described the fact that those injuries had long resolved by the time of the subject accident. She testified that she was being honest with the clinic doctor when she disclosed the previous accident, but denied she was in any way symptomatic. Despite the note that her 'neck pain is persisting", I accept Ms. Mattson's testimony that her pre-accident injuries had long resolved. This is also consistent with the description of her pre-accident condition given by others who knew her well.

**90**  I accept Ms. Mattson's testimony that she was doing whatever she could to manage her ongoing pain without imposing what she perceived to be a burden. For example, she had not sought ergonomic assessments at her workplace because she felt "guilty enough" about her lessened contribution to the clinic. She also admitted that she had a "certain level of denial" regarding any depression "because [she] just kept thinking [she] would get better."

**91**  In her struggle to return to her previous life, Ms. Mattson has tried to adhere to her life plan, maintaining employment and handling two pregnancies.

**92**  In short, I reject the defendant's submission that the court should not rely on Ms. Mattson's evidence. In my view, the evidence simply does not support the contention that Ms. Mattson has been less than forthright.

**93**  In making this finding, I have considered the defendant's submission regarding the Valley Centre Medical Clinic record, the pre-accident clinical records, the plaintiff's evidence about those records and her other statements to medical practitioners. In her testimony, Ms. Mattson explained the basis for certain statements in the clinical records.

**94**  In considering her evidence on this point and the various records put to her, I do not accept that she was being untruthful about the severity of her neck pain, shoulder pain or headaches.

**95**  The defendant submits that the plaintiff was not reliable regarding the impact of her injuries on her ability to work, arguing there are parts of her testimony that are inconsistent with both her discovery evidence and what she told the medical practitioners.

**96**  Regarding her discovery evidence on this point (ability to work more than 40% capacity), I am not satisfied that her testimony at trial was inconsistent on this issue. Rather, I find that she was describing, as best as she was able, how she was coping at the time with work, childcare and the demands of life generally. I accept her answers given at trial in this regard.

**97**  Overall, I did not find material inconsistencies between the plaintiff's testimony at trial and what she has stated on discovery or what she has told the various medical experts. Again, I accept that she was trying her best to describe her persistent pain in the circumstances presented.

**98**  Ms. Mattson's familiarity with injuries, recovery and rehabilitation is also noteworthy. She believed she would recover. Sadly, her recovery was to be far more complicated than what she had anticipated, in spite of her determination and efforts to return to her pre-accident state. At trial, she agreed that she was starting to understand that her recovery would not be complete and that she would need to adjust her life plan accordingly.

**99**  In short, I found Ms. Mattson to have been a most forthright witness. If anything, she tended to understate the impact of her injuries overall.

**IV. ASSESSMENT AND FINDINGS**

**100**  The defendant does not agree that the entirety of the plaintiff's constellation of injuries were caused by the accident. Rather, the defendant contends the scapular injury was caused by an intervening act: the Workplace Injury. The defendant also contends the plaintiff was suffering from a pre-existing injury at the time of the accident and thus, any damage award must be adjusted accordingly. Finally, the defendant submits that the plaintiff has failed to mitigate her damages, requiring a further reduction of any damage award.

**101**  I deal first with causation. I will then address the issues of pre-existing condition, intervening act and failure to mitigate.

**A. Causation - Law**

**102**  As previously noted, although the defendant has admitted liability, the defendant refutes Ms. Mattson's claims for damages on the basis that they are excessive and the issues now affecting her are not causally connected to the accident.

**103**  Ms. Mattson must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to each of the injuries she sustained in the accident. In order to establish causation, Ms. Mattson must prove on a balance of probabilities that but for the accident she would not have suffered the injuries of which she now complains.

**104**  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*. The tortfeasor must take their victim as the tortfeasor finds the victim and is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person (also referred to as the thin-skull rule). At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event. Causation need not be determined by scientific precision: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-17 [*Athey*]; and *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at para. 9.

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

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

**107**  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. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.

**108**  In *Rabiee v. Rendleman*, [*2015 BCSC 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60PD-00000-00&context=), the defendants took issue with the lack of objective evidence supporting the plaintiff's injuries. As such, Justice Sharma considered the standard of proof regarding subjective and objective evidence of injury and confirmed that the standard of proof remains unchanged:

[65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [*[1983] B.C.J. No. 1490*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JNS1-M0BG-00000-00&context=) (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."

[66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendant's ***negligence*** on a balance of probabilities. I have concluded that Ms. Rabiee has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.

[67] With regard to those factors, Ms. Rabiee's injuries were mild in severity but had a longer duration than expected. The medical evidence suggested her age may account for at least part of that lengthened duration. I have also found that the demands of her job combined with her failure to attend physiotherapy and exercise aggravated her soft tissue injuries, increasing the pain she experienced and the duration of her symptoms.

**109**  The defendant cites *Dudek v. Li*, [*2000 BCCA 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61HG-00000-00&context=) [*Dudek*], in support of the position that the workplace injuries are divisible from the accident and any damages award should be apportioned accordingly. In *Dudek*, Justice Braidwood wrote:

[11] These types of cases are discussed in the House of Lords decision of *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.*, [1969] 3 All E.R. 1621. In *McKew*, the appellant sustained an injury for which the tortfeasors were liable, in consequence of which he would unexpectedly lose control of his left leg, which would then collapse. It was expected that he would have recovered within a week or two but for a second injury which he suffered. The second injury, in which he severely fractured his ankle, occurred when he descended steep steps without a handrail. Lord Reid stated at p. 1623:

In my view the law is clear. If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability which in turn was caused by the defender's fault. But if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is novus actus interveniens. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it. ... For it is not at all unlikely or unforeseeable that an active man who has suffered such a disability will take some quite unreasonable risk. But if he does he cannot hold the defender liable for the consequences.

[Emphasis Braidwood J.A.'s.]

The House of Lords found that the appellant in that case was acting unreasonably, thus breaking the chain of causation.

[12] The same principle was applied in the British Columbia Supreme Court decision of *Goldhawke v. Harder* [*(1976), 74 D.L.R. (3d) 721*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4FJ-00000-00&context=). In *Goldhawke*, the victim was injured in a motor vehicle accident and was restricted to using crutches for months. He had a brace on the cast of his left leg and to equalize the length of his legs, he wore a high-heel shoe on his right foot. One night, after going to a nightclub with friends, he suffered further injuries when the heel on his shoe broke, causing him to fall down the stairs. The question at trial was whether the tortfeasor was liable for only the injuries suffered in the original accident, or whether he was also liable for the injuries suffered in the fall down the stairs at the nightclub. Mr. Justice Macdonald referred to the decision of Lord Reid in *McKew* and found that Mr. Goldhawke was not acting unreasonably that night. Therefore the "chain of causation" had not been broken, and the tortfeasor was liable for the damages suffered in the motor vehicle accident including the damages suffered in the fall down the stairs.

[13] In both the *McKew* case and the *Goldhawke* case, therefore, the issue that the courts were wrestling with was the connection between the injuries suffered in the first accident and how they impacted on the occurrence of the second accident.

See also Justice Fleming's recent summary of the authorities on this issue at paras. 134-142 in *Dale v. Vickers*, [*2019 BCSC 821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5W78-2BT1-F30T-B35G-00000-00&context=).

**B. Medical Evidence**

**110**  I will first provide an analysis of the medical evidence on the issue of causation, pre-existing injury and intervening acts. I will then address whether the defendant has established a failure to mitigate bearing in mind the credibility findings I have made.

**111**  Although the defendant raises further issues, which I will address, the primary point of contention relates to the scapular winging that was first observed in March 2015, and its connection (if any) to the accident. Here, I have focused on the medical evidence tendered by Dr. Dhawan, Dr. Travlos and Dr. Kendall.

**112**  I have spent considerable time reviewing Dr. Dhawan's evidence because he has treated Ms. Mattson for almost five years and has had repeated contact with her. He saw her before and after the scapular winging was first noticed.

**113**  Following Dr. Dhawan's first meeting with Ms. Mattson, he noted that he did not look for any winging of the scapula by applying specific maneuvers to bring out the winging. Rather, his initial impression was that Ms. Mattson "had been perfectly healthy and active and suffered soft tissue injuries to the right more than left cervical facets with hyperextension injuries and a side flexion injury to the cervical spine to the right." He treated her with facet blocks, which seemed to provide some relief.

**114**  When he saw her two months later, she reported some improvement from the facet blocks but the symptoms had returned. She was experiencing a lot of spasm in the right side of the neck and almost daily headaches. He wrote:

She was trying very hard to rehabilitate herself but keeping her neck flexed for a prolonged period of time or exercising or supervising clients' exercises was very difficult for her.

**115**  She received a Botox injection at this session and reported at her follow up visit, in February 2015, that it provided some relief from her headaches. However, she reported that the Botox had not helped her neck. At the February visit, Ms. Mattson reported that she had strained her left shoulder at work. Dr. Dhawan recorded that she was feeling "down and anxious about her condition. She did not want to take any antidepressant but I advised her family doctor that Cymbalta, an antidepressant used for chronic pain, may be worth considering in the near future if things did not come around as she was settling into a chronic pain state."

**116**  It was at the follow up visit on March 31, 2015, that Dr. Dhawan observed the scapular winging. He referred Ms. Mattson to Dr. Michelle Mezei of the neuromuscular neurology unit at Vancouver General Hospital for an assessment in response to her report that she was experiencing significant spasm and pain around the right shoulder girdle and immobility to move the shoulder well or do any overhead activities or charting. He noted:

. . . on careful examination on this day I discovered, and was alarmed to see, there was clear winging of the right scapula in a clockwise rotation of scapular winging, suggesting a long thoracic nerve palsy and serratus anterior palsy. Her shoulder movement was quite limited due to an unstable scapula. . . Again, she was struggling with the pain and to maintain her function at work and was quite a diligent patient. Ms. Mattson maintained to me that her shoulder problems were not pre-existing and were only since the car accident. So, it seems that only careful assessment of the shoulder blade area on this day discovered the winging and I may have missed it in the earlier examination.

**117**  Over the next two years, Dr. Dhawan recorded the progression of Ms. Mattson's condition and documented the multiple referrals he made to experts (including Dr. Bill Regan, an orthopedic surgeon with expertise in shoulder injuries and Dr. Syal, an orthopedic surgeon). He also documented his treatment of Ms. Mattson, taking into account the restrictions of some medication because of pregnancy and breast-feeding. He provided this summary of her condition as of October 2018:

In summary, this young woman was previously completely healthy, asymptomatic and very fit in athletic endeavours as well as her work as a kinesiologist. She was involved in a car accident which was a rear-ending accident on January 7, 2014 when her head was turned to the right and her arm was outstretched to the right reaching for the passenger side seat when she was rear-ended. In my opinion she suffered soft tissue injuries to the right cervical facets with right rotational and extension injury to the neck, and secondary posttraumatic dystonia in the right-sided cervical muscles and shoulder girdle muscles, quite tight since then, which have been described in the body of this report. Cervical MRI has ruled out disc herniation or fracture. Brachial plexus MRI was not very helpful and nerve conduction/EMGs had not been helpful either. Since then she has also developed winging of the right scapula which is thought to now by myself, two different orthopedic surgeons, and a neurologist [being Dr. Syal, Dr. Regan and Dr. Mezei] as an imbalance in the muscles stabilizing the scapula with tightness of the cervical muscles such as levator scapulae, rhomboids, trapezii, and weakness relatively of serratus anterior muscles causing winging of the scapula. As a result of this winging her glenohumeral function is compromised, there is increased stress in the rotator cuff as described by Dr. Syal causing shoulder tendinopathy, and as a result of favouring the right arm which is weak and dysfunctional she has developed overuse tendinopathy of the left shoulder which fortunately has responded well to cortisone injections and physiotherapy.

**118**  Dr. Dhawan testified that Ms. Mattson had tried many forms of treatment, including injections, but that any relief was short term. He described Ms. Mattson as someone who pushed herself and, in her recovery, was trying to regain her previous athletic self.

**119**  During his cross-examination, Dr. Dhawan addressed Ms. Mattson's performance during a functional capacity evaluation conducted by Mr. Michael Dydula in October 2018. In particular, Dr. Dhawan was cross-examined about Ms. Mattson's scores on certain tasks, which suggested that her performance was inconsistent with her complaints. Dr. Dhawan did not agree. He testified that the scores seemed to reflect someone who was trying their best to perform. At one point, he simply stated, "She seems to be really going for it."

**120**  Important to this analysis, Dr. Dhawan was cross-examined about the Workplace Injury. Dr. Dhawan agreed that he was aware of the Workplace Injury and agreed these injuries were separate from those sustained in the accident. Despite his knowledge about the Workplace Injury, Dr. Dhawan nevertheless maintained his opinion that her current state, including the scapular winging, was connected to the accident.

**121**  Dr. Travlos also addressed causation in his evidence. He testified that her current symptoms are primarily related to the accident and that the constellation of symptoms she has experienced over time were "directly accident-related". To repeat somewhat, in his report, Dr. Travlos described causation this way:

As noted above, she developed a constellation of symptoms following the accident that was directly accident-related. These symptoms included symptoms in the right shoulder and down the right arm. With time, it appears in the records that the right shoulder and arm symptoms were much less of a concern until January of 2015 when she injured her left shoulder at work. This resulted in compensation and increased symptoms in the right shoulder, and from that point on the right shoulder became the primary issue relating to her symptoms. It is possible that in the absence of the work injury Ms. Mattson's right shoulder pains would not have flared the way they did. Nevertheless, she was still quite symptomatic and seeking medical attention, and it is my opinion that the work injury simply increased the use of the right upper extremity and shoulder, which triggered the onset of dysfunctional shoulder movements as a result of her motor vehicle accident-related injuries and that those issues have remained through to the present.

**122**  Dr. Travlos was cross-examined regarding Ms. Mattson's failure to follow his recommendation that she obtain psychological treatment and the likelihood of improvement if she were to have followed the recommendation. His opinion regarding causation, however, was not undermined.

**123**  Dr. Kendall, the defendant's medical expert, questioned the cause of Ms. Mattson's scapular winging. In his report, he wrote:

It is difficult to know with any certainty whether her scapular winging is directly caused by the accident in question. The delay of a year does suggest that she did not receive any structural injury at the time of the accident in question. However, it is impossible to discount whether her neck pain triggered her shoulder symptoms. She suggests that she did not see winging early on because she was not using the shoulder for any physical activity.

**124**  Dr. Kendall agreed, during cross examination, that he reached a similar conclusion to Dr. Regan's opinion that Ms. Mattson had "[right] myofascial neck pain, resulting in scapular dysfunction". He testified that he suspected her soft tissue injury of the neck and its subsequent pain has led to the associated dyskinesis of the shoulder.

**125**  For the reasons set out more fully below, I am satisfied that Ms. Mattson has proven on a balance of probabilities that the defendant's ***negligence*** caused the physical injuries from which now suffers, including the scapular injury.

**126**  Dr. Travlos addressed the complicated nature of Ms. Mattson's injury and his efforts to understand it better, in order to treat her more effectively. Despite a complicated diagnosis and the requirement to rule out the basis for her current condition, Dr. Travlos was satisfied that the Workplace Injury "simply increased the use of the right upper extremity and shoulder, which triggered the onset of dysfunctional shoulder movements as a result of her motor vehicle accident-related injuries and that those issues have remained through to the present."

**127**  This opinion was not undermined during his cross-examination.

**128**  Similarly, Dr. Dhawan connects Ms. Mattson's injuries, including the scapular injury, to the accident. Dr. Kendall's opinion, although equivocal, does not detract from Dr. Dhawan's and Dr. Travlos' descriptions of her current condition and opinions that it is causally connected to the accident. I accept the evidence of Dr. Dhawan and Dr. Travlos in this regard.

**C. Summary**

**129**  In summary, I find that the totality of the evidence demonstrates, on a balance of probabilities, that the accident caused the following injuries:

1. Headaches described by Dr. Travlos as being triggered from the neck, due to muscular contraction pain;
2. Muscular neck pain;
3. Right shoulder described by Dr. Travlos as "shoulder movements associated with substantial dysfunctional use with almost immediate shoulder blade winging with minimal activities. The degree of winging varies and she is able to alter the winging depending on positions and movements...the winging is due to...an abnormal shoulder movement to accommodate pain." Dr. Travlos is also of the opinion that the "last diagnosis that Ms. Mattson probably does indeed have contributing to her shoulder pains is that of a diagnosis called quadrilateral space syndrome. This is an abnormality of the posterior shoulder;
4. Mid and low back pain, since resolved; and
5. Psychosocial. Here, the medical experts seems to agree that chronic pain and psychological symptoms go hand in hand. Dr. Kendall recommends a referral to a chronic pain clinic for a multidisciplinary assessment and development of a treatment program for her.

**130**  Except for the mid and low back injury, I am satisfied that the medical evidence demonstrates on a balance of probabilities that Ms. Mattson's injuries will persist in the years to come. In particular, I accept Dr. Dhawan's opinion:

She continues to have the same issues and ongoing problems and with the passage now of some four years since the accident it is improbable and unlikely that her situation will materially change. It is my opinion that she has plateaued.

**131**  I turn then to the defendant's submission that Ms. Mattson was symptomatic at the time of the accident, suffering from very similar injuries to those she sustained in the accident. Again, and as described in para. 89 of these reasons, the defendant relies on a clinical note that refers to Ms. Mattson's disclosure of a prior accident. Ms. Mattson explained her disclosure to the clinic doctor and testified she would have disclosed it because she was being honest. She was adamant that she had long since recovered from the minor injuries she sustained in that accident, which occurred three years earlier. She testified that the injuries were so minor that she did not even submit a claim for damages. I accept her evidence in this regard. I am not satisfied that the medical evidence, including the clinical note, demonstrates anything inconsistent with what Ms. Mattson told the court about her physical condition at the time of the accident. I find that at the time of the accident, Ms. Mattson was in top physical condition, without pain or injury. In my view, the clinical note stands in contrast to the bulk of the evidence presented at the trial, which evinces that Ms. Mattson was an active, healthy and asymptomatic individual at the time of the accident.

**132**  I have addressed, at least in part, whether the Workplace Injury constitutes an intervening act, so as to separate Ms. Mattson's current condition from that of her condition following the accident. In my view, based on the whole of the medical evidence, the Workplace Injury did not operate such as to break the chain of causation from the accident injuries. If anything, the Workplace Injury required her to return to using her right side; the side she had been protecting because of the accident. Her doing so was not an unreasonable manoeuvre on her part. In other words, I am neither satisfied that the chain of causation was broken by the Workplace Injury nor that the March 2015 discovery of the scapular winging was caused by Ms. Mattson's "own conduct and not that by the defender's fault or the disability caused by it."

**133**  In short, based on the evidence of Dr. Dhawan and Dr. Travlos, I am not satisfied that the Workplace Injury constitutes an intervening act, so as to break the chain of causation.

**134**  In light of this finding, I do not find that Ms. Mattson in any way was contributorily negligent in the manner suggested by the defendant.

**D. Failure to Mitigate**

**135**  In this case, the defendant submits that Ms. Mattson failed to mitigate her losses with respect to her physical injuries by failing to adhere to Dr. Travlos' recommendations regarding psychological treatment. In particular, the defendant submits that: (1) she failed to take a newer-generation antidepressant medication, such as Cymbalta or Effexor; and (2) she failed to work with a counsellor to help her learn stress and pain reduction techniques, such as meditation and self-hypnosis. Accordingly, the defendant submits that any damage award should be reduced by 20%.

**136**  Relying on *Ranahan v. Oceguera*, [*2019 BCSC 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VHV-R691-FK0M-S1H8-00000-00&context=) at paras. 227 and 228, and *Harris v. Zabras*, [*2010 BCSC 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-201V-00000-00&context=), the defendant submits that the burden of proof, which is born by the defendant on this issue, has been satisfied because of the evidence that the plaintiff did not engage with psychological treatment in the manner recommended by Dr. Travlos and her failure to do so was unreasonable in the circumstances. The defendant submits that the plaintiff's failure to mitigate should result in a reduction in the damages award.

**137**  In addition to the authorities referred to above, I have referred to *Lewis v. Gibson*, [*2018 BCSC 1713*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TGV-PHG1-JB7K-22KY-00000-00&context=), in which Justice Russell stated the following regarding the test for failure to mitigate:

[202] 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=) at para. 78, the Court of Appeal affirmed *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=) as the "guiding authority" on the question of mitigation. In *Chiu*, the court said:

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

[203] In *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=), a case where the allegation of failing to mitigate involved a refusal to undergo cortisone injection treatment, the court said that it:

1. ...would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.

[Emphasis in original.]

**138**  I turn to my analysis regarding the defendant's submission that Ms. Mattson failed to mitigate.

**139**  I am not satisfied that Ms. Mattson has failed to mitigate her damages regarding her injuries because of the medication she did not take or by her failure to engage in psychological counseling. This is the defendant's burden and I find it has not been met. I make this finding based on the whole of the medical evidence, which demonstrates the many forms of treatment she undertook immediately after the accident and in the years that followed including twelve counseling sessions with Dr. Behboodi from November 30, 2015-May 24, 2016.

**140**  In her testimony, Ms. Matson explained her rationale for certain decisions she made regarding treatment. Importantly, she had attended medical experts on a regular and consistent basis from the time of the accident to the time of trial. Her treatment providers, including Dr. Dhawan, wrote about her commitment to recovery and her motivation to try what she could to improve. Ms. Mattson testified that she tried the pain management techniques taught by Dr. Behboodi but they did not provide any improvement in her pain. She also testified that ICBC would not pay for additional sessions for her at the time.

**141**  I am not persuaded that the defendant has met its burden that Ms. Mattson has failed to mitigate her damages with respect to her injuries and resultant chronic pain. I make this finding based on the totality of the evidence presented and in considering the number of practitioners she engaged in the years following the accident and the steps she took, including injections, counseling, physiotherapy, re-learning shoulder movements, to try and deal with her injuries and the enduring pain. The experts agree that Ms. Mattson's injury was unusual. Although not necessary to my conclusion here, it is also of note that she was pregnant and/or breastfeeding for a significant period of her recovery time and her medication options were thus restricted.

**142**  Ms. Mattson's approach to her treatment has been reasonable in the circumstances.

**E. Summary of Findings**

**143**  In summary, I am satisfied that the plaintiff has proven on a balance of probabilities that she suffered the following injuries:

1. Right-sided neck pain and headaches;
2. Soft tissue injuries to the right cervical facets with right rotational and extension injury to the neck and secondary post-traumatic dystonia in the right-sided cervical muscles and shoulder girdle muscles;
3. Winging of the right scapula;
4. Compromise of her glenohumeral function because of increased stress in the rotator cuff; and
5. Low back injury, since resolved.

**144**  I am also satisfied that Ms. Mattson was not suffering from a pre-existing condition at the time of the accident nor did an intervening act cause the scapular winging. Finally, I am not satisfied that the defendant has met the burden establishing Ms. Mattson failed to mitigate her damages.

**V. DAMAGES**

**145**  Ms. Mattson seeks compensation for the injuries she suffered as a result of the defendant's ***negligence*** under the following heads of damages:

1. Non-pecuniary damages for pain and suffering of $180,000;
2. Damages for past wage loss in the amount of $71,750;
3. Loss of future earning capacity of $1,350,000;
4. Loss of future EI benefits of $6,888;
5. Cost of future care of $475,000;
6. Special Damages of $15,935.66; and
7. Deferral of tax gross-up.

**146**  The defendant agrees that the plaintiff is entitled to an award under each of the above heads of damages. In their written submission, the defendant seems to agree with the amount claimed for past wage loss and special damages (except for a few hundred dollars relating to some prescriptions and a cervical collar). As for the remaining heads of damages, the defendant takes the following position:

1. Non-pecuniary damages for pain and suffering of $60,000 - $90,000;
2. Loss of future earning capacity of $90,000;
3. Cost of future care of $35,000 - $75,000; and
4. Housekeeping capacity of $10,000.[**3**](#Forward_fnref_fnr-3)

**A. Non-Pecuniary Damages**

**147**  I have found Ms. Mattson's most significant injury to be chronic pain involving her neck, upper trapezius, shoulder and scapula and headaches.

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

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

The non-exhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

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

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

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**150**  The proper approach to assessing injuries that depend on subjective reports of pain was discussed by Chief Justice McEachern in *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.), which was quoted with approval in *Edmondson v. Payer*, [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=) at para. 2. In referring to an earlier decision, McEachern C.J. wrote:

In *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) at 397 and 399, Chief Justice McEachern, in remarks since quoted many times, stated:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**151**  Ms. Mattson was 30 years old at the time of the accident. I have found that her prognosis for a full recovery is guarded, although further treatment (injections and/or pain management through a pain clinic) may provide some improvement. Ms. Mattson will be restricted in her day-to-day activities. The impact of her condition has been significant, resulting in reduced work hours, nominal participation in extracurricular activities and inability to attend to her home responsibilities. Importantly, her ability to care for her infant children has been impacted.

**152**  When considering the extent and nature of her injuries, the impact on her enjoyment of life and her uncertain prognosis, counsel for Ms. Mattson submits that $175,000-$185,000 is a reasonable award for non-pecuniary damages. In support of this position, counsel relied on the following case authorities:

1. *Broad v. Clark*, [*2018 BCSC 1068*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SRY-8JT1-JW5H-X4PS-00000-00&context=);
2. *Sundin v. Turnbull*, [*2017 BCSC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MKR-T2S1-F27X-60XP-00000-00&context=);
3. *Kallstrom v. Yip*, [*2016 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JVG-2XS1-JN14-G1JY-00000-00&context=); and
4. *Gill v. Lai*, [*2018 BCSC 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RHM-83W1-F873-B4BS-00000-00&context=) and *Gill v. Lai*, [*2019 BCCA 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VV5-F0Y1-JT99-224K-00000-00&context=).

**153**  The defendant submits that an award for non-pecuniary damages should be in the range of $60,000 - $90,000 and relied on the following case authorities:

1. *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=);
2. *T.(S.) v. K.(S.)*, [*2010 BCSC 1564*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X49X-00000-00&context=) [T.(S.)]; and
3. *Turner v. Stones*, [1992] B.C.W.L.D. 1511 (S.C.), [*1992 CanLii 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M12C-00000-00&context=) [Turner].

**154**  Not surprisingly, the cases cited by both counsel are very different factually. The defendant relies on cases where the injured party exhibited scapular winging. However, the balance of the injuries sustained in those cases were less serious than those which I have found for Ms. Mattson. For example, in *T.(S.)*, Justice Smith found injuries to the plaintiff's shoulder and ankle remained but the injuries to the plaintiff's neck and back had all resolved shortly after the accident.

**155**  Furthermore, the plaintiffs in the defendant's cases did not seem to share the same commitment to recovery. For example, Ms. Mattson's attitude could not be more different from the plaintiff in *Turner*, as she sought to find ways to regain her previous physical form. In *Turner*, Justice Wilkinson found that

...Despite the fact that three years have passed since the accident, I do not get the impression that he has made any sort of concerted effort to find out exactly what his limitation on sporting activities are, to ascertain what he can and cannot do...

**156**  The plaintiff's cases all included examples of chronic pain and shared similarities to those presented in Ms. Mattson's case.

**157**  Taking into account the authorities and my findings of fact, I am satisfied that $150,000 will properly compensate Ms. Mattson for her pain and suffering and loss of past and future enjoyment of life, including the psychosocial features identified by Dr. Dhawan.

**B. Past Wage Loss**

**158**  The parties agree that the plaintiff suffered a loss of earnings. Based on the defendant's position and evidence tendered, including the amended report of Mr. Curtis Peever, a labour economist, I award $71,750 for Ms. Mattson's loss of past earning capacity.

**159**  In addition, the defendant did not challenge Ms. Mattson's claim for future loss of employment insurance benefits. Based on Mr. Peever's report and in light of the defendant's position, I award $6,888 for her loss of EI benefits.

**C. Loss of Future Earning Capacity**

**160**  This is the largest aspect of Ms. Mattson's claim. I will deal here with the vocational evidence presented, the legal analysis and my findings.

**1. *Vocational Evidence***

**161**  Ms. Mattson received numerous academic and athletic accolades in high school and at TWU. In addition to academic pursuits, she contributed significant time to her community. Although only 30 years old at the time of the accident, Ms. Mattson had a demonstrated work history in her chosen field of kinesiology. This history is relevant to inform the assessment of future loss in determining what Ms. Mattson would have realistically done in the future, had the injuries not occurred.

**162**  Importantly, she was the primary wage earner in her family. The couple made decisions based on her earning ability, including the fact that Mr. Hutchison would be the primary childcare provider while working from home for the Reflex Supplement business. These plans were in motion at the time of the accident and the two had made substantial cash outlays for the purchase of the franchises.

**163**  At the time of the accident, Ms. Mattson had worked for seven years at HXPT and had T4-reported earnings of:

|  |  |  |
| --- | --- | --- |
| **Tax** | **Earnings** |  |
| **Year** |  |  |
| 2011 | $73,149.15 |  |
| 2012 | $74,289.88 |  |
| 2013 | $92,589.28 |  |
| 2014 | $101,874.00 |  |

**164**  At HXPT, she was paid according to the number of clients she saw. She was also operating a WorkSafeBC return-to-work program and personal active rehabilitation programs. Her earnings increased as the practice grew, reflecting increases in both her base salary and the active rehabilitation program.

**165**  After the accident and a few days off, Ms. Mattson returned to work full-time. As noted above, she struggled when she returned to work. However, even with her struggles, Ms. Mattson accepted Mr. Forde's job offer to work at the Apollo clinic to help develop the kinesiology program. Here, she was earning an annual salary of $100,000. It was expected that Ms. Mattson would continue to treat clients as the program developed.

**166**  Ms. Mattson tried to maintain full-time hours at her new position. However, in the spring of 2016, Dr. Dhawan encouraged her to work four days per week. In March 2016, she stopped working on Wednesdays and continued with that schedule until the birth of her first son in October 2016. Following the advice of her doctors and therapists, Ms. Mattson took one year maternity leave. With the physical challenges of caring for a new baby, she testified that her symptoms did not improve as she had hoped.

**167**  While on maternity leave, Ms. Mattson agreed to work for a week in May 2017, to help train a new kinesiologist. While at work, she developed severe pain in her left shoulder and ended up going to the emergency room, where she was given a cortisone injection. She required assistance from her father over the next two weeks to help care for her son.

**168**  At the end of her maternity leave, Dr. Somani recommended that she return to work two or three days per week. Ms. Mattson organized a work schedule of Mondays, Tuesdays and Thursdays and decreased her daily patient load. Her salary was reduced to $60,000.

**169**  As she continued to experience pain in her right side, Dr. Somani and Dr. Dhawan recommended a further reduction in her workload. In her written submission, Ms. Mattson described her ongoing struggle as follows:

Ms. Mattson found it progressively harder and harder to continue working because of her ongoing headaches, neck pain, shoulder and scapular pain despite her AR program and having physiotherapy and acupuncture treatments. She was losing more function with her right shoulder. . . She fought them on this as she thought she needed to work for her emotional well being. She did not want a further decline in her mental health.

**170**  In March 2018, after considerable deliberation, Ms. Mattson reduced her work schedule to two days per week, which was her workload up to the time she started her second maternity leave in March 2019.

**171**  Due in large part to her drive and determination, Ms. Mattson maintains some work capacity. However, her employment future looks very different today than it did before the accident. The professionals that treat her and know her physical condition best have recommended that she work less than what she has managed to date and that she let go of her kinesiology ambitions. These professionals have tried to balance her physical and psychological well-being with reasonable employment prospects. As various career alternatives were put to her during her testimony, it was clear that she was struggling to accept that her time as a kinesiologist was over. Being a kinesiologist was a part of who she was as an individual. The loss was profound. I was left not knowing whether she would embrace any of the professions recommended to her.

**172**  With that evidence in mind, I turn to the experts' opinions about the impact of Ms. Mattson's injuries on her employability.

**173**  I start with Dr. Travlos. He recognized Ms. Mattson's efforts to maintain the status quo in her chosen profession. He wrote this:

Ms. Mattson has tried to continue working, with great difficulty. When one observes her moving her shoulder, it is clear that she could not possibly fulfill all the duties of a kinesiologist and personal trainer. She has marked restrictions and, although she can show people what to do, she cannot in fact undertake the full duties of her occupation. It is my opinion that Ms. Mattson must look for an alternate career pathway.

I would recommend that Ms. Mattson be seen by a vocational counselor. Her future vocational endeavours must find occupations that allow for general regular body movements and cannot just be sedentary and office-based. For example, sitting in an office working at a computer all day would not be something that she could tolerate because of the pain. Chronic pain patients require the ability to change position, move around and vary their activities in order to accommodate the pains. Ms. Mattson therefore needs to find an occupation that is sedentary to light and that allows for regular variation of daily activities.

It is my opinion that Ms. Mattson will not be able to work [full-time] and will have to work a reduced workload if she is to better manage her pains. It is my expectation that a 0.6 full-time equivalency (three days a week) is likely the functional level that she will be able to manage and control her symptoms. Working longer hours than that will inevitably start to cause escalation in pain and progressive decline in functional abilities. The latter could result in having to go off work entirely. In other words, if she worked longer hours she is at risk of not being able to work at all. Managing a better workload in a more appropriate work environment with reduced work hour will allow her to control her pain and thus continue to work in that capacity over time.

**174**  During cross-examination, it was suggested to Dr. Travlos that Ms. Mattson's residual work capacity would be increased by 20% if she engaged with mental health treatment, including newer forms of medications. I have reviewed Dr. Travlos' testimony in this regard and I do not agree that Dr. Travlos' evidence can be interpreted in the way suggested by the defendant. Rather, Dr. Travlos indicated that with some improvement, her work capacity would be 50-70% of full-time employment. However, he testified there was a risk that having her work too much would cause increased stress and escalating pain and a need for her to take time off. He described it this way: "This is a very driven woman and she is trying her best to do what she can do."

**175**  In short, he testified that it was his opinion she could not work beyond three days a week without escalating pain.

**176**  Similarly, Dr. Dhawan recognized Ms. Mattson's ongoing struggles, even working at 40% capacity. He wrote:

I next saw her on April 4, 2018. She was quite frustrated with ongoing pain and dysfunction of the right neck and shoulder girdle. Fortunately, her right shoulder injection had helped her partially for a couple of months and she was pleasantly surprised. Lately she was having a lot of right-sided neck pain and headaches and it was becoming difficult for her to work, even at 40% capacity, as a kinesiologist. Clearly, she could not sustain this profession long term and I gave her a note that she should retrain and have a vocational assessment done.

. . .

She is functioning at a much reduced capacity; even after her first baby was delivered she could only get back to about 40% capacity it seems, working two to three days a week with a very helpful and accommodating employer. If she were to lose this employment I do not think she would be competitive in the job market to obtain and retain a job as a kinesiologist. She will have to undergo a functional capacity evaluation and a vocational assessment to see what she can do long term. Certainly, her current position as an active kinesiologist is not feasible. She may have to work part time, employ assistants to do the physical aspects of training clients, and do more administrative work.

**177**  Dr. Dhawan was cross-examined about a perceived inconsistency between Ms. Mattson's performance in the functional capacity evaluation and her ability to continue working as a kinesiologist. Dr. Dhawan maintained his opinion regarding her work capacity and ability to perform as a kinesiologist, explaining that Ms. Mattson "gives her best" but in a work setting, day after day, she could be quite impaired by the end of the week. He added that "these things have limitations in real life situations."

**178**  Ms. Mattson met with Mr. John Lawless, a vocational rehabilitation consultant in September 2018. In his view, maintaining her position at the Apollo clinic would be the least disruptive way forward but he believed she was no longer suited for her work as a kinesiologist, writing:

To conclude, Ms. Mattson is not suited for her work as a Kinesiologist. She can only do it part-time and over the long run might not be capable of even that. She is still young and bright and so has alternate prospects, yet alternate occupations may not be any better than what she is doing now. Thus her best option may be to remain as she is, working two days a week. Vocational Counselling is advised.

**179**  The defendant takes a very different view of Ms. Mattson's future earning capacity. The defendant agrees that Ms. Mattson is entitled to approximately $90,000 under this head of damages. However, the defendant took a somewhat contrary position in the written submission stating as follows:

The prognosis for her chronic pain has not been made as Dr. Travlos defers to colleagues in Psychiatry.

So, if the Plaintiff is physically capable of medium work, but is prevented from full-time work due to stress and anxiety and those symptoms will improve, the Plaintiff should eventually be able to return to full-time work.

In contrast to the reports of Dr. Dhawan and Dr. Travlos reports, the Defendant notes Michal Dydula who evaluated functional capacity and had the benefit of seeing the plaintiff most recently. He does not opine that the Plaintiff is now disabled from her vocation:

*"Ms. Mattson demonstrated the ability to lift a Medium Physical Demand Characteristic (PDC). She also demonstrated the ability to push at the Heavy PDC and pull at the Heavy PDC." [Exhibit 4, Tab 4 page 12]*

The Defendant submits that the opinion of Dr. Dhawan regarding the Plaintiff's long-term capacity to work is logically and fundamentally flawed. Dr. Dhawan provides evidence that, in his opinion, the Plaintiff will not return to full-time work. But this opinion is not persuasive.

**180**  I will return to this submission after I review the legal principles.

**2. *Future Earning Capacity -- Legal Principles***

**181**  An award for loss of future earning capacity is appropriate where the plaintiff has established a "real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32 [*Perren*]. The loss is to be assessed based on the probability of the occurrence of future events.

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

**183**  Justice Fisher (as she then was) summarized the principles to be considered in determining a claim for loss of future earning capacity in *Chappell v. Loyie*, [*2016 BCSC 1722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KT4-DY51-JW5H-X0HM-00000-00&context=) at paras. 222-225:

[222] An award for future loss of income is to compensate a plaintiff for his loss of earning capacity. This kind of loss is also proven, not on a balance of probabilities, but if the plaintiff establishes that it is a real and substantial possibility that he will suffer a future income loss: *Athey* at para. 27.

[223] General factors for courts to consider in assessing a loss of earning capacity were set out in *Brown v. Golaiy* [*(1985), 26 BCLR (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (SC) at para. 8:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[224] These factors must be considered in the context of each case in order to determine what a particular plaintiff would realistically have done in the future had the injuries not occurred. If the plaintiff proves a real and substantial possibility of a future event leading to an income loss, that loss may be quantified either on a capital asset approach (where the loss is not easily measurable) or an earnings approach (where it 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. This assessment should also take into account both positive and negative contingencies to be given weight according to their relative likelihood: *Cook* at para. 218.

[225] A future loss of capacity may be established even where a plaintiff continues in the same job and continues to earn the same income as he did before the accident: *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 BCLR (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (CA); *Chang v. Feng*, [*2008 BCSC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=). However, unless there is evidence that the plaintiff is disabled from performing some of his duties, or is unable to perform a realistic occupation, a future loss will not be proven: *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=); *Perren*, at para. 32; *Kathuria v. Wildgrove*, [*2015 BCCA 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60WP-00000-00&context=) at para. 34.

**184**  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.) at para. 8 [*Brown*]; *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=) (S.C.) at para. 24 [*Pallos*]; and *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at paras. 18-19.

**185**  The assessment will necessarily involve a comparison between what the plaintiff would probably have earned if the accident had never occurred and what she probably will earn having suffered the injuries in the accident: *Kondor v. Shea*, [*2014 BCSC 2146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4P7-00000-00&context=) at para. 89.

**186**  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.

**187**  Insofar as possible, the plaintiff should be put in the position 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.

**188**  There are two possible approaches[**4**](#Forward_fnref_fnr-4) 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* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

**3. *Has a loss of earning capacity been proven*?**

**189**  The first issue to determine is whether Ms. Mattson has proven a loss of earning capacity. The defendant concedes that she has: "the defendant admits that the plaintiff has suffered a loss of future earning capacity, and is entitled to compensation for this. However, the defendant says that the quantum of this award should be much less than is claimed by the plaintiff."

**190**  I am satisfied that the evidence demonstrates a diminished ability to earn income in the future. In other words, there is uncontradicted medical evidence of a partial physical disability, which could have an effect on Ms. Mattson's capacity to work. This is so despite Ms. Mattson's efforts to maintain her work hours in the two years immediately following the accident.

**191**  Ms. Mattson described the enormous effort required to persevere with her employment responsibilities. She resisted reducing her work hours as recommended by those treating her. Although not in dispute, I am satisfied, based on the totality of the evidence, that there is a real and substantial possibility of a future event leading to income loss. In other words, I am satisfied that there is cogent evidence that demonstrates Ms. Mattson's earning capacity has been reduced.

**4. *Assessment of loss of future earning capacity***

**192**  I agree that, in the circumstances presented here (particularly with a defined work history such as Ms. Mattson's) that the earnings approach assessment is preferable. Therefore, the task is to conduct a valuation, involving a comparison of the likely future of Ms. Mattson absent the accident with her likely future now that it has occurred. Under these two scenarios, I must ensure overall fairness and reasonableness of the award after taking into account all of the evidence.

**193**  I have considered the vocational evidence presented, including the opinions about the amount of time Ms. Mattson will be able to work in the future. I am satisfied that Ms. Mattson will be able to return to work, after this maternity leave, at 60% capacity but not as a kinesiologist. I say this reluctantly as Ms. Mattson has resisted giving up her chosen profession. That said, the medical evidence demonstrates that she will be unable to carry forward in her current position. I have based this determination primarily on the medical opinions of Dr. Dhawan and Dr. Travlos. She was working as a kinesiologist at 40% capacity before her maternity leave commenced in 2019 and she struggled - even at two days per week. Based on the evidence, the most probable alternative employment is as a recreational consultant.

**194**  In this case, the defendant actually gains the advantage of a determined young earner doing what she can to regain some semblance of her former earnings.

**195**  Ms. Mattson presented a number of scenarios for assessing any loss of future earning capacity. Those scenarios suggest an award for loss of future earning capacity of $1,235,000-$1,354,000. In support of these scenarios, she relies on Mr. Peever's earnings calculations.

**196**  The defendant submits that the plaintiff has a far greater residual earning capacity and may be able to resume full-time employment. In my view, the evidence, even that of Dr. Kendall and the defendant's vocational expert, does not support such a finding. Dr. Kendall was of the opinion that she needed to go to a chronic pain clinic to develop pain management techniques. He remained guarded about her work activities writing:

Whether she can continue to work at this time is difficult to say. I note that her inability to work full-time is causing her great distress and I worry that taking her off work will make this situation worse. However, should she continue to work, she should be provided with some accommodations to allow her to work in a more pain-free manner. I note that Dr. Dhawan has suggested that she requires a career change, although I am not convinced at this time that is completely necessary. Given the fact that all of her investigations to date have proven to be negative (i.e. no apparent cause for her ongoing pain), the prognosis remains optimistically guarded that some improvement over time may occur.

[Underlining added.]

**197**  In his testimony, Dr. Kendall seemed to agree that Ms. Mattson's guarded prognosis may limit her in the future even if she was able to maintain her career as a kinesiologist. There was one assumption that Dr. Kendall made in forming his opinion that I find troubling: he assumed that "likely for the first year, she experienced no symptoms referable to the right shoulder. In particular, there was no evidence of winging of the scapula." During his cross-examination, Dr. Kendall explained his statement "no symptoms" was referring to the lack of winging or shoulder dysfunction. However, in my view, this assumption, even as explained, was inconsistent with the totality of the evidence on this point, including the evidence from Ms. Mattson.

**198**  I am satisfied that, based on the totality of the vocational and medical evidence, Ms. Mattson has been rendered less capable overall of earning income because of her physical limitations caused by the accident. I am also satisfied that she could be less marketable as a kinesiologist and is less valuable to herself as a person capable of earning income in her chosen vocation. I have also accepted that she is unable to perform her duties as a kinesiologist. Of those occupations proposed, I have accepted that recreational consultant is perhaps the best suited for her future employment that will allow for an increased working capacity (from 40% as a kinesiologist to 60% as a recreational consultant).

**199**  I have thus assessed her loss of future earning capacity by relying on Mr. Peever's calculations of full-time employment working to age 65 years as a kinesiologist ($2,073,800) less her residual earning capacity (from table 5-A of $719,000) for a total of $1,354,800.

**200**  I agree with the plaintiff that the negative contingencies may or may not be fully reflected in this calculation when I consider the financial participation in the Reflex Supplements business, wholly disregarding the evidence about a policing career, and there was a very real possibility that she would work past age 65.

**201**  Taking into account positive and negative contingencies and adjusting the calculation accordingly, I award $1,350,000 for loss of future earning capacity.

**D. Cost of Future Care**

**202**  Insofar as is possible, Ms. Mattson is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition. When full restoration cannot be achieved, the court must strive to ensure full compensation by ensuring adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 84 (S.C.) [*Milina*]; *Williams (Guardian ad litem of) v. Low*, [*2000 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X038-00000-00&context=) at para. 48; *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; and *Gignac v. Rozylo*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 29-30.

**203**  The test for determining the appropriate award for the future care is objective, and must be based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 79; and *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.

**204**  The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. However, the award may also be reduced or increased based on the prospect of improvement or deterioration in the plaintiff's condition. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 253. Again, assessing a future cost of care award is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=) at para. 91.

**205**  Pamela Russell, an occupational therapist, assessed Ms. Mattson's future care costs in November 2018. In her report, Ms. Russell explained the basis for each of her recommendations and testified that the recommendations were based on the medical information she reviewed and her interview and at-home assessment of Ms. Mattson. In his costs of future care report, Mr. Peever set out the total present value of Ms. Russell's assessment as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Table Description** |  | **Total Present Value of** **Costs of Future Care** |  |
| Table 3-A: Low Cost Estimates Table 3-B: High Cost Estimates |  | $370,296 $535,149 |  |

**206**  Ms. Mattson seeks $475,000, being the midpoint between the estimates and taking into account an allowance for some form of retraining in the future.

**207**  The defendant separates housekeeping from the cost of future care and submits that $35,000-$75,000 should be awarded generally. As for the loss of housekeeping capacity, the defendant submits an award of $10,000 is appropriate.

**208**  I turn to consider the future care claim and whether the items claimed are medically justified on the medical evidence.

**209**  In describing the state of her injuries, Dr. Travlos addressed her capacity for housework and activities of daily living. He wrote:

Ms. Mattson remains very restricted in her capacity to be active with her dominant right upper extremity. She has significant pain and dysfunction that limits the use of the arm. She remains with significant restrictions in function of her dominant right arm. These restrictions include vocational, avocational and recreational activities. In essence, she is now predominately left-handed with some additional assistance from her right hand, but no significant use of the right upper extremity from the shoulder level. She can use the forearm, wrist and hand easily, but that is all. As a result, activities around the home other than light activities will need assistance, and any type of yard activities will almost certainly require someone else to do for her. Recreational activities such as the plethora of physical activities that Ms. Mattson once participated in are no longer within her reach. Optimistically, she should improve, but this all remains to be seen.

**210**  In his second report, Dr. Travlos again commented on her marked restriction for day-to-day tasks and wrote:

Ms. Mattson remains with marked restriction in day-to-day living, recreational and vocational activity levels. The shoulder remains dysfunctional and restricts all activities that she can participate in. Unless there is marked improvement in the functional use of the arm, her activity level will remain much as is. At this point in time, I am expecting her symptoms to persist and her overall activity level to continue much as is. The above interventions should allow for improved quality of life, but may not materially change what her functional level will be. It is my expectation that she will remain with restrictions in and around the home, and she will remain with marked limitations in her previous level of recreational activity.

**211**  Similarly, Dr. Dhawan noted the impact of her condition on daily living, stating:

I do not think her condition is going to change overall from here on; she has plateaued but she may require once in a awhile cortisone injections to the right cervical spine and right shoulder, but all other treatments have failed. She will have to manage her pain when she is not pregnant with painkilling medications, anti-inflammatories and muscle relaxants as tolerated. She should maintain range of motion of the neck and shoulder with regular fitness and exercise and a stretching program and periodic massage therapy. She will require assistance for heavy household chores and overhead work indefinitely.

**212**  I accept the opinions of Dr. Dhawan and Dr. Travlos regarding Ms. Mattson's requirements in the future. I am satisfied that the medical evidence establishes an entitlement to future care costs sought by Ms. Mattson as set out in the table I have prepared below. I will not review the medical evidence for each item particularized. My findings regarding cost of future care are based on the notion that Ms. Mattson will be working at three days per week and maintaining that level of work will only be manageable if certain supports, such as massage therapy, physiotherapy, pain medications and support with housekeeping tasks, are put into place.

**213**  Dr. Travlos and Dr. Dhawan made some recommendations to help the plaintiff manage her pain and the psychological complications related to her recovery. Counseling support was recommended and Ms. Russell estimated $200 per hour for 26 sessions. I find that these services are medically justified and accept that the rate and number of sessions is reasonable. These services are expected to be used within the next year.

**214**  Almost all of the medical experts recommended that Ms. Mattson obtain the assistance of a vocational rehabilitation firm, both now and in the future, on the basis that she will be unable to function in her current employment capacity. The defendant agrees that the plaintiff is entitled to some vocational support. I am satisfied that these services are medically justified and have found that the lower end of the range is reasonable.

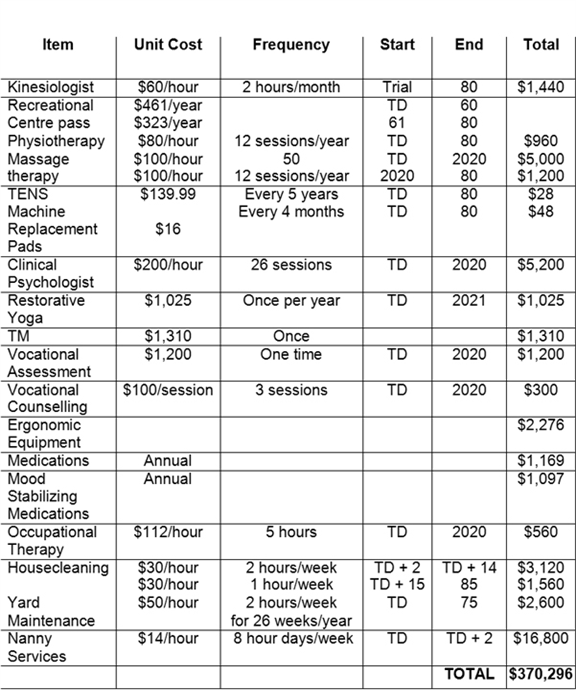
**215**  In Ms. Mattson's circumstances, and as suggested by Dr. Dhawan and Dr. Travlos, Ms. Mattson will benefit greatly from the physical and psychological benefits of suitable physical activity. She was committed to an active and healthy lifestyle before the accident. Based on the medical evidence presented, continuing with some form of physical activity, suited to her current physical condition, will benefit her. She has benefited from exercise-related therapy in the past, to treat her accident-related injuries, and will need to continue this for the rest of her working life in order to best manage her pain. At Dr. Travlos' recommendation, she has been working with a physiotherapist to deal with the scapular injury. This treatment will continue to be necessary for recovery. Despite her own expertise in this regard, she could benefit from a kinesiologist's assistance in recommending exercises (and monitoring performance), and treatments by a physiotherapist, as recommended by Dr. Travlos. I find that these costs are medically justified and have granted an award, as reflected in the table below, for a kinesiologist, physiotherapy, massage therapy, some equipment and a recreational pass at the lower end of Ms. Russell's range. In my view, these expenditures are reasonable and medically justified.

**216**  Dr. Travlos noted the benefits of ongoing pain medication and mood stabilizers. I find that these are medically justified and have accepted the lower estimates provided by Ms. Russell as reasonable.

**217**  I have considered the housekeeping, yard work and childcare expenditures and the recommendations made by Dr. Dhawan. I am satisfied that Ms. Mattson will require support for each of these items and that they are medically justified on the totality of the evidence presented. I have accepted the lower estimates provided by Ms. Russell as reasonable.

**218**  Summing the items of future care costs I have found to be medically justified, I find that the plaintiff is entitled to a total award of $370,296[**5**](#Forward_fnref_fnr-5) to address her costs of future care caused by the accident.

**219**  Again, the majority of the items specified below have been awarded in an effort to support Ms. Mattson's return to employment and enable her to earn an income. I am satisfied that Ms. Mattson has established, on the medical evidence, the necessity of these specified items:



**E. Special Damages**

**220**  Ms. Mattson seeks special damages in the amount of $15,935.66. The defendant agrees with that amount, save and except for prescriptions relating to cold sore medication ($216.42).

**221**  Ms. Mattson provided an explanation at trial for incurring the cost of cold sore medication and I am satisfied that it was reasonable in the circumstances. As such, I award special damages in the amount claimed.

**F. Tax Gross-up**

**222**  The parties have agreed that the calculations necessary for a tax gross-up be reserved until after judgment.

**VI. SUMMARY**

**223**  In summary, damages are awarded as follows:

|  |  |  |
| --- | --- | --- |
| 1. Non-Pecuniary Damages | $150,000 |  |
| 2. Past Loss of Earning Capacity | $71,750 |  |
| 3. Loss of EI benefits | $6,888 |  |
| 4. Loss of Future Earning Capacity | $1,350,000 |  |
| 5. Future Cost of Care | $370,296 |  |
| 6. Special Damages | $15,935.66 |  |
| 7. Tax Gross Up Deferred |  |  |
| **Total:** | **$1,964,869.66** |  |

**224**  If the parties are unable to agree on costs, they may speak to the issue.

**225**  At the commencement of the closing addresses, counsel provided helpful written submissions, for which I am grateful.

J. WINTERINGHAM J.

[**1**](#Backward_fnref_fnr-1) At the time of the accident, Ms. Mattson's family doctor was on leave and Dr. Somani was the replacement.

[**2**](#Backward_fnref_fnr-2) During the trial, the plaintiff played a video-recording depicting the right scapular winging and showing abnormality of the right upper quadrant on her back.

[**3**](#Backward_fnref_fnr-3) The defendant takes the position that house cleaning and yard maintenance should be dealt with separately as a loss of housekeeping capacity as opposed to an award for cost of future care.

[**4**](#Backward_fnref_fnr-4) The defendant suggested a third way to assess loss of future earning capacity. However, I have determined that I am bound to follow the methodology as reiterated in *Pallos and Brown*.

[**5**](#Backward_fnref_fnr-5) I have attempted to incorporate the figures used in counsels' written submissions and the Russel report. If there is disagreement about my calculations, counsel are granted leave to speak to the calculations I have made.

**End of Document**

[***Roback v. University of British Columbia, [2007] B.C.J. No. 484***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Koenigsberg J.

Heard: January 25 - 26, 2007.

Judgment: March 9, 2007.

Vancouver Registry No. S023741

**[2007] B.C.J. No. 484** | [*2007 BCSC 334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21Y-00000-00&context=) | [*277 D.L.R. (4th) 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21Y-00000-00&context=) | [*156 A.C.W.S. (3d) 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21Y-00000-00&context=)

Between Michael Gordon Roback, Ph.D., Plaintiff, and The University of British Columbia, Defendant

(55 paras.)

**Case Summary**

**Civil procedure — Disposition without trial — Dismissal of action — Action unfounded in law — Application by the defendant to determine questions of law allowed — Contract was not created between the parties when the plaintiff applied for employment with the defendant — Defendant did not owe the plaintiff a duty of care when the plaintiff submitted his application — Action was dismissed.**

**Contracts — Formation — Non-contracts — Where subject matter non-existent or not ascertainable — Application by the defendant to determine questions of law allowed — Contract was not created between the parties when the plaintiff applied for employment with the defendant — Action was dismissed.**

**Professional responsibility — Professions — Other — Teachers — Application by the defendant to determine questions of law allowed — Contract was not created between the parties when the plaintiff applied for employment with the defendant — Defendant did not owe the plaintiff a duty of care when the plaintiff submitted his application — Action was dismissed.**

**Tort law — *Negligence* — Duty of care — Application by the defendant to determine questions of law allowed — Defendant did not owe the plaintiff a duty of care when the plaintiff submitted his employment application — Action was dismissed.**

|  |
| --- |
| Application by the defendant University of British Columbia to determine specific points of law -- University published an advertisement that invited applications for the position of assistant professor in its creative writing department -- Roback applied for the position but was unsuccessful -- He sued the University in contract and tort -- He claimed that by submitting his application and not being selected his contractual rights were breached and a tort was committed against him -- Two points of law were to be determined -- First was whether a contract arose from Roback's application -- Second was whether the University owed Roback a duty of care when he submitted his application -- HELD: Application allowed -- No contract arose between the parties at any time from the publication of the invitation, contained in the advertisement, to apply for the position -- Advertisement was not meant to induce specific performance -- University did not promise anything or make any representations related to the hiring process -- Advertisement did not provide a sufficient basis to ascertain the essential terms of a contract -- It was highly unlikely that an employer and a job applicant intended to initiate contractual relations simply by the employer advertising a job vacancy and by the applicant submitting a resume -- No duty of fairness was owed to Roback when he was invited to apply for the position -- To impose such a duty would create a novel cause of action -- Negligent misrepresentation did not apply because this case did not involve misrepresentation -- No duty of care was owed by the University -- Its refusal to hire Roback or to consider entering contractual relations with him did not give rise to any liability in tort -- Based on the foregoing Roback's action was dismissed -- He was at liberty to file a statement of claim that would give rise to a cause of action. |

**Statutes, Regulations and Rules Cited:**

Human Rights Code, *R.S.B.C. 1996, c. 210*

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

Ontario Human Rights Code, R.S.O. 1970, c. 318

Public Service Employment Act, R.S.C. 1970, c. P-32

Rules of Court, Rule 19(24), Rule 34, Rule 34(1), Rule 34(2)

**Counsel**

Appearing on his own behalf: G. Roback, Ph.D..

Counsel for the Defendant: R.W. Sieg.

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| --- |
| **KOENIGSBERG J.** |

**1**   This is a hearing pursuant to Rule 34 of the for the determination of specific points of law which arise from the pleadings of the parties. These points of law were specified by Martinson J. by order dated May 29, 2006. Four points of law were initially specified but two of the four were abandoned by the parties before this hearing. Thus, the points of law for disposition are:

1. whether a contract between the plaintiff and defendant arose from the plaintiff's application for the position of Assistant Professor in the defendant's Creative Writing Department of the Faculty of Arts (the "position");
2. whether the defendant owed the plaintiff a duty of care when the plaintiff submitted his application for the position.

**2**  Lengthy argument and numerous authorities were submitted to the court, orally and in writing. I have carefully considered the authorities submitted and the arguments advanced. My conclusion is that on the undisputed facts of this case, and having particular regard to the advertisement for the position published by the University of British Columbia, no contract arose between the plaintiff and the defendant at any time with respect to the publishing of the invitation to apply for the position by UBC and the application for it by the plaintiff. The advertisement in question states:

CREATIVE WRITING

UNIVERSITY OF BRITISH COLUMBIA - Faculty of Arts. The Department of Creative Writing invites applications for a tenure-track appointment at the Assistant Professor rank commencing July 1, 1995. Appointment may be considered at a higher rank for a woman with exceptional qualifications. M.F.A., or equivalent, preferred. Salary commensurate with qualifications and experience. This position is subject to final budgetary approval. The successful candidate's primary roles will be as a teacher of screenwriting to graduate students and senior undergraduates, and as an active, energetic liaison with the Film Division of the Theatre Department, in particular to help get student work produced. The candidate should also have writing experience in another genre and should have had work in that genre published or produced. Candidates should have worked with and expanded opportunities for student writers, as well as having had experience in the teaching of workshops and tutorials. Candidate should have a strong screenwriting credits and some production knowledge. Applications, including a curriculum vitae and the names and addresses of three references, should be sent to Professor Bryan Wade, Acting Head, Department of Creative Writing, U.B.C., Vancouver, B.C. V6T 1Z1 by January 31, 1995. U.B.C. welcomes all qualified applicants, especially women, aboriginal people, visible minorities, and persons with disabilities. In accordance with Canadian immigration requirements, this advertisement is directed to Canadian citizens and permanent residents of Canada.

**Facts and Law in Relation to the First Point of Law**

**3**  The plaintiff commenced this proceeding against the defendant University of British Columbia ("UBC") in relation to a hiring competition conducted by the University in the summer and fall of 1994 and 1995. The competition was for a position as an Assistant Professor in the University's Creative Writing Department of the Faculty of Arts, to commence July 1, 1995. In or about the summer or fall of 1994, the University caused to be published an advertisement inviting applications for the position. The plaintiff submitted an application for the position. The plaintiff was an unsuccessful applicant.

**4**  The plaintiff advances claims in contract and tort against the University arising from his reply to the advertisement and says that by submitting his application for the position and not being selected for the position there was a breach of his contractual rights and a tort committed against him. The claims are essentially based on the facts that the successful candidate did not have any post-secondary academic degrees. The plaintiff, on the other hand, has six academic qualifications including two M.F.A.'s and a Ph.D. in fields specifically related to the qualifications mentioned in the advertisement.

**5**  The plaintiff filed a writ of summons with attached statement of claim on July 4, 2002. The University filed a statement of defence on July 24, 2002 and an amended statement of defence on December 16, 2004.

**6**  The plaintiff subsequently filed an amended statement of claim on February 7, 2005. There remains an outstanding issue regarding the plaintiff's now further amended statement of claim which I will deal with at the end of these reasons.

**7**  The University's application pursuant to Rule 34(1) of the ***Rules of Court*** for an order that certain points of law be set for hearing was heard by Madam Justice Martinson on March 3, 2006. By order dated March 29, 2006, Martinson J. ordered that the following points of law arising from pleadings be set down for hearing before trial of the plaintiff's action, and that further steps in this proceeding be stayed pending the hearing of those points of law:

1. whether a contract between the plaintiff and the defendant arose from the plaintiff's application for the position of Assistant Professor in the defendant's Creative Writing Department of the Faculty of Arts (the "position");
2. whether the defendant owed the plaintiff a duty of care when the plaintiff submitted his application for the position;
3. whether the plaintiff's tort claims are barred by 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=); and
4. whether this Court can entertain the plaintiff's allegation of a violation of the ***Human Rights Code***, *R.S.B.C. 1996, c. 210*.

**8**  Martinson J. also granted the University leave to bring its alternative application that portions of the amended statement of claim be struck pursuant to Rule 19(24) of the ***Rules of Court***. The point of law engaging the ***Limitation Act*** has been abandoned by the defendant and the point of law engaging the ***Human Rights Code*** has been abandoned by the plaintiff.

**Rule 34 Points of Law Application**

**9**  The University brings this application pursuant to Rule 34 of the ***Rules of Court*** and seeks an order pursuant to 34(2), dismissing the action. Rule 34 provides:

1. A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set down by requisition for hearing and disposed of at any time before the trial.
2. Where, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim ground of defence, set-off, counterclaim or reply, the court may dismiss the action or make any order it thinks just.

**10**  For the purposes of Rule 34, the University must accept as true the facts as alleged in the amended statement of claim. Despite the lack of clarity in the amended statement of claim and although significant portions of that pleading contain, in the University's submission, irrelevant facts and argument, a position with which I agree, the material allegations of fact relating to the points of law are (as Martinson J. held) revealed in the pleadings and are not in dispute. It is therefore not necessary for the Court to hear further evidence to determine those points of law.

**11**  With respect to the points of law arising from the plaintiff's claims in contract and tort, the essential facts giving rise to those claims are as follows: the University published the advertisement inviting persons to submit applications for the position; the plaintiff submitted his application in response to the advertisement; and the University hired another person for the position. The points of law raised in the pleadings are whether a contract between the plaintiff and the University, or a duty of care owed by the University to the plaintiff, arose when the plaintiff submitted his application to the University? The plaintiff alleges that the University breached the contract or was negligent in respect of the hiring of the successful candidate. The defendant submitted that there must first be a determination of whether a contract and a duty of care arose. The plaintiff sought to convince the Court that there is difference between whether contractual relations arose at all on the above noted facts or whether there was a breach of a contract or what kind of contract arose. I respectfully disagree. The first and only question in relation to whether the University is liable to the plaintiff in contract is: is there a contract?

**12**  The determination of whether the University owed any duty of care to the plaintiff is a question of law that is appropriate to be determined under Rule 34. In order to proceed under Rule 34, the allegations of facts in the pleadings must be accepted as true.

**13**  Martinson J. held that insofar as the actual wording of the advertisement is relevant to the points of law and their determination, it is appropriate for the advertisement to be produced as it is not in dispute. I agree and I have considered the advertisement in full and appended it to these reasons.

**Breach of Contract**

**14**  Simply put, the plaintiff alleges that he entered into a contract with the University when, in response to the advertisement, he submitted an application for the position. The plaintiff relies on the law relating to unilateral contracts and specifically he relies on the leading case on this subject, ***Carlill v. Carbolic Smoke Ball Co***., [1893] 1 Q.B. 256 (C.A.).

**15**  The plaintiff further alleges that the University breached the contract by hiring a person who allegedly failed to meet the selection criteria for the position, which the plaintiff alleges are set out expressly or impliedly in the advertisement. The University's defence, in part, is that the University did not enter into a contract with the plaintiff when the plaintiff submitted his application for the position.

**16**  The University says that, by causing the advertisement to be published, it did not intend to enter into contractual relations with any person who may have viewed the advertisement and submitted a resume to be considered for the position.

**17**  The University submits that, at most, the advertisement was an invitation to treat or an announcement of the position. The advertisement merely called for individuals to identify themselves as potential candidates for consideration for the position. The advertisement contained no offer or statement that the position would be awarded to an individual submitting an application in response to the advertisement, nor that the candidate with the highest post-secondary degree or degrees would be hired. In fact, the advertisement states "M.F.A., or equivalent, preferred".

**18**  The plaintiff submits that the advertisement constitutes a "promise" or an offer to hire a candidate on "merit" defined, says Dr. Roback, by the achievement of academic credentials of an M.F.A. or equivalent. This then constitutes a form of unilateral contract upon the candidate submitting his resume.

**19**  However, the facts in this case are distinguishable from those in ***Carlill v. Carbolic Smoke Ball Co.*** and the unilateral contract line of cases in which the court enforces a promise (or an offer of a reward) that is made to the general public to induce performance. In the present case, the advertisement was not meant to induce specific performance such as reward cases do. Nowhere in the advertisement does the University promise anything or make any representations relating to the hiring process. The clear purpose of the advertisement was to invite applications: "The Department of Creative Writing invites applications for a tenure-track appointment at the Assistant Professor rank commencing July 1, 1995." The advertisement was an invitation for expressions of interest. Unlike ***Carlill v. Carbolic Smoke Ball Co***., the advertisement does not provide a sufficient basis to ascertain the essential terms of a contract.

**20**  The plaintiff further pleads that a University policy relating to employment equity was, or should have been, incorporated into the advertisement. Based upon that policy, the plaintiff alleges "merit" (which the plaintiff equates to having attained a M.F.A. or a Ph.D. degree) was a criterion for the position and part of the alleged contract formed when a person applied for the position in response to the advertisement.

**21**  The plaintiff seeks to apply an Ontario decision, ***Ontario v. Ron Engineering and Construction (Eastern) Ltd.***, [*[1981] 1 S.C.R. 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1YP-00000-00&context=), [*119 D.L.R. (3d) 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1YP-00000-00&context=), which sets out a tendering process contract analysis to the advertisement. There does not appear to be any reported case in which the ***Ron Engineering*** Contract A/Contract B analysis has been applied or even considered in the employment hiring context. The likely reason for this is that the unique characteristics of, and concerns underlying the tendering process, as well as the rationale underlying the Contract A/B analysis, do not arise in the employment hiring process where a job vacancy is advertised and applicants submit applications or a resume in response.

**22**  The tendering process bears little, if any, resemblance to the pre-employment hiring process. Under tendering law and ***Ron Engineering's*** Contract A/B analysis, "Contract A" comes into existence upon the bidder submitting its bid in compliance with the tender call documents. This obligates the bidder to keep its bid open for acceptance. Therefore, the bidder agrees to be bound by the terms of its bid. It is obvious that the same is not true in the employment context where a person submits a resume or application for an advertised job vacancy. Consistent with the fundamental principle that no one can be forced to work for another against his will, an applicant is free to withdraw themselves from the pre-employment hiring process. Even if the applicant chooses to participate in that process, he/she is free to refuse any offer of employment that the employer might make. This, of course, highlights the essential difference between a tendering process and an employment process. In the employment context, no offer of employment has taken place until after full consideration of the advertisement and the resume.

**23**  Even if a job applicant intends to be bound to accept the job position merely upon submitting his resume to a job advertisement, it is likely not possible to determine what the applicant agrees to be bound to in relation to even the most basic terms of employment (e.g., work hours, rate of pay, vacation entitlement, detailed job duties, etc.). Unlike the tendering process in which the tender call and bid documents are highly detailed, job advertisements typically are brief advertisements or postings that merely provide a brief description of the position (if that), and specify to whom applications may be directed. The lack of detail in job advertisements, such as the advertisement for the position at issue here, do not provide the requisite certainty of terms that necessarily underlies the intention to create contractual relations and the formation of a "Contract A". The result is that a job advertisement is not an "offer" capable of being "accepted" by a job applicant.

**24**  A fundamental criterion for contract formation is the intention to create contractual relations. It is highly unlikely that an employer and job applicant intend to initiate contractual relations simply by an employer advertising a job vacancy and the submission of resume. The Supreme Court of Canada in ***M.J.B. Enterprises Ltd v. Defence Construction (1951) Ltd.***, [*[1999] 1 S.C.R. 619*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41Y-00000-00&context=), [*170 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41Y-00000-00&context=), stated that the important feature for determining whether an invitation to submit tenders goes beyond an invitation to treat and becomes an offer capable of being accepted, is whether the parties intended to initiate contractual relations by the submission of a tender. Indeed, in ***M.J.B. Enterprises*** it was acknowledged that even in the construction tendering context, not every tendering process creates a preliminary contract, (Contract A). The intention to create contractual relations is to be contrasted with a mere invitation to treat, as described in the classic case of ***Carlill v. Carbolic Smoke Ball Co.***:

It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as I think some learned judge in one of the cases has said.

**25**  Establishing the requisite intention to create contractual relations under the ***Ron Engineering*** Contract A/Contract B analysis is highly specific, not only to the construction industry in which the analysis arose, but also, as emphasized by the Supreme Court in ***M.J.B. Enterprises***, to the particular tendering process which must be considered on a case-by-case basis. The law of tenders and the Contract A/Contract B analysis derives from the specific nature and purpose of the tendering process in the construction industry.

**26**  The importance of the special nature of construction tenders underlying the Contract A/B analysis is clearly evident in the Supreme Court of Canada' s Reasons in ***M.J.B. Enterprises***, in which the Court re-visited the law of tenders and ***Ron Engineering***. In ***M.J.B. Enterprises***, the particular issue was whether a "privilege clause" in the tender documents permitted an owner to disregard the lowest bid in favour of any other tender, including a non-compliant bid. Mr. Justice lacobucci for the Court held that there was no express term obligating the owner to award the contract to the lowest valid tender but, in the circumstances of that case, there was an implied term to accept only compliant bids. lacobucci J. expressly did not endorse Estey J. s characterization of Contract A in ***Ron Engineering*** as a unilateral contract, and also stressed that Contract A does not always arise upon the submission of a tender. He remarked at para. 19:

What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

**27**  In determining whether the parties had the requisite intention to create contractual relations, lacobucci J. considered the comprehensiveness of the tender documents, including the Instructions to Tenderers form and the Tender Form. Upon considering the formality of the tendering process, which requires preparation of complex documentation and terms, considerable time and expense, as well as the provision of bid security, lacobucci J. found that the parties had intended to create contractual relations:

As I have already mentioned, whether or not Contract A arose depends upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. In the present case l am persuaded that this was the intention of the parties. At a minimum, the respondent [owner] offered, in inviting tenders, through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant [tenderer] accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the Bid Security. The question to be answered next is the precise nature of the respondent's contractual obligations.

Unlike bidders in a formal tendering process, persons responding to a job posting by submitting a resume or application do not incur the same expenditures of time and money. What is even more stark in contrast between a tendering process and an advertisement for resumes for a potential position is the fact that there is no clear job description or terms for what it is that the person must do in order to be hired.

**28**  Again, important to the Court's application in ***M.J.B. Enterprises*** of the Contract A/B analysis was the purpose underlying the tender process in the construction industry:

A tender, in addition to responding to an invitation for tenders, is also an offer to perform the work outlined in the plans and specifications for a particular price. The invitation for tenders is therefore an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the contractor. The goal for contractors is to make their bid as competitive as possible while still complying with the plans and specifications outlined in the tender documents. [para. 37]

The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contact B. [para. 41]

**29**  Whether the parties intended to initiate contractual relations and enter into a Contract A will therefore depend, in part, on the comprehensiveness (or lack thereof) of the tender call documents. As applied to the present case, the analogous "tender call documents" is the advertisement. The contents of advertisement fall well short of the specificity and detail characteristic of tender calls and reflect the lack of intent to initiate contractual relations and basis upon which the advertisement can be construed as an offer capable of acceptance by the submission of a resume. Further, unlike bidders responding to a tender call, applicants for the position were not required to expend considerable time or resources to be considered for the position, but were requested merely to submit a curriculum vitae and three references.

**30**  Essentially, the plaintiff relies on what he terms an amazing similarity between the tender process cases and employment hiring cases. In my view, there are in fact no material similarities or even a superficial one. The superficial one is only that a potential employer invites potential candidates to apply for hire for a particular job.

**31**  While other material differences are apparent, the two cardinal ones, in my view, are the following: first, there is no promise to hire anyone, and, second, there are no specific requirements which candidates have to meet. The advertisement uses the word "preferred" in relation to "M.F.A.'s or equivalent" and not "required", and nothing else in the advertisement would suggest it means required. All other potential "qualifications" - and by my count there are five altogether - such as "should have writing experience in another genre" (screen writing) and "should have work in that genre published or produced", similarly lacking the wording which translates into a requirement. What is required from potential candidates who wish to apply is a curriculum vitae and names and addresses of three references.

**32**  Dr. Roback analogizes the candidates' investment in applying for the position as including all of the training and academic work done. However, there is no basis for including things done in all of one's life in order to potentially be qualified for any particular job. The rationale for imposing contractual relations on employers who advertise for tenders for say, construction jobs, includes close specifications of exactly what is included in getting the job done. Candidates or bidders, must indicate how they will do the job and for how much. Coming up with estimates when bidding on such jobs is understood to be a highly skilled but also a time consuming job and includes providing potentially valuable information to the potential employer. The fact that a potential bidder may have an M.B.A. or an Engineering degree or have been hired and handsomely paid as a skilled "Estimator" is not part of what is counted as the "investment" in the bid which attracts the imposition of contractual relations.

**33**  A similar analysis is found in a recent British Columbia Court of Appeal decision, ***Powder Mountain Resorts v. British Columbia***, [*[2001] 94 B.C.L.R. (3d) 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61BF-00000-00&context=), [*2001 BCCA 619*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61BF-00000-00&context=). In that case, the salient facts were set out in the reasons of Newbury J.A..

**34**  In their action, the plaintiffs alleged they had been wrongly deprived of an opportunity to pursue a ski resort development proposal for the Powder Mountain area in the Callaghan Valley, near Whistler, British Columbia. They alleged that that deprivation was the result of the breach of a contract ("Contract A" in the parlance of ***R. v. Ron Engineering & Construction (Eastern) Ltd.***), between Powder Mountain Resorts Ltd. ("PMR") and the Province. They alleged such a contract was formed when PMR alone responded to a call by the Province for "expressions of interest" in the development. Alternatively, the plaintiffs alleged the Province was under a duty to negotiate fairly and in good faith with PMR and failed to do so, and that the defendants had made negligent representations and/or interfered unlawfully with PMR's economic interests and contractual relations.

**35**  In 1985, the government issued an advertisement calling for "expressions of interest" which stated that "the Ministry may grant rights to proceed with the development process in accordance with the British Columbia Alpine Ski policy" (para. 11). The policy was stated in general terms. It contemplated a process involving review of expressions of interest that might be received and then, if the process continued, evaluation of a formal proposal, execution of interim agreements to commit to the preparation of further plans and "master" development plans, as well as the execution of a master development agreement. The appellants/plaintiffs were the only party to submit a response by the specified deadline (which response largely consisted of the resumes of the principals and descriptions of the area to be potentially developed as a ski resort) (para. 11). Following years of negotiations between the plaintiffs and the Province, another group presented a proposal which the government considered but, ultimately, the area became part of a provincial park.

**36**  The Court of Appeal's primary focus related to the tort of abuse of office. However, Newbury J.A. (Finch C.J.B.C. concurring) dismissed the plaintiffs' claim that a Contract A arose or that there was a breach of any duty to negotiate fairly and in good faith, stating (at para. 72):

I also agree with Tysoe J. [trial judge] that the plaintiffs' claim based on this cause of action must fail, generally for the Reasons given by him. The invitation for expressions of interest and the plaintiffs' response in June 1 985 did not give rise to a contract of the sort referred to as "Contract A" in Ron Engineering, supra. There was nothing approaching an invitation to tender, or a tender for work or materials of a certain scope, that could have given rise to a contract. In the absence of a contract, no free-standing enforceable duty of fairness arises.

**37**  Mr. Justice Tysoe in his Reasons, [*[1999] 11 W.W.R. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G163-00000-00&context=), [*47 C.L.R. (2d) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G163-00000-00&context=)) considered the Province's advertisement and the plaintiffs' response and opined it was unlikely that the parties intended to initiate contractual relations that would give rise to a Contract A; the advertisement's invitation for proposals was merely an invitation to treat. Of particular importance to Tysoe J. was that the terms of a proposed contract were not set out in the invitation for expressions of interest. Also, the submission of a proposal did not obligate that person to carry through and do the work, nor obligate the Province to allow the development to occur (para. 112). Tysoe J. noted that although a tender giving rise to Contract A may allow for a limited form of negotiation, the final form of contract must be substantially non-negotiable in the form as specified in the tender (para. 107), which was not present. Tysoe J.'s opinion was that the parties' intention was to initiate negotiations which, if mutually satisfactory, would lead to contractual relations.

**38**  The analysis applied by Tysoe J. and Newbury J.A. in ***Powder Mountain*** in rejecting the application of the law of tender, Contract A/B analysis, to the invitation for expressions of interest is applicable to the present case. The plaintiff's response to the advertisement is not analogous to a contractor/tenderer responding to a tender call. The University simply invited the submission of resumes from persons who wished to be considered as potential candidates for the position. Nowhere in the advertisement does it state that the University will hire anyone from the applications received. No terms of a proposed employment contract for the position are specified in the invitation. Importantly, as with any job advertisement, the submission of a resume in response to the advertisement did not obligate the potential candidate to participate further in the hiring process or to accept the position should it be offered, nor did the submission of a resume obligate the University to proceed further with the hiring process or hire anyone for the position. The advertisement was merely an invitation to negotiate or, in other words, an invitation to treat; its purpose was to advise persons of the position and to invite persons who might be interested in the position to notify the University of their interest by forwarding their resume. It was not an offer capable of being accepted to bring into being a contractual relationship between the University and each individual who responded to the advertisement. The University's intention, as is the intention of any potential employer interviewing persons for a job, was to initiate (in effect) negotiations which, if mutually satisfactory, would potentially lead to an offer of employment being made by the University, which if accepted by the candidate, would then result in an employment relationship.

**39**  Also of note from Tysoe J.'s Reasons in ***Powder Mountain*** are his comments relating to why the duty of fairness implied in the tendering process's Contract A is problematic outside the tendering context:

I think it unlikely that Contract A would include an implied term to negotiate in good faith. Canadian law has not generally recognized a duty to negotiate in good faith in commercial transactions. [para. 116]

...

It is more arguable that Contract A contained an implied term of fairness. In the tendering cases, the duty of fairness has been described as "a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others" [references omitted]. In a tendering process, most of the specifications are typically set out in the tender call and the selection of the successful bidder is usually based on price alone. If the person initiating the process has other selection criteria, the duty of fairness requires the criteria to be disclosed to all of the bidders. However, a request for proposals, such as the one in this case, may not contain many, if any, specifications and the selection process is much more subjective in nature because there are many factors other than price which must be considered. Hence, it is much more difficult to apply any duty of fairness to the selection process in a request for proposals and any subsequent negotiations. [para. 117]

**40**  Thus, there is no basis whatsoever to analogize the published invitation by the University to potentially qualified candidates to unilateral contractual situations or Contract A or tender contractual situations. Thus, there is no basis for finding a contract or an intention to be legally bound to anything by the publishing of the advertisement.

**41**  The question raised by the plaintiff in relation to both contract and tort relates to whether there is a separate cause of action based on a concept of "merit". Dr. Roback relies on ***Evans v. Canada (Public Services Commission Appeal Board)***, [*[1983] 1 S.C.R. 582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M286-00000-00&context=), [*146 D.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M286-00000-00&context=), to argue that "merit" or more precisely the "policy" approved by the Board of Governors of UBC in 1990, "that individual merit is the prime criterion for employment for ... the employment of new faculty and staff is *inter alia* the objective of its employment equity policy" is imported into the contract or its common law "duty" in hiring, and is thus on its own justiciable. Dr. Roback submits that ***Evans*** makes a similar analysis of the issue of "merit" in a hiring process justiciable. Suffice it to say that while the issue of "merit" in a hiring process is very much one of the principal issues in ***Evans***, the application of "merit" and its meaning arose under the ***Public Service Employment Act***, R.S.C. 1870, c. P-32.. Thus, this case does not stand for the proposition that failure to hire on "merit" has been created as a stand alone cause of action. That case deals with an examination of the meaning of merit and its application as specifically set out in a statute. It has no application to the situation the Court is faced with here, that is, whether "the employment equity policy" approved by the Board of Governors in 1990 creates a specific and contractually binding meaning in the advertisement of a position at UBC at issue here. Nowhere is the word merit used in the advertisement and no doubt it is not difficult to imply that merit is expected by all parties to be the basis of hiring for a tenure-track position. However, what merit specifically consists of is certainly not specified. Dr. Roback submits merit equals, at a minimum, academic credentials such as an M.F.A. or higher. I do not agree that it can be inferred to be so narrowly defined - even if it were justiciable in this situation which, in my view, it is not.

**Duty of Fairness**

**42**  The plaintiff submits that there is a duty of fairness, in general and in particular, owed to the plaintiff in inviting him to apply for the tenure-track position. The plaintiff appears to submit that UBC owed him a duty of care on a number of tortious bases. The content of that duty of fairness as argued appears to be that the alleged "requirements" set out in the advertisement be applied in the consideration of all candidates and those who did not meet those "requirements" be screened out. In his view, since the person who was hired for the job did not have any post-secondary academic degrees, the criteria or requirements for the job were not utilized and thus criteria other than "merit", as he defines it, were at play. He submits this amounts to negligent misrepresentation and a breach of a generalized duty of fairness. Generally, he alleges ***negligence*** on the part of the University in failing to apply and enforce "merit" and "requirements" in hiring pursuant to the advertisement by the English Department and by various individuals alleged to be responsible for the enforcement of those requirements.

**43**  There is no question that to impose a freestanding duty of fairness in an employment hiring situation like this one would be to create a new or novel cause of action. I will isolate as best I can those aspects of the plaintiff's claim which may fall within the legal classification of ***negligence*** in tort.

**Negligent Misrepresentation**

**44**  Dr. Roback asserts that the advertisement sets out criteria to be met by potential candidates which amount to requirements, including such academic credentials as an M.F.A., or equivalent, preferred. He asserts further that the University's policy, which is labelled policy #2, of hiring on merit as the pre-eminent criterion, is included in the advertisement by implication. Dr. Roback asserts that "merit" must mean academic achievement because it is known that 98% of the faculty at UBC have a Ph.D. I have already found that the advertisement does not state any "requirements". While it may be reasonable to imply on the face of the advertisement that the University will hire on "merit", nowhere does it state that this position "requires" academic credentials to achieve "merit".

**45**  Dr. Roback submits that by hiring someone with only a high school diploma as an academic credential, UBC negligently misrepresented what was required of candidates to successfully apply.

**46**  Thus, in my view, not even the first element of negligent misrepresentation is present, that is, any misrepresentation. Therefore, I will not go on to explore the difficulties of proving reliance and detriment.

**47**  While I cannot clearly discern any other established claim in ***negligence***, I will go on to consider whether the ***Anns*** test for establishing a new or previously unarticulated cause of action in ***negligence*** has been met in this case.

**48**  The law of ***negligence*** requires a plaintiff to demonstrate a duty of care, a breach of that duty and resulting damages. The correct articulation of the duty of care is that set out in ***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.). This is widely known as the ***Anns*** test and has been applied in numerous decisions in this jurisdiction. In ***Kamloops (City) v. Nielson***, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=) at 10-11, the Supreme Court of Canada adopted and restated the test, which can be summarized as follows:

1. is there a *prima facie* duty of care based on foreseeability and proximity (i.e., is there a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the defendant, carelessness on his part might cause damage to the other)?, and, if so;
2. are there policy considerations that ought to negative, reduce or limit the scope of the duty or the class of persons to whom the *prima facie* duty is owed or the damages to which a breach of it may give rise?

**49**  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=), the Supreme Court of Canada reaffirmed the application of the ***Anns*** test, providing further direction on determining whether a duty of care exists and clarifying the types of policy considerations involved at each stage of the test. Writing for the Court, Chief Justice McLachlin and Major J. also endorsed the ***Anns*** framework as useful where a duty of care is asserted in a new or novel situation, as it was in that case. They stated that in such a circumstance, the question is whether the law of ***negligence*** should be extended to the situation before it. In that case it would then be necessary to consider the second stage of the ***Anns*** test.

**50**  The first question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. This case does not fall within, nor is it analogous to a category of cases in which a duty of care has previously been recognized. An employer's refusal to hire or even consider entering into contractual relations with another person (that is, an employer/employee relationship) has been held not to give rise to any liability in tort. In ***Seneca College v. Bhaduria***, [*[1981] 2 S.C.R. 181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M220-00000-00&context=), [*124 D.L.R. (3d) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M220-00000-00&context=), the Supreme Court of Canada considered whether a potentially provable case of discrimination under the ***Ontario Human Rights Code***, R.S.O. 1970, c. 318, could give rise to a common law liability in ***negligence*** or tort. That case is somewhat similar to this case in that, on paper, a highly qualified candidate applied several times for a teaching position at Seneca College and was refused even an interview. The ***Ontario Human Rights Code*** provided for remedies in relation to discrimination on certain grounds which may have been provable on the facts in ***Bhaduria***. However, the court had to consider whether such potential "discrimination" gave rise to a civil cause of action. At p. 194, the Chief Justice said this:

In the present case, the enforcement scheme under ***The Ontario Human Rights Code*** ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the ***Code*** to this Court. The Ontario Court of Appeal did not think that this scheme of enforcement excluded a common law remedy, saying in the words of Wilson J.A. (which I repeat):

Nor does the ***Code***, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather, the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the ***Code*** a matter of ministerial discretion.

I would have though that this fortifies rather than weakens the Legislature's purpose, being one to encompass, under the ***Code*** alone, the enforcement of its substantive prescriptions. It is unnecessary to consider here how far the Minister's discretion is untrammelled, or whether a clue to its character is afforded by the ensuing provisions for appeal to the courts from a decision or order of a board of inquiry.

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the ***Code***.

For the foregoing reasons, I would hold that not only does the ***Code*** foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the ***Code***. The ***Code*** itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

**51**  As can be seen in this decision, aside from the foreclosing of a civil action based on a breach of the ***Code***, the ***Code*** also excludes any common law action based on an invocation of the public policy expressed in the ***Code***. Thus, the expansion of the duty of care sought by the plaintiff in this case clearly finds no comfort in the ***Bhaduria*** case.

**52**  Under the first stage of the ***Anns*** test, the plaintiff has the onus of establishing foreseeability of harm such that in the contemplation of the University, carelessness on its part may likely cause damage to the plaintiff. The plaintiff pleads that, had the hiring process been conducted in the manner and upon the criteria he alleges it should have, he would have been hired for the position, he would have written history on Canadian film industry and revised his Ph. D. thesis, and "probably would have written" a book on Adolph Zuker. The plaintiff also alleges that not being hired for the position was a major factor in other sad occurrences in his life including lack of job security. The plaintiff claims damages for alleged damage to his reputation, his "academic achievement" and "integrity," and lost wages. In my view, neither foreseeability or proximity are appropriate to apply in this particular case. There is a clear absence of a crucial element to establish any applicability of the ***Anns*** test to the case at bar. That is, there is no basis for any finding that the University was careless in hiring the candidate that they did. There is clear evidence they hired that person with care. Simply not applying "merit," as defined by the plaintiff, is not evidence of carelessness.

**53**  I will simply mention the second part of the ***Anns*** test as it may be applied in this particular case as relating to residual policy considerations. The weakness of the relationship between the facts of this case and the first part of the ***Anns*** test leads inexorably into why tort liability would not be extended to a pre-employment hiring process from a policy perspective. It is obvious that to extend it to facts such as these would invite litigation by disappointed job applicants and the court would thus be assuming a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. The potential burden on the courts is obvious when consideration is given to the number of advertisements issued by employers relating to hiring processes for job vacancies to which multiple persons may respond for the positions. Aside from the floodgates issues which is, of course, considerable in this case, it is more important in my view that the court cannot intrude into what is both an objective and highly subjective process between employer and potential employee in determining who is most appropriate for any particular job.

**54**  For the reasons I have set out above I would dismiss the cause of action and the action as currently pleaded by the plaintiff. As I already set out when I gave my decision with reasons to follow, the plaintiff's newly amended statement of claim is not accepted. Dr. Roback is at liberty to attempt to frame a statement of claim which finds a justiciable cause of action currently not dealt with.

**55**  Costs follow the event.

KOENIGSBERG J.

**End of Document**

[***R. v. Kerr, [2012] B.C.J. No. 1841***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2K7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

R.E. Powers J.

Heard: June 19-22 and 25-27, 2012.

Judgment: September 5, 2012.

Docket: 88488

Registry: Kamloops

**[2012] B.C.J. No. 1841** | 2012 BCSC 1311 | 38 M.V.R. (6th) 217 | 103 W.C.B. (2d) 1009 | 2012 CarswellBC 2710

Between Regina, and Todd Gordon Kerr

(90 paras.)

**Case Summary**

**Criminal law — Criminal Code offences — Offences against person and reputation — Motor vehicles — Dangerous operation of motor vehicle — Causing bodily harm — Causing death — Trial of Kerr who was charged with dangerous operation of vessel causing death and bodily harm — Kerr acquitted — Kerr operated speed boat that left bay on dark night — He was not familiar with area, travelling at 30 miles per hour and visibility was 20 feet — Boat struck island near flashing green navigation light — Crown did not prove mens rea — There was reasonable doubt as to whether Kerr's conduct amounted to marked departure from civil norm.**

**Criminal law — Elements of the offence — Mens rea — Trial of Kerr who was charged with dangerous operation of vessel causing death and bodily harm — Kerr acquitted — Kerr operated speed boat that left bay on dark night — He was not familiar with area, travelling at 30 miles per hour and visibility was 20 feet — Boat struck island near flashing green navigation light — Crown did not prove mens rea — There was reasonable doubt as to whether Kerr's conduct amounted to marked departure from civil norm.**

**Criminal law — Evidence — Burden and standard of proof — Standard of proof — Beyond a reasonable doubt — Trial of Kerr who was charged with dangerous operation of vessel causing death and bodily harm — Kerr acquitted — Kerr operated speed boat that left bay on dark night — He was not familiar with area, travelling at 30 miles per hour and visibility was 20 feet — Boat struck island near flashing green navigation light — Crown did not prove mens rea — There was reasonable doubt as to whether Kerr's conduct amounted to marked departure from civil norm.**

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| Trial of Kerr who was charged with dangerous operation of a vessel causing death and dangerous operation of a vessel causing bodily harm. Kerr was operating a speed boat with four passengers when the boat left a bay on a dark night. He was not familiar with the area. He was travelling at 30 miles per hour. Visibility was limited to 20 feet. The boat struck an island, 150 to 300 metres from a flashing green navigation light. One passenger died. Kerr and another passenger were injured.  HELD: Kerr acquitted.  The Crown proved the actus reus of the offence. Kerr's driving, viewed objectively, was dangerous in the circumstances. However, the Crown did not prove the mens rea. There was reasonable doubt as to whether Kerr's conduct amounted to a marked departure from the civil norm. He proceeded at 30 miles per hour because he believed that he had clear water ahead of him. He did not understand the significance of the flashing green light. He believed that he was following the same path that he took when he entered then bay. He was not aware of the existence of the island. |

**Statutes, Regulations and Rules Cited:**

Canada Ship Act, [*S.C. 2001, c. 26*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9S1-JKHB-649S-00000-00&context=),

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Collision Regulations, [*C.R.C., c. 1416, Rule 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5FBX-WFV1-FBFS-S52D-00000-00&context=)[*, Section I*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5FBX-WFV1-FBFS-S52K-00000-00&context=)

Criminal Code, R.S.C. 1985, c. C-46, s. 249, s. 249(1)(a), s. 249(1)(b)

**Counsel**

Counsel for the Crown: N. Flanagan.

Counsel for the Accused: J.I.S. Sutherland.

**Reasons for Judgment**

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| **R.E. POWERS J.** |

**Introduction**

**1**  Mr. Kerr is charged with one count of dangerous operation of a vessel causing death and two counts of dangerous operation of a vessel causing bodily harm (s. 249 (1)(b) of the *Criminal Code* (the "*Code*").

**249.** (1) Every one commits an offence who operates

...

(*b*) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea; [My emphasis]

**2**  These are serious offences and although there is no minimum sentence the maximum sentence is ten years in jail for causing bodily harm and 14 years in jail for causing death.

**Background**

**3**  Mr. Kerr is 43 years of age now, and on August 2, 2008 he was 39 years of age. He has operated boats for approximately 20 years and owned a number of different boats himself. He has no formal instruction, but learned from friends and their parents, and his father. Most of his experience is on the coast of British Columbia.

**4**  In August of 2008, he had limited understanding of the meaning of navigation buoys and beacons. He believed that they marked hazards such as land or shallow water, and that a person should navigate around them or stay away from them. He did not understand the significance of the different coloured lights on beacons or buoys. Prior to August of 2008, he had operated vessels at night on the coast without encountering any problems.

**5**  On August 1, 2008, at the request of a friend who owned a 30' Baja Outlaw inboard speed boat, he, his friend, and one other man, hauled the boat from the Lower Mainland to Blind Bay on Shuswap Lake. The boat was launched from its trailer and fuelled at Blind Bay. Mr. Kerr went below into the area called the "cuddy" cab. The owner of the boat, Mr. Baird, operated the boat while the other individual passed luggage and sleeping bags, etc. down to Mr. Kerr. Mr. Kerr was busy sorting those things out in the cuddy cab while the boat was underway. The boat was well out of Blind Bay before Mr. Kerr came back to the cockpit area.

**6**  Copper Island is a large island outside the entrance to Blind Bay. It is just under one nautical mile across. It has steep, rocky sides and is uninhabited. The only light on Copper Island is a green flashing navigation light which operates at night. This is on the southeast end of Copper Island. Across from Copper Island, on the northeast edge of Blind Bay, at a place called Reedman Point, is a navigation light that flashes red at night. They indicated a safe passage for navigating up the lake. Moving in an easterly direction would be considered up-stream because the lake flows from east to west towards the ocean. An individual proceeding up-stream should keep the flashing red light on their right, or starboard side, and the flashing green light on their left, or port side. Mr. Kerr was below and did not see the island when they passed it on August 1, 2008.

**7**  The west end of Copper Island is not marked. It is possible to travel on the north side of Copper Island between Copper Island and the north shore of the Shuswap Lake. This is a wide, unmarked channel.

**8**  Mr. Kerr, Mr. Baird, and the other gentleman, proceeded east along Shuswap Lake until they met with some friends who had rented a houseboat. There were probably 15 or 20 people on that houseboat.

**9**  August 2, 2008 was a hot, clear summer day on the Shuswap Lake. Mr. Kerr used the boat to take people from the houseboat to and from a floating store at a location referred to as the "narrows on the Shuswap Lake." He also took people for rides on the boat. The speeds varied. I am satisfied that Mr. Kerr was comfortable and felt confident in operating this particular boat.

**10**  At approximately 10:30 p.m. on August 2, 2008, Mr. Baird told Mr. Kerr he was going to pick up two young ladies and asked if Mr. Kerr was coming along, and asked if anybody else would like to come.

**11**  Ms. Jennifer Jankowski decided to go for a ride. She had been out on the boat with Mr. Kerr earlier in the day. Ms. Jankowski felt comfortable with the manner in which Mr. Kerr had operated the boat during the day. He appeared to be competent and conscientious. It was a very dark night. Mr. Baird was operating the boat as they left the houseboat, but after about 15 or 20 minutes it was apparent he was having difficulty seeing, difficulty understanding the significance of the various lights along the shore, as well as lights of other boats approaching. They had to stop at least twice because they thought they saw something in the water, but were not sure. He asked Mr. Kerr to drive the boat. Mr. Kerr had not intended to operate the boat and only went along because he felt an obligation to do so. However, he could see that Mr. Baird was having difficulty and felt safer operating the boat himself. In the darkness, they were having trouble finding Blind Bay, and there was some confusion between Mr. Baird and the two young ladies that they were attempting to meet as to where the meeting would take place.

**12**  Neither Mr. Kerr nor Ms. Jankowski saw Copper Island as they proceeded in a westerly direction along the north shore of the lake. Copper Island would be to their left. Ms. Jankowski could only say that she had a sense of something in the darkness, but could not actually see anything. They followed the shore by observing the lights from cabins, campfires, and the road along the shore. When they passed Copper Island, they could see some lights on what turned out to be Blind Bay. They entered Blind Bay, but still were not sure where the marina was where they were going to meet the young ladies. They left Blind Bay and continued in a westerly direction, this time on the south shore of the lake. They eventually realized they had gone too far and returned to Blind Bay. They did locate the marina and the two young ladies.

**13**  Again, at the request of Mr. Baird, Mr. Kerr was operating the vessel when they left Blind Bay. At some point, there was a disagreement between Mr. Baird and Mr. Kerr about which direction they should be going. Mr. Kerr's evidence is that he followed the shore of Blind Bay until he felt he was out of Blind Bay. Mr. Baird then tapped him on the shoulder and he brought the boat to a stop. Mr. Baird gestured that they should go back in towards Blind Bay. Ms. Jankowski observed this exchange and thought that Mr. Baird was pointing across Blind Bay to where she could see shore lights. Mr. Kerr was adamant that they should proceed straight ahead. Ms. Jankowski was not familiar with boating or the area. She did not think they were proceeding along the same route they had followed when they came in and thought they should go off to their left more; that is to their port side. However, she believed that she may have simply been confused. Her evidence is that the exchange between Mr. Kerr and Mr. Baird was heated, and that they each remained firmly convinced that they were right and the other was wrong.

**14**  Ms. Shannon Herd and Ms. Pattie Lynn McKenna, the two young ladies that had been picked up at the marina, had gone below to get something warm. Mr. Baird had also gone below at the same time. Ms. Jankowski was just bending over to pick something up. In the meantime, Mr. Kerr proceeded forward in the direction he believed was the correct one. He was travelling at approximately 30 miles per hour. The boat had just come up to planing speed. No one saw Copper Island or was aware of its presence until they collided with it. Mr. Baird would have seen Copper Island the day before when he was driving the boat.

**15**  The boat struck Copper Island an estimated 150 to 300 metres west of the flashing green navigation light. The shore was rocky and steep, and the boat went approximately 4.7 metres up onto the shore before the bow struck a tree. The boat then slid back into the water.

**16**  Mr. Kerr and Ms. Jankowski were both injured as a result of this collision. Unfortunately, Ms. McKenna died as a result of injuries she suffered in the collision.

**17**  When Mr. Kerr left Blind Bay itself, he believed he was following the same course he took when entering Blind Bay. However, as he proceeded across the lake to the north shore he was obviously not following the same course that he had followed when he came across the lake the first time. Instead he was travelling in a northeast direction directly into the side of the island.

**18**  Mr. Kerr was unaware that Copper Island was ahead of him. Visibility was limited to approximately 20 feet. He had seen the shore lights on the eastside of Blind Bay and the flashing red light and the flashing green light. He did not understand the significance of the flashing lights except that they marked a hazard of some sort and should be avoided. He did not know what the hazard was. He assumed the flashing green light marked the outside edge of the shore of Blind Bay. He believed he was proceeding in a direction that would allow him to clear any hazard that was marked by the green light, and believed he was on the same path he had followed to Blind Bind. Unfortunately these assumptions were wrong.

**19**  I have not heard any evidence from Mr. Baird, the owner of the vessel. He was subpoenaed by Crown, but the subpoena was served with some difficulty. He did not communicate with Crown and did not respond to the subpoena. He knew that Copper Island was outside of Blind Bay because he had operated the vessel during daylight hours when it was first launched in Blind Bay. Mr. Kerr said that Mr. Baird never mentioned that an island was there. Ms. Jankowski did not say that she heard Mr. Baird mention the island. She was not aware of its existence herself. I find Mr. Baird did not warn Mr. Kerr about the island.

**20**  This boat has a planing hull which affects the level at which the boat moves across the water. Depending on weight distribution and trim setting, the boat can stay flat in the water at speeds up to 10 miles per hour. Between 10 and 25 miles per hour the bow of the boat rises and obstructs visibility ahead. When the boat achieves planing speed, between 25 and 30 miles per hour, it again flattens out on the water. The boat can travel at speeds up to 75 miles per hour. The boat was travelling approximately 30 miles per hour at the time it collided with the island; in other words, at or just above the planing speed.

**The Law**

**21**  Section 249(1)(a) of the *Code* covers dangerous operation of a motor vehicle and s. 249(1)(b) dangerous operation of a vessel. The description of the manner of operation which is central to the offence as it relates to a motor vehicle and a vessel are similar:

**249.** (1) Every one commits an offence who operates

(*a*) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

1. a vessel ... in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;

**22**  These similarities mean that the law with regard to motor vehicles is instructive in deciding cases with regard to vessels. It must be kept in mind, however, that there are significant differences between operating a vehicle on a roadway which may be well marked and delineate the safe course of travel, and operating a vessel on a waterway which may have some navigational aids marking some of the hazards, but in most places will not have specifically marked pathways over the water.

**23**  The Supreme Court of Canada has tried to clarify the law with regard to the dangerous operation or driving of a motor vehicle in the cases *R. v. Beatty*, [*2008 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BB-00000-00&context=) and *R. v. Roy*, [*2012 SCC 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20D-00000-00&context=).

**24**  In *Beatty*, the accused was driving his truck on a highway with a single lane of traffic in each direction. There was no indication of any abnormal driving up to just before the collision. For reasons unknown, his vehicle crossed the centre line and struck an oncoming vehicle, killing the three occupants of that vehicle. He was charged with three counts of dangerous driving causing death. He was acquitted at trial, [*[2005] B.C.J. No. 3071*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1NY-00000-00&context=), and that decision was overturned by the Court of Appeal, [*[2006] B.C.J. No. 1038*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B251-00000-00&context=). The Supreme Court of Canada allowed the appeal from the Court of Appeal, restored the trial judgment, and confirmed the acquittal.

**25**  Charron J., speaking for the majority, considered the law and the application of what has been described as a modified objective test in dangerous driving offences. Charron J. noted the difference between civil ***negligence*** and what was called "penal" ***negligence***. Justice Charron noted the difficulty in applying the test and went to great lengths to discuss the history of the law, and to clarify the test itself [para. 21].

**26**  In criminal law, in order to prove the offence the Crown must prove what is described as the *actus reus*; that is the act which constitutes the offence, and the *mens rea* or the mental element of the offence; that is the intent. In general, the intent is a subjective matter. However, with regard to dangerous driving, which is a ***negligence***-based offence, the court has adopted a modified objective test for *mens rea*. Referring to an earlier Supreme Court of Canada decision *R. v. Hundal*, [*[1993] 1 S.C.R. 867*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60BG-00000-00&context=) (S.C.C.), the court in *Beatty* said:

[29] The Court accepted objective fault as an appropriate basis for imposing criminal liability because of "[t]he nature of driving offences", having particular regard to: the "licensing requirement" for driving; "the automatic and reflexive nature of driving"; the wording of the legislative provision; and the "obvious and urgent" need to control the conduct of drivers (pp. 883-86). The fact that driving is a regulated and voluntary activity plays a key role in the adoption of a modified objective test for the *mens rea* of dangerous driving. The Court explained how the licensing requirement impacted on the question of *mens rea* in two principal ways.

[30] First, because driving can only be undertaken by those who have a licence, as a general rule, the law can take it as a given that those who drive are mentally and physically capable of doing so and that they are familiar with the requisite standard of care. As Cory J. put it: "As a result, it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving" (p. 884). In other words, the driver's capacity and awareness can simply be inferred from the licensing requirements.

[31] Second, there is no injustice in inferring the requisite *mens rea* from the voluntary act of driving because, as Cory J. explained, "[l]icensed drivers choose to engage in the regulated activity of driving" and by doing so, "place themselves in a position of responsibility to other members of the public who use the roads" (p. 884). Hence, those who choose to engage in this inherently dangerous activity and fail to meet the requisite standard of care cannot be said to be morally innocent. The Court shed further light on how objective fault can thus be reconciled with principles of fundamental justice in *R. v. Finlay*, [*[1993] 3 S.C.R. 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M391-00000-00&context=), released later that same year. In *Finlay*, the Court confirmed that the modified objective test adopted in *Hundal* also satisfied minimum fault requirements under s. 7 of the *Charter* in respect of the offence of storing firearms and ammunition in a careless manner. Lamer C.J. explained as follows (at p. 115):

It is a basic tenet of the principles of fundamental justice that the state not be permitted to punish and deprive of liberty the morally innocent. Those who have the capacity to live up to a standard of care and fail to do so, in circumstances involving inherently dangerous activities, however, cannot be said to have [page69] done nothing wrong. The Law Reform Commission of Canada emphasized this point in the following passage from *Workplace Pollution*, Working Paper 53 (1986), at pp. 72-73:

Certain kinds of activities involve the control of technology (cars, explosives, firearms) with the inherent potential to do such serious damage to life and limb that the law is justified in paying special attention to the individuals in control. Failing to act in a way which indicates respect for the inherent potential for harm of those technologies, after having voluntarily assumed control of them (no one *has* to drive, use explosives, or keep guns) is legitimately regarded as criminal. [Emphasis in original.]

[32] As we can see from this discussion, the adoption of an objective test for ***negligence***-based offences such as dangerous operation of a motor vehicle does not obviate the *mens rea* requirement. Fault is still very much a necessary part of the equation. However, because of the licensing requirement, which "assures ... a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers" (*Hundal*, at p. 888), from a logical standpoint, criminal fault can be based on the voluntary undertaking of the activity, the presumed capacity to properly do so, and the failure to meet the requisite standard of care.

**27**  The court did recognize that the accused must be given the benefit of any reasonable doubt about whether a reasonable person would have appreciated the risk, or could have done something to avoid creating the danger [para. 37].

**28**  The court also recognized:

... a reasonably held mistake of fact may provide a complete defence if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care. It is therefore important to apply the modified objective test in the context of the events surrounding the incident. [para. 38]

**29**  Charron J., at para. 46, also confirmed that in determining the *actus reus* it is the manner in which the vehicle was operated, not the consequences of the driving that must be considered:

... The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving. The consequence, of course, may assist in assessing the risk involved, but it does not answer the question whether or not the vehicle was operated in a manner dangerous to the public. This Court explained this distinction in *R. v. Anderson*, [*[1990] 1 S.C.R. 265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-653D-00000-00&context=), as follows:

In the circumstances of this case, the unfortunate fact that a person was killed added nothing to the conduct of the appellant. The degree of ***negligence*** proved against the appellant by means of the evidence that he drove after drinking and went through a red light was not increased by the fact that a collision occurred and death resulted. If driving and drinking and running a red light was not a marked departure from the standard, it did not become so because a collision occurred. In some circumstances, perhaps, the actions of the accused and the consequences flowing from them may be so interwoven that the consequences may be relevant in characterizing the conduct of the accused. That is not the case here.

(The appeal was allowed and the acquittal reinstated. There was no evidence of any erratic driving and he was proceeding at the speed limit. This was found not to be a marked departure).

**30**  In the *Beatty* case, the court did find that crossing into the opposing line of traffic at 90 kilometres per hour was dangerous within the meaning of s. 249. However, in dealing with the mental element, the court found there was no other indication of a marked departure from the standard expected of a reasonably prudent driver and that what occurred, occurred as a result of a momentary lapse of attention. Although this was dangerous it did not amount to a marked departure of the standard of care of a prudent driver.

**31**  In *Roy*, the court again revisited the offence of dangerous driving. Mr. Justice Cromwell discussed the *Beatty* decision at length and provided in a very clear and helpful review of the decision. He opened his judgment with the following two paragraphs:

[1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct -- operating a motor vehicle in a dangerous manner resulting in death -- and a required degree of fault -- a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.

[2] Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put in *R. v. Beatty*, [*2008 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BB-00000-00&context=), [*[2008] 1 S.C.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BB-00000-00&context=), at para. 34, "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy." Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

**32**  In *Roy*, the accused had entered a highway from a side road and crossed the northbound lane of traffic in order to turn left into the southbound lane of traffic. Visibility was poor, being reduced by fog. A northbound tractor-trailer unit was proceeding about 75 to 80 kilometres per hour due to limited visibility. When Mr. Roy's vehicle entered the highway, the operator of the northbound tractor-trailer was unable to stop his vehicle and collided with Mr. Roy's vehicle, killing Mr. Roy's passenger. Mr. Roy was unable to remember the accident. It is worth repeating what Mr. Justice Cromwell said when he restated *Beatty* in paras. 29-42:

[29] It will be helpful to reiterate the main elements of the majority reasons in *Beatty*.

1. The Importance of the Fault Requirement for Dangerous Driving

[30] A fundamental point in *Beatty* is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. The distinction between a *mere* departure, which may support civil liability, and the *marked* departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes *markedly* beyond mere carelessness.

[31] From at least the 1940s, the Court has distinguished between, on the one hand, simple ***negligence*** that is required to establish civil liability or guilt of provincial careless driving offences and, on the other hand, the significantly greater fault required for the criminal offence of dangerous driving (*American Automobile Ins. Co. v. Dickson*, [*[1943] S.C.R. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B017-00000-00&context=)). This distinction took on added importance for constitutional purposes. It became the basis for differentiating, for division of powers purposes, between the permissible scope of provincial and federal legislative competence as well as meeting the minimum fault requirements for crimes under the *Canadian Charter of Rights and Freedoms* (*O'Grady v. Sparling*, [*[1960] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X2XR-00000-00&context=); *Mann v. The Queen*, [*[1966] S.C.R. 238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22HS-00000-00&context=); *Hundal*). Thus, the "marked departure" standard underlines the seriousness of the criminal offence of dangerous driving, separates federal criminal law from provincial regulatory law and ensures that there is an appropriate fault requirement for *Charter* purposes.

[32] *Beatty* consolidated and clarified this line of jurisprudence. The Court was unanimous with respect to the importance of insisting on a significant fault element in order to distinguish between ***negligence*** for the purposes of imposing civil liability and that necessary for the imposition of criminal punishment. As Charron J. put it on behalf of the majority, at paras. 34-35:

If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.

In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of ***negligence***, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of ***negligence*** is the determinative question because criminal fault must be based on conduct that merits punishment. [Emphasis added.]

1. The *Actus Reus*

[33] *Beatty* held that the *actus reus* for dangerous driving is as set out in s. 249(1)(*a*) of the *Code*, that is, driving "in a manner that was dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place" (para. 43).

[34] In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, "The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving" (emphasis added). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

[35] To summarize, the focus of the analysis in relation to the *actus reus* of the offence is the manner of operation of the motor vehicle. The trier of fact must not simply leap from the consequences of the driving to a conclusion about dangerousness. There must be a meaningful inquiry into the manner of driving.

1. The *Mens Rea*

[36] The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused's circumstances.

[37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in *Beatty*, put it this way: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).

[38] The marked departure from the standard expected of a reasonable person in the same circumstances -- a modified objective standard -- is the minimum fault requirement. The modified objective standard means that, while the reasonable person is placed in the accused's circumstances, evidence of the accused's personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused's incapacity to appreciate or to avoid the risk (para. 40). Of course, proof of subjective *mens rea* -- that is, deliberately dangerous driving -- would support a conviction for dangerous driving, but proof of that is not required (Charron J., at para. 47; see also McLachlin C.J., at paras. 74-75, and Fish J., at para. 86).

1. Proof of the "Marked Departure" Fault Element

[39] Determining whether the required objective fault element has been proved will generally be a matter of drawing inferences from all of the circumstances. As Charron J. put it, the trier of fact must examine all of the evidence, including any evidence about the accused's actual state of mind (para. 43).

[40] Generally, the existence of the required objective *mens rea* may be inferred from the fact that the accused drove in a manner that constituted a *marked departure* from the norm. However, even where the manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to determine whether it is appropriate to draw the inference of fault from the manner of driving. The evidence may raise a doubt about whether, in the particular case, it is appropriate to draw the inference of a marked departure from the standard of care from the manner of driving. The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity: *Beatty*, at para. 37.

[41] In other words, the question is whether the manner of driving which is a marked departure from the norm viewed in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.

[42] Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.

**33**  In deciding to enter an acquittal, the Supreme Court of Canada stated that, on the evidence, the driving objectively viewed was dangerous. However, there was no evidence that the driving up to that point was other than normal and prudent driving. Essentially the court found that there was a momentary decision to pull onto the highway when it was unsafe to do so, and that this was not sufficient to infer that the appellant's standard of care was a marked departure from that expected of a reasonable driver in the same circumstances [para. 54].

**34**  The court found essentially that Mr. Roy had made an error of judgment of speed and distance in difficult conditions and poor visibility. This was a single momentary error of judgment with tragic consequences. However, it did not support a finding of a marked departure from the standard of care of a reasonable person [para. 55].

**35**  The Crown referred me to the decision *R. v. MacKay,* [*2008 NSPC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-DXHD-G1KJ-00000-00&context=). Mr. MacKay was operating his speed boat in Halifax Harbour. This was at night, and he was following a course which he had followed many times before. The course was marked in his on-board navigation system. The course would have provided a clear pathway out of the harbour barring any unforeseen obstacles. The harbour had an unlit naval buoy. Mr. MacKay's normal course would have cleared the normal and charted position of that buoy. However, due to severe tidal streams the buoy had been moved 53 to 75 metres away from its plotted position. The accused struck the buoy. and as a result, some of his passengers were injured and one of them drowned.

**36**  The court found that Mr. MacKay had a reasonably held belief that it was safe to operate his vessel in that direction, the waters were calm, he was a competent operator, and the vessel was in sound mechanical condition. The court also found there was no evidence that a reasonably prudent person would have foreseen the buoy would have drifted into the vessel's pathway [para. 159].

**37**  Mr. MacKay was charged with a number of offences, including impaired operation of a vessel causing bodily harm and causing death and criminal ***negligence*** causing bodily harm and causing death. The case involved multiple issues, including identity, voluntariness of statements, and alleged breaches of the *Charter*.

**38**  The Crown has provided me with those portions of a decision that deal with the dangerous operation of the vessel offence.

**39**  This decision was pre-*Beatty*. With respect, after reading parts of the decision the Crown has provided me with, I may not have understood the full thrust of the decision; however, some parts of it appear to be contradictory. In dealing with the issue of criminal ***negligence***, the court said:

[160] ... it is difficult for me to conclude, beyond a reasonable doubt, that the accused conduct immediately before the collision, was a marked departure from the standard of care of a reasonable person in both the external circumstances and the mental element. As a result, I conclude and find that the Crown has not proved beyond a reasonable doubt that the accused conduct, in the set of circumstances as presented, amounted to criminal ***negligence***. I so find.

[161] However, that is not to say that there was no departure from the standard of care of a reasonable person only that it was not a marked departure.

**40**  The court then went on to deal with the included offence in criminal ***negligence*** that was dangerous operation of a vessel. The court properly stated:

[162] The crime of dangerous operation of a vessel is established where the prosecution proves a marked departure from the conduct of a reasonable prudent operator in all the circumstances. ***...***

**41**  The court considered that a safe speed which was prescribed by the regulations was not specifically defined and depends on the prevailing conditions and visibility [paras. 163-164].

**42**  The court dealt with the issue of an inevitable accident and considered a civil case *Conrad v. Snair* [*(1995), 146 N.S.R. (2d) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-JFKM-63KW-00000-00&context=), in which a passenger was injured on a passenger carrying vessel. The passenger vessel had struck another vessel which was anchored, but did not display its anchor light. The operator of the passenger vessel was negligent for operating at an excessive speed, drinking before operating, and not keeping a proper lookout. The carrier's ***negligence*** was the sole cause of the accident since an anchor light would not have averted the collision [para. 167].

**43**  In *MacKay,* the court said:

[168] This case, in my opinion, stands for the proposition that as a general rule, a moving vessel is *prima facie* at fault if it collides with a stationary object even if the latter is not in its proper place or with any lights provided the moving vessel, with ordinary care, could have avoided the collision. Moreover, I think that it is unquestioning from the *Collision Regulations* that it is the duty of a vessel in motion to keep clear of an object if it can be seen, and that careful seamanship demanded that everything, from a proper lookout and safe speed is necessary to allow an assessment of all risks. Thus, if there is any collision, the operator cannot merely say that he is not guilty of the ordinary standard of care as it was entirely an unforeseen accident that could not have been prevented by proper and safe seamanship. It must be shown that indeed it was an inevitable accident.

**44**  The court also said:

[169] Thus, I think that a presumption of ***negligence*** arises from the breach of all the Regulations to operate at a safe speed although it may not be a breach of duty not to do so depending on the prevailing set of circumstances. Here, the accused was under a duty to anticipate any risk and to operate at a speed to avoid that risk. Additionally, he had a duty to ensure the safe operation of the vessel and the well being of his passengers.

**45**  The court then went on in para. 170 to note that:

\* the buoy was unlit and known to be unlit;

\* the buoy was in a known position, and a reasonable boater would be aware of the tidal ebb and flow in the harbour;

\* the tidal ebb and flow would affect temporarily the location of objects such as the buoy;

\* that the bow rises on a vessel such as this one when the throttle is applied, reducing visibility.

**46**  The court then said:

[171] Therefore, when I consider all these noted factors that I accept to be credible, reliable and trustworthy, I conclude and find that I must assess the accused impugned conduct from the standards, by which a reasonable boater must be guided, as required by the *Collision Regulations*. Thus, from the evidence, I conclude and find that the accused expected to find the buoy in the general area. Therefore, he was bound to keep a proper lookout. From the 911 transcript and testimony I accept and find that he thought he had struck a log or a rock when in fact he had struck the buoy. As a result, I conclude and find that this was because he did not see the hazard nor was he able to have assessed the risk due to the acceleration of the vessel as seen from the shore. Thus, it is reasonable to conclude that the speed of the vessel, in the instant set of circumstances, was unsafe as it did not permit him the time to avoid the collision.

**47**  The court went on to find that he was operating in a careless manner that did not allow him to stop within his vision distance or to safely avoid a collision. A safe speed would have allowed him to avoid the collision. As he did not avoid the collision, he was not proceeding at a safe speed [para. 172].

**48**  The court found he was travelling blind in the sense that he had the navigational information in his head and was using no navigational aids. If he had obeyed the *Collision Regulations* and kept proper lookout and a safe speed, the collision could have been avoided. Keeping a safe speed and a proper lookout was the standard of care of a reasonable operator in those circumstances [para. 173].

**49**  The court went on to conclude at para. 174:

... that if either his lookout was less negligent and his speed more responsible he could have navigated through the Bedford Basin safely and avoided the collision. Further, I find that excessive speed in the dark with limited visibility was a grave breach of duty to take care as it puts at risk the safety of lives at sea.

**50**  The court then concludes that he did operate his vessel in a manner dangerous to the public.

**51**  Based on the words used, particularly in para. 174, "a grave breach of duty", it could be inferred that the court had found a marked departure from the standard of care of a reasonable person. However, that is contrary to the specific findings in para. 161. In those circumstances, it is difficult to know what, if any, reliance can be placed on this case. Despite the court's comments about marked departure, they found the accused guilty because he was travelling blind, not using any navigational aids or keeping a proper lookout of travelling at a safe speed. The accused simply relied on his auto pilot. As I say, I am not sure that I understood the decision correctly.

**Collision Regulations**

**52**  The *Collision Regulations*, *C.R.C., c. 1416* were passed pursuant to the *Canada Ship Act*, [*S.C. 2001, c. 26*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9S1-JKHB-649S-00000-00&context=). Rule 3 of the *Collision Regulations* provide as follows:

(*l*) The term "restricted visibility" means any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms or any other similar causes.

**53**  This regulation does not specifically refer to darkness.

**54**  Section I is entitled "Section 1 - Conduct of Vessels in any Condition of Visibility" and reads as follows:

RULE 4

*Application*

Rules in this Section apply in any condition of visibility.

RULE 5

*Look-out*

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

RULE 6

*Safe Speed -- International*

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

\* (*a*) By all vessels:

1. the state of visibility,
2. the traffic density including concentrations of fishing vessels or any other vessels,
3. the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions,
4. at night the presence of background light such as from shore lights or from back scatter of her own lights,
5. the state of wind, sea and current, and the proximity of navigational hazards,
6. the draught in relation to the available depth of water.

...

RULE 7

*Risk of Collision*

(*a*) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

...

*c*) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

**55**  The *Collision Regulations* are really based on common sense. They require a person to keep a proper lookout in order to make a full appraisal of the situation and any risks. A safe speed is one which allows a person to take proper and effective action to avoid a collision. The state of visibility is an important factor in determining a safe speed. Traffic density is also an important consideration. Again, the *Collision Regulations* say assumptions should not be made on scanty information and if there is a doubt that there is a risk of collision then such risks shall be deemed to exist.

**56**  The easterly side of Copper Island has a green flashing beacon; that is a light mounted on the island itself. Reedman Point, which is to the south or southeast of Copper Island, has a red flashing light mounted on a beacon. This marks the easterly edge of Blind Bay. These two beacons mark a safe channel between Copper Island and the south shore of the Shuswap Lake when a vessel is proceeding upstream; in this case to the east. The lake drains from east to west towards the ocean. This is considered upstream. The determination of upstream may be confusing. However, in this case, Mr. Kerr has acknowledged that his only understanding of the navigation lights was that they marked a hazard. He had no understanding of the significance of the colours of the lights.

**57**  Defence counsel noted that there were no other lights marking Copper Island. It would be financially impossible to mark every hazard on every waterway in Canada. A boater with 20 years experience, or any boater for that matter, would readily understand that not all of the hazards are marked. In this case, Mr. Kerr did not have access to a chart of Shuswap Lake. If he had access to such a chart and had consulted it, he would have been aware of Copper Island and the hazard it presented. He would also have been aware simply by looking at the chart and without even understanding the significance of the colours of the navigation lights, that safe passage could be made between Copper Island and the south shore of the lake by proceeding between the flashing red and flashing green lights.

**Was Mr. Kerr's Operation of this Vessel Dangerous Within the Meaning of the *Criminal Code*?**

***Actus Reus***

**58**  The first question is whether the driving viewed objectively was dangerous to the public in all of the circumstances [*Roy*, at para. 34]. The public includes the passengers on the boat as well as other users of the lake. In answering this question, it is important to focus on the risks, not the consequences, that is the fact that people were injured and Ms. McKenna died. Also, I have to be careful not to conclude that the driving was dangerous simply because of the inherent risks of operating a boat.

**59**  In the present case, Mr. Kerr was an experienced boater who had operated boats at night. He was aware that navigation lights mark hazards, although he had no understanding of the meaning of the various colours of lights. He was not familiar with the *Collision Regulations*. He knew he was on a lake and that he did not have unlimited safe operating room. He knew he had to avoid the shoreline of the lake. He was unfamiliar with the area of the lake in which he was operating at the time. The only time he was in that part of the lake during daylight he was below deck and had not seen Copper Island. He had navigated the vessel shortly after leaving the houseboat until finding his way into Blind Bay, out again, and then back into Blind Bay. He could see some shore lights and the two navigation lights. Visibility was extremely limited; perhaps to as low as 20 feet, although the lights on shore and the beacons could be seen for some distance. The boat could be operated at a very low speed, but anything between 10 and 25 miles per hour would result in the bow rising into the air and limiting visibility to the front. He did have a disagreement with the boat owner about which was the safe direction to proceed in, but on the evidence, the boat owner was indicating they should be proceeding back into Blind Bay towards the shore. The owner had difficulty navigating the vessel earlier and, therefore, asked Mr. Kerr to take over the operation of the vessel. The opinion expressed by the owner should have caused Mr. Kerr to reconsider his own opinion, but it would be clear that the owner's directions were wrong. Mr. Kerr believed that he had exited the bay in the same route that he had taken entering the bay. He may be correct in that evidence. However, when he proceeded across the lake towards the north shore of the lake, he did not follow his original route. Without any form of electronic navigation equipment or careful plotting, it would be very difficult for him to have confidence that he was following the same route back to the north shore of the lake.

**60**  He believed the green flashing light on Copper Island marked a hazard, but he was unsure of the size or nature of that hazard. He said that he thought about what he was doing and where he was going. In his mind, he believed the green light may well have marked the extremity of the south edge of the lakeshore as it entered Blind Bay. He assumed that there was simply rock or land between the flashing red and the flashing green lights. He said that he gave the flashing green light what he thought was sufficient clearance. The collision with Copper Island occurred perhaps 150 to 300 metres west of the flashing green light. Unfortunately, Copper Island is an obstruction which is more than 750 metres across. The only light marking Copper Island is the flashing green light on its eastern edge.

**61**  Mr. Kerr proceeded at just planing speed; he believed this was a safe speed to operate at because he believed he had clear water ahead of him. It is always possible that there will be some unforeseen obstacle, such as a log, an unmarked boat, or even a person in the water.

**62**  Proceeding at 25 to 30 miles per hour, as Mr. Kerr did with such limited visibility, would have made it impossible for him avoid such hazards. The speed at which he was travelling certainly made it impossible for him to see Copper Island in time to avoid a collision, or reduce the damage that was caused by a collision.

**63**  The defence expert gave the opinion that it would be reasonable to operate that boat just at planing speed if the operator had "situational awareness". His evidence was that just at planing speed the boat would operate more smoothly, be more fuel efficient, ride smoother, and be easier to control. He also said that the boat would be operating with the bow down at that speed. Operating between 10 and 25 miles per hour would cause the bow to rise, blocking vision ahead. The defence expert's proviso, however, was that the individual must have situational awareness. This means having a pre-departure plan and understanding what hazards presented themselves, knowing where the boat was in relation to those hazards, and then proceeding in a manner to avoid those hazards. In the event that a person lost situational awareness, a proper course would be for them to stop, assess the situation, formulate a plan, and then proceed in a safe manner. The defence expert has many years of experience operating vessels and training other people to operate vessels. He is familiar with the *Collision Regulations*. He understands the meaning of navigational lights, and the difficulty that a person can sometimes have in determining what is upstream and what is not. However, he had difficulty imaging himself in a situation where he would have been out on the water with such limited visibility due to darkness without having proper situational awareness derived from pre-departure planning and knowledge. The most that I can take from his evidence is that his opinion is provided an operator has good reason to believe, and can reasonably be confident that they have clear water ahead of them, operating this vessel at 25 to 30 miles per hour or just on plane would not be unreasonable.

**64**  The Crown expert, equally qualified, took a more conservative approach. His evidence is that essentially operating at night presents more dangers than operating during the daylight, and that a person should not be out on the water without good reason. If a person is out on the water in the dark, they must proceed at a very slow speed to prevent a collision with potential hazards.

**65**  The difference between the Crown and defence experts is that the defence expert was of the view that travelling at just planing speed in the dark would not be unreasonable provided a person knows where the navigational hazards are and knows where the boat is in relation to those hazards. The defence expert was also clear that travelling at anything more than planing speed would not be reasonable. The Crown's expert was of the view that unless you could actually see the navigational hazards, that you must travel at a significantly lower speed; that is from idle up to approximately 10 miles per hour, but not faster. Even the defence expert, however, did not give the opinion that it would be safe to travel at 30 miles per hour without good reason to believe that you actually knew where the hazards were.

**66**  However, Mr. Kerr did not have situational awareness. He was not reckless or willful or wanton with regard to the circumstances. He was wrong in his assessment of the situation. The most he could say is that he believed he was travelling along the same course on which he entered the bay and, therefore, it should have been safe. He did not strike Copper Island on the way to Blind Bay because he followed the north shore. The channel between the north side of Copper Island and the north shore of the lake was sufficiently wide for him to pass safely as long as he was close to the shore. The darkness, however, was such that he was unable to see Copper Island as he passed it.

**67**  His speed made it impossible for him to avoid striking Copper Island, and such speed made it inevitable that there would be damage to the boat and risk to himself and his passengers if he hit a solid object like Copper Island at that speed.

**68**  He was not operating in a manner consistent with the *Collision Regulations*. The Crown is correct that to a large extent the *Collision Regulations* are common sense. A reasonably prudent operator would not operate in circumstances which would prevent him from foreseeing and avoiding a collision. His conduct was clearly negligent. Operating a vessel is inherently dangerous. Operating a vessel at night increases the risks. Operating this particular vessel at 30 miles per hour at night on August 2, 2008 was dangerous. There was very little traffic on the lake that evening. There was also the risk of debris or an individual swimming, or some unmarked vessel being on the lake. In this case, the danger was that an operator would be unable to see a significant navigational hazard such as Copper Island in time to avoid colliding with that hazard with the risk of significant injury. I am satisfied the Crown has proven the *actus reus* of the offence.

***Mens Rea***

**69**  The test for *mens rea* is the modified objective test. In determining whether the Crown has proven the necessary *mens rea* beyond a reasonable doubt, I have to ask "whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances."

**70**  As stated in *Roy,* I must ask two questions:

1. whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible?;
2. whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused's circumstance [*Roy*, at para. 36].

**71**  I also keep in mind what Cromwell J. said in *Roy* at para. 31; that this is a significantly greater fault required for a criminal offence than for civil liability or guilt of a provincial careless driving offence.

**72**  The age, experience, and education of the accused are irrelevant unless they go to the accused's capacity to appreciate and avoid the risk [*Roy,* at para. 38]. In our case, there is no evidence of lack of capacity, although there is a lack of understanding of the meaning of the beacons. I am satisfied that Mr. Kerr had the capacity to appreciate the risk and the experience to understand that there were risks in operating this boat on the lake, particularly at night.

**73**  The accused argued that because there was no necessity at the time for a licensing or special training to operate a boat, that it may not be appropriate to apply the modified objective test for *mens rea*. I find that the appropriate standard is the modified objective standard. There are significant differences between the environment in which a boat is operated and in which a car is operated, but common sense still prevails. As was pointed out in para. 31 of *Beatty* referred to earlier, the modified objective standard is applied not only to a driving offence, but also to offences involving other dangerous activity including use of explosives or storage of firearms.

**74**  In this case I have evidence from the accused about what he was thinking and why he operated the boat in the manner he did. This is evidence that I must consider in determining whether it is appropriate to infer or to conclude that his conduct amounted to a marked departure from what a reasonable person would have done in the circumstances.

**75**  The accused argues that *Beatty* leaves the defence of mistake of fact open [*Beatty*, para. 38]. The accused argues that in difficult conditions he made a navigational error, a mistake of fact. The mistake was in not knowing where the shoreline ended. The mistake was in believing that the flashing green light on Copper Island marked the edge of the shore.

**76**  However, in cases where the modified objective standard is the fault element, a mistake of fact will only prevent a conviction if it is one that a reasonable person would have made; in other words, an honest and reasonable mistake (*Essentials of Canadian Law*, 3rd Ed., Kent Roach, p. 154).

**77**  A negligent-based offence is one which is based on negligent conduct that can result in mistaken belief of fact. The ***negligence*** is a marked departure from the standard of a reasonably prudent person. Not knowing, or not taking reasonable precautions to avoid hazards that are reasonably foreseeable is the basis of the offence. Saying I did not know, or I believed there was no hazard, is not a defence. The mistake would have to be an honest mistake and one that a reasonable person would make.

**78**  In this case, the error was in deciding to operate at the speed he did when he had limited information and visibility was restricted by darkness. A reasonable person would have recognized the difficulty of knowing where the boat was in relation to any potential navigational hazards. A reasonable person would not have had confidence to operate at that speed. There was insufficient basis for the confidence expressed by Mr. Kerr.

**79**  The accused also argued that the Crown must prove beyond a reasonable doubt that the accused was aware of the standard of care required. Based on the evidence, it is clear that Mr. Kerr had the capacity to appreciate the inherit risks of operating a boat, particularly at night. He was aware that he had to exercise care in doing so. He had the capacity to and did understand, or was aware of the risks of harm. The Crown does not have to prove any more.

**80**  Has the Crown proven the mental element; that is the *mens rea* in these circumstances? Mr. Kerr's actions were not wanton, reckless or intentionally dangerous. The question is whether they amounted to a marked departure from the civil norm. As pointed out in *Beatty* and *Roy*, I cannot simply conclude that because people were injured and Ms. McKenna was killed in this accident, that Mr. Kerr is guilty of dangerous operation of the vessel. Mr. Kerr's conduct in operating the vessel in the manner he did in all of the circumstances must go significantly beyond ***negligence***. The difference between a mere departure from the civil norm and a marked departure is one of degree. If the departure is marked, then that may be a sufficient basis for imposing a criminal penalty.

**81**  However, as pointed out by the court, I must look at all of the circumstances, including Mr. Kerr's actual state of mind at the time. If the evidence of the defence raises a reasonable doubt whether a reasonable person in his position would have been aware of the risks and taken steps to avoid them, then he must be acquitted. I must consider the evidence from Mr. Kerr about what he was thinking, what he considered before deciding to operate the vessel in the manner he did, and evidence of anything which may have affected his state of mind, including impairment.

**82**  In this case, although Mr. Kerr did have one beer that night, even on the evidence of the independent witness, Ms. Jankowski, there is nothing to suggest that he was impaired. Certainly he appeared to be better able to operate this vessel than the owner, Mr. Baird. When leaving Blind Bay, he and Mr. Baird did have a discussion about which way to proceed. However, it was clear that Mr. Baird did not know which way to proceed because he was pointing back towards the shore. Mr. Kerr wrongly concluded that he was well clear of any hazard marked by the flashing green light. He was unaware that it was simply a navigational aid to show a clear channel. He believed it marked some form of a hazard and he thought, by giving it ample clearance, he was in safe water. He had also followed the shoreline and the lights on the shore in order to get into Blind Bay, and believed he was following the same path when exiting Blind Bay. He believed he was crossing back to the north shore of the lake following the same route he had taken when entering Blind Bay. He was seriously mistaken.

**83**  He proceeded at a speed which was faster than prudent. He believed he had clear water between himself and the north shore of the lake, but he did not. A prudent operator would have been less confident than Mr. Kerr was and travelled at a slower speed. Mr. Kerr was clearly negligent in proceeding at 30 miles per hour.

**84**  He proceeded at 30 miles per hour because he believed he had clear water ahead of him. He had considered and tried to take a reasoned approach to his decision. The boat in question could be operated up to 10 miles per hour with the bow being kept low enough to allow visibility over the bow. However, this was not the most comfortable or manageable position for this type of boat to operate. Operating between 10 and 25 miles per hour in this boat would cause the bow to rise to the point where visibility would be completely blocked ahead. Again, this was not the most manageable or comfortable speed for this particular boat. This boat was designed to operate at a speed of approximately 25 to 30 miles per hour or above when the boat would be planing. Mr. Kerr did not operate the boat any faster than necessary to get it onto a plane. This kept the bow down and made the boat easier to handle. The ride was also more comfortable.

**85**  However, operating the boat at that speed also increased the risk of injury to the occupants of the boat, and damage to the boat itself if it were to strike something.

**86**  Had Mr. Kerr been aware of the existence of Copper Island and proceeded as he did, this decision would be much easier. It is remarkable that Mr. Baird did not say anything to Mr. Kerr about Copper Island, a navigational hazard as significant as the shoreline of the lake itself. Mr. Baird was aware of the existence of Copper Island because he had operated the boat in daylight when they left Blind Bay the day before.

**87**  Had it been reasonable to expect a significant amount of other traffic on the water that night, this decision would also be much easier. The risk of operating a vessel at these speeds in those circumstances would likely be determined to be a marked departure from the civil norm.

**88**  Mr. Kerr's conduct on August 2, 2008 was beyond mere ***negligence***, but given the evidence I have heard about his thought processes and his reasoning, I am left with a reasonable doubt about whether the Crown has proven the necessary mental element for this offence. Although his manner of operating this vessel was dangerous and he was negligent, I am not satisfied beyond a reasonable doubt that his conduct, amounted to a marked departure from the norm. He was clearly negligent, if there were a provincial offence, similar to careless driving, I am satisfied that he would have been guilty of that provincial offence. He clearly made serious errors of judgment. He believed he knew where he was, but he did not know. A reasonable person would have had less confidence in their situational awareness in those circumstances. He operated the vessel at just planing speed. He was operating the boat at a higher speed than a reasonable person would have done in the circumstances. That is clearly negligent. Any greater speed than this would have amounted to a marked departure despite his thought process. There was very little traffic, if any, on the lake in that particular area at the time. His failure to appreciate the significances of lights that he could see and his decision to operate at the speed he did was negligent.

**89**  This case is certainly close to the line. It is important not to simply conclude as it would be easy to do, that because he struck an island in the dark at a speed high enough to result in serious injuries to some of the occupants of the boat and the death to one of his passengers, that he must be guilty. It is important not to simply leap from the consequences of the actions and the fact that the driving was clearly negligent to criminal liability. Given Mr. Kerr's evidence which was not seriously challenged about the thought process he entered into, and the evidence of Ms. Jankowski about his generally conscientious operation of the vessel, I find that I am left with a reasonable doubt about whether the Crown has proven as a mental element or the *mens rea* of this offence beyond a reasonable doubt.

**90**  Therefore, I find Mr. Kerr not guilty.

R.E. POWERS J.

**End of Document**

[***Scottish & York Insurance Co. v. Metrix Professional Insurance Brokers Inc., [2006] B.C.J. No. 1431***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1SV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Garson J.

Heard: January 30 - February 24, 2006.

Judgment: June 23, 2006.

Vancouver Registry No. S035347

**[2006] B.C.J. No. 1431** | [*2006 BCSC 970*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=) | [*[2006] 11 W.W.R. 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=) | [*58 B.C.L.R. (4th) 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=) | [*39 C.C.L.I. (4th) 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=) | [2006] I.L.R. 4536 | [*151 A.C.W.S. (3d) 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=) | [*2006 CarswellBC 1557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1N2-00000-00&context=)

Between Scottish & York Insurance Co. Limited, plaintiff, and Metrix Professional Insurance Brokers Inc., defendant

(132 paras.)

**Case Summary**

**Contracts — Breach of contract — Conditions and warranties — The respondent broker had not breached its contractual duty by not delivering the warranties within the quote as it had not been instructed to do so.**

**Insurance law — Brokers — Liability — Although the respondent broker Metrix owed a duty of care to the plaintiff insurer to communicate the warranties in the insurance policy to the jewellery store owner's agent, the plaintiff had not discharged its burden of proof to establish that the owner would have obeyed the security-related warranties even if the agent had advised her of them.**

**Insurance law — Liability insurance — Business and commercial insurance — Although the respondent broker Metrix owed a duty of care to the plaintiff insurer to communicate the warranties in the insurance policy to the jewellery store owner's agent, the plaintiff had not discharged its burden of proof to establish that the owner would have obeyed the security-related warranties even if the agent had advised her of them.**

**Tort law — *Negligence* — Causation — Causal connection — Intervening causes — Duty of care — Although the respondent broker Metrix owed a duty of care to the plaintiff insurer to communicate the warranties in the insurance policy to the jewellery store owner's agent, the plaintiff had not discharged its burden of proof to establish that the owner would have obeyed the security-related warranties even if the agent had advised her of them.**

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| The plaintiff's case was dismissed -- A Ms. Haworth, an owner and operator of a jewellery store took out a jeweller's block policy of insurance with the plaintiff insurance company -- Before being provided with a copy of the warranties and advised that some of her business practices such as failing to lock the exterior doors before the jewellery was moved from the locked display cases to the vault might breach such warranties, Haworth's store was robbed -- At the time, the doors were not locked, and the jewellery had been removed from the display cases and collected on a trolley ready for night time storage -- The plaintiff paid the loss, and now sued to recover the loss from its broker Metrix for failing to advise the agent of the content of the warranties and obtain the insured's acceptance of such by the time the insurance was bound -- The plaintiff had appointed Canadian Block Mangers Inc. (CBI) as its agent, who had dealings with Metrix; in turn, Metrix had dealt with Capri, the agent of the insured Haworth -- The questions to be determined were whether Metrix owed the plaintiff a duty of care, and/or had it breach a contractual duty -- HELD: The case was dismissed -- The respondent was not liable for breach of contract -- CGU knew that Metrix had not delivered warranties within the quote, and had not instructed it to do so, with the result that there was no basis to imply a term of the contract to that effect -- There was no concurrent duty in tort, as on the facts there was no basis to find that the relationship between CGU and Metrix entailed Metrix having responsibility to monitor CBM's own underwriting practices -- It was CGU's own deficient underwriting practices, managed or mismanaged by its agent CBM that caused CGU to be on risk without enforceable warranties -- Metrix had not breached the performance standards set by CBM and CGU, nor had it breached the duty it owed to CGU and CBM when it took about three weeks to forward the warranties to Capri and did not specify the return date requested by CBM -- However, Metrix did owe a duty of care to CBM and its principal CGU, to communicate the content of the standard warranties to Capri, at least at the binding stage of this transaction, and Metrix breached this duty of care -- Still, the court found on the issue of causation, that even if the respondent had reviewed the warranties with Capri, and Capri had reviewed them with Haworth, it was extremely speculative that Haworth would have complied with the opening and closing warranty, given her lax attitude to security in general -- The plaintiff had not discharged its burden of proof. |

**Statutes, Regulations and Rules Cited:**

Insurance Act, R.S.B.C. 1996, c. 226, s. 1, s. 12

**Counsel**

Counsel for the Plaintiff: E. Dolden K. Lafontaine

Counsel for the Defendant: M. Skorah

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| **GARSON J.** |

**Introduction**

**1**  Heather Haworth is the third generation of Haworths to own and operate the Haworth Jewellery Store in Kelowna, British Columbia. On January 23, 2000, Ms. Haworth closed the doors to her store at about 5:30 p.m. She and her goldsmith sat talking in an office at the back of the store. All other employees had left for the day. She had not locked the back door. At about 5:45 p.m., four masked, armed gunmen entered the store through the unlocked back door. The valuable jewellery had been removed from the display cases and was collected in trays, on a trolley, ready for night time storage in the vault. The robbers grabbed the jewellery from the trolley. They escaped with jewellery worth in excess of two million dollars. Three of the four robbers were eventually caught, tried, convicted and jailed, but only a small portion of the jewels was recovered.

**2**  On November 1, 2000, shortly before the robbery, Ms. Haworth purchased, through her local insurance agent, Capri Insurance Services Ltd., ("Capri"), a Scottish & York jeweller's block policy of insurance. It was recounted in evidence, that Ms. Haworth's grandfather had two German shepherds to guard the store but no insurance. Her father, the subsequent operator of Haworth Jewellery Store was, I gather, somewhat sanguine about insurance. He also relied on two German shepherds. Ms. Haworth was instructed by her banker that jeweller's block insurance on her inventory was a condition of their continued financing of her business. She purchased her first jeweller's block insurance policy on November 1, 2000. The Scottish & York jeweller's block insurance policy contains warranties that stipulate certain store closing procedures. One of those warranties requires the insured to lock the exterior store doors before the jewellery is moved from the locked display cases to the vault.

**3**  By the date of the robbery, Ms. Haworth had not been provided with a copy of the warranties and consequently, having never previously purchased a jeweller's block insurance policy, was unaware that some of her business practices breached the warranties. Scottish & York paid the loss and in this action sues to recover the loss in respect to the robbery from their broker, the defendant, for its failure to advise the agent, Capri, of the content of the warranties and failure to obtain the insured's acceptance of the warranties by the time the insurance was bound.

**4**  The plaintiff, Scottish & York, had appointed Canadian Block Managers Inc. ("CBM") as its agent to underwrite its jeweller's block insurance program. Haworth Jewellers bought its jeweller's block insurance though its local insurance agent, Capri. Capri, in turn, bought through Metrix. Only Metrix had direct dealings with CBM.

**5**  The insurance that is the subject matter of this action was bound effective November 1, 2000. The policy and warranties were issued and sent by CBM to Metrix on December 11, 2000, with a request that the signed warranties be returned by January 22, 2001. Metrix forwarded the policy and warranties to Capri on January 5, 2001 with a request that Capri obtain Ms. Haworth's signature on the warranties as soon as possible. Capri had not delivered the policy to Haworth, nor obtained her signature on the warranties, before the robbery occurred on January 23, 2001.

**6**  The issues to be resolved in this case include the following: whether Metrix owed a duty of care to the plaintiff; the scope of such duty and whether Metrix breached that duty of care; and whether Metrix breached an implied term of its contract with Scottish & York, by failing to ensure that, for the period between the date the insurance was bound, November 1, 2000, and the date the policy (containing the warranties) was received by, and agreed to by, the insured, the insured through her agent, was aware of her obligation to comply with the warranties.

**7**  It is common ground that the store opening and closing warranty was not contained, nor referred to, in the application for insurance, so the insured had no knowledge of the obligation under her new policy of insurance to lock the doors of the store before transferring jewellery from the show case to the vault.

**8**  Scottish & York says that Metrix owed it a duty of care to act as a prudent professional insurance broker and that Metrix breached its duty of care and was negligent in failing to ensure that the insured was informed of, and agreed to, the warranty obligations under the policy, by the time the policy was bound.

**9**  Metrix contends that its obligations to Scottish & York are governed by contract, written and oral, and that it was never an express or implied term of their contract that Metrix was obliged to send warranties to the insured in the quotation or with the interim binder.

**10**  Mr. Dolden for the plaintiff concedes that neither Ms. Miller of CBM, nor Ms. McKenzie of Scottish & York, ever told Metrix that a copy of the warranties should be included with the quote or the interim binder. He says they expected, or assumed, that Metrix would take the step of disclosing the warranties as a matter of the prudent standard of care of the broker to do so. Mr. Dolden contends that warranties have to be accepted by the insured to be legally binding. Mr. Dolden says Metrix should have enumerated the warranties and attached them to the quote and binder in order to create contractual certainty. He says this is the broker's duty of care regardless of the lack of specific instructions from CBM. Ms. Miller, he says, was entitled to assume that in some manner the content of the warranties was conveyed and accepted by the insured. Mr. Dolden argues that I should find this as a fact.

**11**  Metrix commenced third party proceedings against Capri. I was told at the outset of this trial that those proceedings were resolved.

**Facts**

**12**  Before recounting the facts relevant to the issues that must be resolved in this matter, I shall describe the parties to this litigation, and to the extent that it is necessary, explain the various corporate acquisitions of the insurance companies involved. I shall also list the main individuals and describe their positions.

**13**  The original participants in the jeweller's block program were the insurer - GAN General Insurance Company and CBM. GAN appointed Canadian Block Managers Inc., a company owned and operated by Stan Feder, to act as its managing general agent, in respect to jeweller's block insurance. CBM had actual authority to bind the insurer.

**14**  CBM appointed about six brokers throughout Canada with experience in jeweller's block insurance to act as its brokers. Metrix, the defendant herein, was one of those brokers appointed by CBM to sell jeweller's block insurance. In this instance the insurance policy in question was sub-brokered through Capri of Kelowna, British Columbia, who purchased the insurance on behalf of their client, James Haworth & Sons Ltd. of Kelowna, British Columbia.

**15**  Both GAN and CBM underwent certain corporate changes which I shall endeavour to describe. GAN General Insurance Company was acquired by CGU Group (Canada) Ltd. as was Canadian General, Scottish & York and several other insurance companies. These acquisitions occurred between 1998 and 2000. GAN, Scottish & York and the others were merged into CGU Group (Canada) Ltd. which then began to operate through four wholly owned subsidiaries which included CGU Insurance Company of Canada and Scottish & York. CGU Group (Canada) Ltd. changed its name to Aviva Canada Inc. and continued to carry on its business through the four insurance companies, one of which included Scottish & York. Scottish & York was used to issue specialty program insurance policies such as jeweller's block insurance. Scottish & York had no actual employees; all employees were employees of CGU Group (Canada) Ltd., later Aviva. Because the witnesses at trial did so, I shall in these Reasons usually refer to the plaintiff as CGU, except where it is necessary to specifically refer to Scottish & York.

**16**  On the CBM side of the equation, there were also certain corporate changes. In 1999, Stan Feder sold CBM to the HUB Group Inc. Barb Miller, the CBM underwriter, moved to HUB where she continued in the same underwriting position. HUB continued to operate CBM under the name Canadian Block Managers Inc. HUB was acquired in late 1999 or early 2000 by The Wholesale Insurance Group (the acronym of which is TWIG), and TWIG continued to operate CBM as an identifiable entity.

**17**  The main individuals involved in this case are:

**CBM**

Stan Feder, President

Barb Miller, Underwriter

**CGU**

Brenda McKenzie, Underwriter

Joan Edey, who was in 2000 the acting supervisor of property and casualty

**Metrix**

Dave Anderson, President

Angie Hodgins, V.P. Marketing

**Capri**

Robin Durrant, Marketer

Ev Rea, Producer

**Haworth**

Heather Haworth, Owner

**18**  The relationship between these parties began when Stan Feder incorporated CBM in early 1996. He had become experienced in writing jeweller's block policies. At first he incorporated CBM to act as a managing general agent for GAN. The function of CBM was to accept applications for jeweller's block insurance, to issue quotes, to underwrite, and to issue the policies. CBM had no responsibilities in respect to claims handling. Mr. Feder was the president of CBM, Barb Miller was his underwriter. CBM operated as if it was an underwriting arm of GAN.

**19**  Mr. Feder testified that he was looking for brokers who were knowledgeable and experienced in the field. He said that expertise in jeweller's block insurance is necessary in order to deal with the terms, conditions and warranties of this specialized area of insurance. CBM and Metrix began their business relationship in 1996. Mr. Feder met with Metrix, and they entered into a broker agreement. The terms of the agreement are brief and deal only with the financial relationship between CBM and the broker. The agreement does not spell out how the broker is to conduct its business.

**20**  Warranties in the insurance context are promises by the insured to operate its business, during the currency of the policy, in accordance with certain performance standards specified by the insurer. The warranties used by CBM were standard in the sense that the same basic warranty wording could be found in every CGU jeweller's block policy. There was some variation depending on the nature of the location, type of jewellery store and geographic area in which the jewellery store was located. Particulars such as the level of alarm and vault system required varied and were customized from insured to insured.

**21**  Mr. Feder testified that CBM did not attach warranties to quotations because the brokers they used, those they had appointed, "already had the warranties."

**Chronology of Purchase of Haworth Jeweller's**

**Block Insurance Policy to Date of Loss**

**22**  On August 25, 2000, Robin Durrant of Capri faxed David Anderson of Metrix enclosing a Lloyd's of London application for a jeweller's block quotation. The application, (sometime referred to as a "proposal") was unsigned and was forwarded by Angie Hodgins of Metrix to Barb Miller of CBM with the following note:

Hi Barb!

This has been submitted to us by one of our sub-brokers. I apologize for it not being on your application form, but they sent it to us this way and I would appreciate it if you could cull what you need from this and quote it.

I look forward to hearing from you soonest.

**23**  Capri had also submitted applications for jeweller's block insurance, on behalf of Haworth, to Lloyd's and several other insurers. The four insurers other than Lloyd's all eventually declined to quote. Fleming's, a Lloyd's broker, eventually asked for a new signed Lloyd's proposal. Notwithstanding continued efforts by Capri to obtain a quote, on October 27, 2000, Fleming's advised Capri that they were still working on obtaining a quote. Eventually Fleming's provided an "indication" (something less than a quote) for a jeweller's block policy. The premium quoted by Fleming's was $21,000. In the meantime, Angie Hodgins re-faxed Ms. Miller of CBM on October 27, 2000, asking Ms. Miller to quote. On October 27, 2000, CBM issued a quote for a $3 million jeweller's block policy. The premium quoted was $11,677. The quotation was said to be:

SUBJECT TO THE FOLLOWING:

...

- Satisfactory inspection and completion of any recommendations contained therein.

- all Terms, Conditions, Warranties and Wordings of the Policy to be issued. ...

...

Comments:

Clients must have the following prior to binding.

Minimum extent 2, line level 2, UL certified alarm system.

Vault must have complete protection on it

...

Completion of CBM,s (sic) Jewellers Proposal.

**24**  On October 30, 2000, Capri faxed Mr. Anderson at Metrix requesting "a quote by return (urgently) for seasonal coverage increased to $5 million from November 1, 2000 to January 31, 2000 each year." After some further information was exchanged, on October 31, 2000, Ms. Miller quoted an additional premium of $1,608 for the seasonal coverage.

**25**  On November 1, 2000, Metrix advised Ms. Miller that "the client wished to bind", meaning that the quotation and offer of insurance was accepted by Haworth. On November 2, 2000, Ms. Miller of CBM advised by fax to David Anderson:

please advise the effective date this account is to be bound ... we will also require a completed CBM jeweller's block proposal before we can issue the policy.

**26**  On November 2, 2000, Ms. Miller faxed David Anderson that "confirmation coverage is bound effective November 1, 2000, stock at $5 million."

**27**  On November 7, 2000, Metrix prepared and sent to Capri an interim binder titled Memorandum of Insurance. It was effective November 1, 2000, at 12:01a.m. Pacific Standard Time. It was stated to be "subject to all terms and conditions of the policy to be issued which when delivered replaces this memorandum". The interim binder contained the following clause:

Schedule of Property and Amounts Insured

Subject to all the terms, conditions, exclusions, limitations, extensions and warranties appearing in the policy, including in the proposals and/or declaration this policy insures the following property for the amounts indicated.

The interim binder did not describe the warranties.

**28**  Ms. Haworth completed and signed CBM's proposal on November 8, 2000. Ms. Haworth responded to questions No. 13 and 16 in the following way:

Question 13

1. Are the showcases kept locked with keys removed during business hours?
2. Yes

Question 16(c) surveillance system ...

1. Is a business week library of tapes in place?
2. Yes.

**29**  The proposal included the following statement:

The signing of this form does not bind the proposer or the underwriters to complete this insurance, but it is agreed that this form shall become a part of the policy contract if issued and the answers to the questions shall constitute warranties should a contract be issued. The limits and deductibles applied for on this form may vary from coverage provided in the policy. Please recognize the producing agent or broker whose name appears herein as my agent (broker for the handling and/or negotiating the policy herein applied for)

Signed by Heather Haworth

**30**  CBM's proposal (application) form did not match its policy warranties in the sense that the warranties were broader in scope than the application questions. Of specific importance to this case is that the CBM warranties included opening and closing procedures stipulating that the doors of the premises must be locked when the jewellery was moved from the showcases to the vault. But no questions were asked about the opening and closing procedures on the CBM application form.

**31**  On November 10, 2000, Capri gave to Metrix the completed jeweller's block application. Metrix made minor changes to the interim binder and it was issued to Capri on November 20, 2000. Metrix sent a copy to Ms. Miller on November 15, 2000, together with the signed application and a letter from Chubb Security Systems describing the security system.

**32**  In December, Mr. Rea of Capri provided Metrix with additional information about the security system that had been required by CBM. On December 11, 2000, CBM issued the policy with warranties for the signature of Ms. Haworth. CBM requested Metrix to ensure the signed warranties were returned by January 22, 2001.

**33**  The following are the relevant warranties contained in the policy:

1. The Insured will maintain in proper working order during the life of this policy, alarms and protective devices including video cameras and video recorders (VCRs) described in his or their proposal from and in endorsements attached hereto. Upon the Insured becoming aware of any interruption of the alarm service or of any protective devices as described in his or their proposal and in endorsements attached hereto, the Insured shall immediately notify their Insurance Brokers.

It is further understood and agreed that the Insured will take all reasonable steps immediately to restore the alarm service or protective devices including video cameras and video recorders (VCRs) or otherwise secure the property insured hereunder.

1. The Insured further agrees to provide notification to the Insurer within twenty four (24) hours of receipt of any advice from any police authority of suspension of response by their members. Failure to provide notification as stipulated above will render the coverage provided under this policy null and void as of the date of notification of suspension of response by the police authority.
2. **Upon Opening:** All entrances and exits shall be kept locked, except to admit authorized personnel, while the premises are being prepared for the usual daily display of stock.
3. **Upon Closing:** All entrances and exits shall be locked at the close of each business day prior to the removal of stock from show windows, showcases, counters and or wall cases and are to remain locked until all stock usually deposited in the safe(s) and/or vault(s) is deposited therein and all protective devices are set.

**IT IS UNDERSTOOD AND AGREED THAT NON-COMPLIANCE WITH ALL OR ANY OF THE ABOVE WARRANTIES SHALL RENDER VOID ALL COVERAGE UNDER THIS POLICY**

**34**  On January 5, 2001, Metrix sent the policy and warranties to Capri asking for the return of the signed warranties "as soon as possible." On January 8, 2001, Capri received the letter from Metrix enclosing the policy and warranties; it was received by Mr. Rea's assistant Jody Hayes. Ms. Hayes put the policy and warranties on Robin Durrant's desk in a prominent position and later that morning told Mr. Durrant what she had done and that the policy was on his desk for review. Ms. Hayes recalls doing so, Mr. Durrant does not. I accept Ms. Hayes' evidence on this point. The policy and warranties remained on Mr. Durrant's desk until after January 23, 2001, the date of the robbery.

**35**  After the robbery it was discovered that the surveillance tape system was not working. There was, in any event, no library of tapes as required by the policy and contrary to Ms. Haworth's answer to question 16(c) of the proposal. (CGU determined it could not avoid payment of the claim on the basis of this incorrect answer because their inspector failed to note the absence of the tape library when he inspected the premises before the policy issued.)

**36**  Ms. Haworth was not aware of the warranties. She refused to sign them after the robbery.

**Subsequent Events**

**37**  Following the Haworth loss, the following two additions to the CBM program guidelines were implemented by CGU in March, 2001:

*"No quotes to be done without receipt of a properly completed CBM proposal;*

*Copy of all warranties to be attached to all new business quotes going out to ANY sub-broker."*

**38**  Prior to these criteria being added to the CBM program guidelines and implemented by CGU, a competitor's application (such as Lloyd's) could be quoted on. Ms. McKenzie testified that prior to the loss, this was a reasonable procedure. However, in light of the Haworth loss, CGU wanted to ensure that a CBM application was used in all case, and also to ensure that the warranties were attached to all new quotes going to a sub-broker so that the Haworth type loss (that is without signed warranties) would not happen again. In November, 2001, CGU decided to obtain signed warranties before binding. The further amended guidelines, effective November 1, 2001, required a signed proposal with every submission prior to quoting. The new procedures required warranties to be sent to the broker with the quote.

**39**  Mr. Dolden argues against a finding that the subsequent change in underwriting procedures is evidence of the plaintiff's own ***negligence***. Mr. Dolden says "hindsight is 20/20" and he attributes the following quotation to the late Justice Seaton; '... the fact that I am smarter now does not mean that I was stupid before the loss'. However, in my view, the evidence of subsequent conduct does serve as evidence about the division of responsibility concerning underwriting procedures. In the post-loss discussions between CGU and CBM there was considerable debate over the manner in which warranties would in the future be sent with a quote. This evidence corroborates other evidence that CGU had no expectation to that point that warranties would be sent out with a quote or an interim binder.

**40**  By October 10, 2001, Barb Miller's employment was terminated by TWIG. The CGU witnesses testified that her employment termination was not because of the Haworth loss. In my view, she was terminated primarily because Joan Edey had lost confidence in her underwriting ability. The Haworth loss had focused attention on the CBM program and its weakness. After an exhaustive investigation, CGU decided to pay the Haworth claim and to sue Metrix.

**Underwriting Procedure Concerning Warranties**

**41**  In his written submissions, Mr. Dolden for the plaintiff says:

So from the plaintiff's perspective, the crux of this case is that the plaintiff was on risk from November 1, 2000 to January 23, 2001 without enforceable warranties. The plaintiff says that given the disparity between what the application listed and what the warranties required it was incumbent upon Metrix to inform Capri, at an early stage, what the warranties consisted of - thus avoiding the "disconnect" that ensued from the resulting failure to communicate.

**42**  Later, in the plaintiff's submissions, Mr. Dolden says:

Metrix needed to expressly incorporate the warranties into the quote. The decided cases make clear that if the quote which is an offer is accepted, it creates a binding obligation. To achieve that commercial result Metrix could have done one of many things including:

1. have a cover letter that specifies the warranties and requires that acceptance, by Capri be on those terms;
2. take the CBM quote and where it says warranties specifically enumerate the fifteen or so warranties in short hand form as did Lloyd's when it provided its quote to Capri;
3. send the quote out with the three pages of warranties and make clear that the quote includes incorporation of these warranties;
4. send the quote out with Dave Anderson's jeweller's block form which he used with his own customers to list the applicable warranties.

**Barbara Miller's Testimony**

**43**  I turn to Ms. Miller's evidence as to what she understood about the communication of the contents of the warranties to the insured. Ms Miller testified:

1. Okay. When you send out your quotation, at any time from 1996 to October 2000, would you enclose your CBM warranties with the quote?
2. No.
3. Why not?
4. Cause the brokers were aware of the warranties, and we just put it on the quotation that it was subject to terms, conditions and warranties of the policy.
5. Now, to be clear, which term in your quotation are you referring to?
6. "Subject to the following." In that section on page 2 of the quote, second-last sentence:

All terms, conditions, warranties and wordings of the policy to be issued.

And you wouldn't send warranties with a quote, because the warranties have to be customized to the insured, each risk, and we didn't bind this account, so warranties wouldn't come into play on a quote.

1. Right. So at this point, you're just providing an offer of -
2. Yes.
3. -- what you'll afford?
4. Yes.

**44**  Ms. Miller testified:

1. And I asked you - you may recall I asked you earlier whether you ever indicated to Metrix they were not at liberty to provide information to the customer about the warranties or send out a document evidencing what the warranties would contain. I want to ask that same question in respect of sub-broker business. Did you ever indicate to Metrix they were not at liberty to disclose to a sub-broker either to provide information about the warranties or to indicate in an information sheet the content of those warranties?
2. No, I never told them not to give out information about the warranties.
3. Okay. Would you have had any communication with Metrix as to the extent to which you would want them to send information to the customer or to the sub-broker?
4. Possibly with the customer, but not to the sub-broker. I'm not quite sure what you're asking, sorry.
5. Okay. Did you ever have a discussion with anyone at Metrix as to whether in fact you would like them to provide information about your warranties or an information sheet?
6. No.

**Brenda McKenzie's Evidence**

**45**  In 2000, Brenda McKenzie was a senior commercial lines underwriter at CGU. She and her supervisor, Joan Edey, had no concerns about CBM's application process or the process for the return of warranties. They were very concerned about profitability and security requirements. On June 15, 2000, CGU issued "updated program guidelines". These guidelines were in force when the Haworth loss occurred. The guidelines were intended to and did tighten control over Ms. Miller and CBM. The only mention of warranties is found in the following statement:

Warranties must be signed by insured and on file within four months of renewal of business. A form letter to insured or broker informing them of warranty must be on file.

**46**  This was the first time CGU had specified a time period. Ms. McKenzie was aware that CBM's guideline for return of warranties was six weeks. She testified that Barb Miller referred the Haworth application to her and that she approved the quotation.

**47**  After the Haworth loss, when CGU had determined it would pay Haworth and seek recovery from Metrix, Ms. McKenzie authored a report to reinsurers. She wrote:

**Do you consider that the underwriting was properly addressed?**

Yes

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | x |  | No - Please explain? What steps were not completed and why? |  |

**In hindsight, could more stringent underwriting have avoided the loss? If so, what do you suggest?**

There was a warranty violation on this claim. However, the subbroker did not get the warranties out to the insured in time for her to implement the changes. Our MGA (CBM) assumed that the subbroker (Metrix) would make sure the importance of these warranties were relayed to the insured immediately as the subbroker is an extensive jewellery block broker for our program and was perfectly aware of our warranties. I suggested that CBM send copies of ALL the warranties out with the quotes to any broker whether they have dealt with them for years or just new. Also, I suggested that we get off this policy as soon as possible.

**What action was/will be taken?**

**CBM is now sending out the warranties with their quotes. This policy has been cancelled by registered mail.**

**Was there any learning from this claim, which could assist other branches in underwriting?**

(E.g. new process hazard, l new type of construction, inadequate fire safety equipment, etc.)

The biggest lesson learned from this was that we should never assume our subbroker is doing the correct job of getting the information out. Our MGA must take the responsibility of making sure the sub-broker is aware of the warranties and gets them out to any new clients immediately.

**48**  She testified that in the future CBM should send out the warranties and not rely on Metrix.

**49**  As already noted, on March 30, 2001, after the Haworth loss, a written directive was given to Barb Miller that a copy of all warranties was to be attached to all new business quotes regardless of the sub-broker.

**50**  Barb Miller's employment was terminated in the fall of 2001. She was replaced by Marie Ryan. Marie Ryan had previously worked for Economical Insurance underwriting jeweller's block insurance. Brenda McKenzie testified that Economical's jeweller's block warranties were contained in the application and had to be signed by the insured prior to quoting.

**51**  Ms. McKenzie did not have a great deal of experience underwriting the jeweller's block program so she was in an unusual position in the sense that she could give instructions to Ms. Miller but she relied on Ms. Miller's expertise. I have concluded that Ms. McKenzie could not, or did not, stand up to Ms. Miller and that what Ms. Miller generally decided is what governed in how a risk was underwritten. Ms. McKenzie agreed with Ms. Miller's successor Marie Ryan, who did have experience in jeweller's block insurance, that CBM had handled matters in a very relaxed manner and "that had been accepted by all involved."

**52**  Ms. McKenzie testified as follows:

1. Yes. The reason that four months was allowed to get the signed warranties back, was in part simply a recognition of the realities of the business of insurance end of jewellers; right?
2. Oh, I would assume so. I don't recall what that - why the four-month date was actually - but I would think it was because of there were times of the year when it would be difficult for them to have time to do those things, so we made sure that we gave them enough time-
3. Yes.
4. -- to cover off that.
5. Well, part of it was just that Christmas was one of those times. It was probably the busiest time for jewellers; right?
6. Correct.
7. Okay. And on behalf of CGU, and you understood that during that period of time from binding to getting the signed warranties back, you were completely on the risk with no signed warranties in place; correct?
8. Oh, yes, we were on the risk.

**53**  I conclude from this testimony that Ms. McKenzie knew that CGU was on risk without warranties in the period between the date of binding and the signing of warranties.

**Evidence of Joan Edey**

**54**  Ms. Edey was the manager of the underwriting department, as well as other departments, at CGU. CGU brought GAN insurance in 2000. Brenda McKenzie, the GAN underwriter, became a CGU underwriter under the supervision of Ms. Edey.

**55**  Ms. Edey realized immediately upon acquiring GAN that the relationship between GAN and CBM was not good. In 1999, she conducted a comprehensive review of the CBM's jeweller's block program. She identified a number of problems but she did not identify any problems with respect to the enforceability of warranties in the period between binding and the policy issuing. She concluded that CGU should continue to use the CBM to underwrite the jeweller's block insurance program.

**56**  Ms. Edey also conducted audits of CBM after the Haworth loss. The results of the 2000 audit were mixed, but the 2001 audit was highly critical of CBM. The procedure for taking of warranties was not, however, identified as a problem in either of those audits. Ms. Edey noted that the CGU relied on CBM's expertise in jeweller's block because, "we [CGU] didn't know anything about jeweller's block when we came into the program". CGU was concerned about the lack of profitability of the program. By 2001, Ms. Edey had reached the opposite conclusion about the competence of CBM. She eventually concluded that Barbara Miller did not have the necessary underwriting skills to manage the program.

**57**  One explanation for CGU's apparent acquiescence to its being on risk without signed warranties (which I concluded was the case) is that the warranties had to be customized. While the bulk of the warranties contained standard clauses there were certain items that needed to be customized. I conclude that CGU senior managers had no experience in jeweller's block before CGU acquired Scottish & York. They relied on CBM, essentially Ms. Miller, and never put their minds to the weakness in their program posed by the delay in getting the signed warranties, which was exposed by the Haworth loss.

**58**  CGU conducted a number of audits of CBM. The audits became increasingly critical of the CBM underwriting during the period before and after the Haworth loss. In all the evidence I heard, and read, I concluded that no one at CGU or CBM was under the impression that warranties were being sent out by the broker with the quote or even with the interim binder. I concluded that Brenda McKenzie's report to re-insurers was self-serving. Barb Miller did not testify that she assumed the warranties "were relayed to the insured immediately". I conclude that no one at CGU or CBM ever expected warranties to be accepted by the insured prior to the date of their delivery with the policy.

**59**  None of the various people who reviewed the CBM program or audited the CBM program ever appeared to have identified the fact that CGU was on risk from the date of binding to the date the warranties were signed, without enforceable warranties.

**Evidence of Angela Hodgins**

**60**  Angela Hodgins was, in August of 2000, the Assistant Vice-President and Marketing Manager at Metrix. Her responsibilities required her to be the conduit between the producers, that is those employees of Metrix who dealt with clients, and CBM. In that role, Ms. Hodgins was the primary contact between Metrix and CBM.

**61**  She testified that on occasion new business would come in on an application of a competitor, such as Lloyd's, and the business would be bound by CBM. These applications could be unsigned. She testified that she would not obtain a signed CBM application until the business was bound. She was asked:

1. Okay. So doing it that way, it means the insurers on risk, the policy is incepted before the CBM app gets signed?"
2. Yes.

**62**  She noted that part of the process of issuing the warranties included customizing the warranty for the particular risk with features like the type of vault or the type of alarm.

**63**  She acknowledged that when Metrix prepared the interim binder it stated that the insurance was subject to "all terms, conditions, warranties, and wordings of the policy" but Metrix did not enumerate the warranties contained in the standard CBM policy. She was asked:

1. So if Ev Rea at Capri looks at that, there's no way for him to know specifically what warranties are in the policy; correct?
2. That's correct.

**64**  She said it was not the standard practice at Metrix to send warranties with the interim binder. It was the standard for Metrix to ask that the signed warranties, issued with the policy, be returned as soon as possible. Although CBM specified a return date in their correspondence to Metrix, Metrix chose not to incorporate a specified date in their correspondence to the insured or the sub-broker, but rather use the words "as soon as possible."

**65**  Subsequent to the Haworth loss, the procedure for delivering warranties to an insured or the sub-broker was altered. It took some negotiation to work out the method of sending warranties prior to the issuance of the policy. First CBM objected to warranties being prepared by Metrix because the format Metrix was suggesting did not include a CBM, Scottish & York, or CGU branding on the form of warranty. There were also negotiations as to whether the warranties would be sent out with or without Ms. Miller's signature, and ultimately, it was agreed that it was permissible for Metrix to send warranties to the insured without Ms. Miller's signature. This negotiation process also supports the defendant's contention that CBM never contemplated the delivery of warranties to the insured before the issuance of the policy.

**David Anderson's Evidence**

**66**  David Anderson is the President of Metrix. He testified that when he sells jeweller's block insurance to his own client, he reviews the expected warranties with the client at the application stage, but that the client would not actually receive the warranty until the policy was issued.

**67**  In this case, Mr. Anderson did not explain the warranties to Robin Durrant because he expected Mr. Durrant, who had numerous years of experience in the insurance industry, would know what was required of him. He commented that Mr. Durrant was very experienced - "he has had the pen" - meaning that Mr. Durrant had, at various times, underwriting authority for insurers.

**68**  Mr. Anderson testified as follows:

1. And had CBM ever asked you to send out the warranties with a memorandum of insurance?
2. No, they had not.
3. In your dealings with or on behalf of CBM what was the practice for the timing of sending out the warranties?
4. The warranties would have been sent out with the policy documents as CBM would be the ones issuing the policy and issuing the warranties at that time.
5. Other insurers on jewellers block with whom you dealt, did they do that the same way?
6. Some were similar and some did not require signed copies of warranties so they may have included the warranties and the policy terms with the actual quote.

He also testified that CBM had never asked him to pass on the warranties or the warranty wordings earlier than the time that the policy and warranties were issued. He did testify that when he meets with his own client anticipating insuring with CBM, he explains the opening and closing procedure warranty. He testified about the procedure to submit an application for jeweller's block insurance to various insurers to obtain quotes.

**69**  He testified:

1. Okay. All right. Well, I guess - let's say the retail broker takes time on the phone to talk a little bit about the jewellery store. He says it's 5,000 square feet; it's got an old-fashioned vault, she's got a local alarm, that sort of thing. How do you gauge in that decision-making process where you say, okay, this might lead to a CBM policy or it might lead to a Lloyd's policy?
2. We might not make that decision whatsoever; we may just send them an application to be completed, and then once we have that completed, submit to markets and see what we get back.

**70**  From this evidence I concluded that a broker would not have a specific discussion with a sub-broker about warranties that each different insurer might have. It would not be practical to do so, they simply submit the application to a number of markets. In the Haworth case, for example, Capri submitted the application to about five different markets to see what quotes they got back.

**71**  Lloyd's had different warranties than CBM. Lloyd's lists the warranties on the application. The customer signs indicating awareness of the warranties at the application stage. When the Lloyd's policy is issued containing the warranties, the customer is not then required to sign the warranties. At the time in question, Lloyd's quotations contained only a short-hand version of the warranties which would have had to be explained, in most instances, to an insured. Mr. Anderson testified:

1. And if you submitted it [an application to CBM] on a Lloyd's application, would you nonetheless inform the customer of the import of the CBM warranties?
2. Yes. We would go through what we thought would be the warranties that are going to apply.

**72**  The warranties did differ from insurer to insurer. For example, Lloyd's syndicates had a two person warranty, meaning there must be two staff persons in a jewellery store during opening hours at all times. CBM, on the other hand, did not require a two person warranty, but did have an opening and closing procedure warranty that Lloyd's did not. As well, the requirement of a business week surveillance tape library was a warranty unique to CBM.

**73**  Mr. Anderson admitted that when he sent the interim binder to Mr. Durrant at Capri, he did not list the warranties. Therefore, Mr. Durrant did not know the content and substance of the CBM warranties. Specifically, Mr. Anderson did not advise Capri of the opening and closing procedure warranty. No witness from CGU or CBM testified that it was Metrix's obligation to inform the insured or the sub-broker about warranties. On the contrary, as noted already, I concluded the plaintiff knew the warranties were not sent out before the policy was issued. Similarly, no underwriters from CGU or CBM testified that they specifically relied on Metrix to inform the insured or the sub-broker about the content of the warranties (other than the above-mentioned report by Ms. McKenzie to re-insurers.)

**74**  I find as a fact that the enforceability of the plaintiff's warranties between binding and signing of warranties by the insured simply was not addressed, noted or considered to be a problem by CGU or CBM or Metrix. During the period between binding until the issuance of the policy, there were often changes made to the coverages as in fact happened with the Haworth policy. There was information to be provided to the insurer which was included in the warranties, such as a description of alarms systems (as in fact happened with the Haworth policy). I find that it was the practice of CGU and CBM to bind and acknowledge that final details concerning the policy would need to be further addressed. For example CGU had the insured's premises inspected after binding and the results of that inspection and the inspector's recommendations might be communicated to the insured and might require the insured to warrant certain changes to their security system or business practices. I find as a fact that CGU and CBM were aware that Metrix did not as a matter of course send out blank forms of warranties with the quote or the interim binder. Further support for this finding is found in CGU's subsequent changes to its procedures following the Haworth loss which I described above.

**Analysis**

**75**  Mr. Dolden says that the warranties in the Haworth insurance policy were not enforceable because Ms. Haworth had not accepted them. Mr. Dolden says CGU had no alternative but to pay the Haworth claim because the warranties were not enforceable. The plaintiff and defendant agree on the propositions of law that follow.

**76**  The proposal form or application form submitted to the insurer through the broker is a form of offer coming from the proposed insured. This proposition is set out in the text, Ivamy, ***General Principles of Insurance Law*** at p. 110-111 and 116-117:

The proposal form, when duly filled in and signed by the proposed assured and forwarded to the insurers, operates as a formal offer by the proposed assured to the insurers to enter into contracts of insurance. The proposal form shows the terms on which he is willing to contract, and if the offer is accepted, he cannot insist on having an insurance differing in its terms from those specified in the proposal.

Since the proposal form, in practice, proceeds from the insurers, it further shows the terms on which they too are willing to contract. They are bound, therefore, after acceptance, to issue a policy in accordance with the proposal.

**77**  If the insurer agrees to the proposal but requires the insured to agree to certain warranties that were not contained in the proposal submitted by the insured then, the unsigned warranties constitute a counteroffer which is capable of acceptance by the insured. (***Morin v. Royal Insurance Co. of Canada***, [*[1995] 8 W.W.R. 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F2MB-S08J-00000-00&context=) (Sask. Q.B.), at p. 744.; ***Logging Ltd. v. Saskatchewan Government Insurance***, [*[2003] 3 W.W.R. 581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-F528-G1M8-00000-00&context=) (Sask. Q.B.),at p. 592.; aff'd [*[2004] 6 W.W.R. 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F873-B49R-00000-00&context=) (Sask. C.A.); ***Fleche Verte Ltée v. Dominion Insurance Corp.*** [*(1987), 86 N.B.R. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-K054-G0D8-00000-00&context=) (N.B.Q.B.) at p. 207.

**78**  When, and if, the insured accepts the "counter-offer", that is, the warranties, the parties have contractual certainty as to all the terms of the insurance policy.

**79**  Unless the insured has had an ability to read and accept the full warranties before the loss, the warranties are unenforceable. ***McKay v. Norwich Union Ins. Co.*** [*(1895), 27 O.R. 251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBW1-F06F-21BJ-00000-00&context=) (Ont. C.A.) at pp. 259-260; ***Beury v. Canadian National Fire Insurance Co.*** [*(1917), 38 O.L.R. 596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JBDT-B1TB-00000-00&context=), [*35 D.L.R. 790*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JBDT-B1TB-00000-00&context=) (Ont. H.C.) at pp. 109-111, aff'd (1917), 37 D.L.R. 105 (Ont. C.A.).

**80**  Delivery to an insured's broker is not delivery to the insured if the terms of the warranty were not previously known by the insured. ***Morin***, at pp. 743-744;

The content of the warranties need to accord with the representations in the application.

**81**  If the substance of the warranties is not made known to the insured prior to the loss, the insured cannot comply and, as a consequence, the warranties are of no effect. [***Re An Arbitration between Coleman's Depositories, Limited and the Life and Health Assurance Association***, [1907] 12 K.B. 798 (C.A.), at pp. 812-813; ***Parker & Company (Southbank) Limited v. The Western Assurance Company and Another*** (1925) W.C. + Ins. Rep. 82 (O.H.) at pp. 3-4; ***Austin v. Zurich General Accident & Liability Insurance Company, Ltd.,*** [1944] 2 All E.R. 243].

**82**  Section 12 of the ***Insurance Act***, [*R.S.B.C. 1996, c. 226*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B0DY-00000-00&context=), is triggered when two instruments are intended to form the whole contract but only one instrument is received by the insured. In this case the interim binder was delivered to Capri, and in turn, Ev Rea delivered the interim binder to the Haworth store on approximately December 2, 2000. Metrix issued an interim binder and did not include the warranties. Therefore, the insured had no notice of the warranties and was unaware of their existence until after the loss.

**83**  Section 12 of the ***Insurance Act*** applies to interim binders. It states:

1. A term or condition of a contract which is not set out in full in the policy or in a document in writing attached to it, when issued, is not valid or admissible in evidence to the prejudice of the insured or a beneficiary.
2. This section does not apply to an alteration of the contract agreed on in writing between the insurer and the insured after the issue of the policy"

**84**  The ***Insurance Act*** defines "contract" at s. 1 as follows:

"contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement.

**85**  Mr. Dolden submits that, in effect, an interim binder is a "contract" for the purpose of s. 12 of the ***Insurance Act***.

**86**  He cites the following passage from *McGillivray on Insurance Law*:

4-13 **Cover note superseded by policy**. An interim receipt or cover note including any provisions in the company's usual form of policy which may be incorporated into it by reference, expresses the term of the contract between the parties up to the date when a policy is issued. From that date, the contract expressed in the policy supersedes the contract evidenced by the cover note as to the future, but not as to the past. A claim arising out of an occurrence happening before the issue of the policy falls to be adjudicated by reference only to the contract as expressed in or evidenced by the cover note. This distinction is important where the insurers have the right to introduce conditions into the policy which were not applicable to the cover note, and which might bar a claim under the policy that would succeed on the preliminary contract of insurance. It must be remembered that, unless the parties have expressly, bound themselves respectively to accept and to issue a policy, the contract of insurance may be terminated upon the expiration of the temporary cover.

...

|  |  |
| --- | --- |
| 4-15 ... |  |

It is doubtful whether this principle of implied incorporation extends to a special addendum or marginal condition in the insurers' policy of which the assured has no actual knowledge, and which is not usual in policies covering the subject-matter in question issued by other insurers.

|  |  |
| --- | --- |
| 4-16 ... |  |

4-17 ... The Court of Appeal held, by a majority, that the condition was not applicable until the contents of the policy had been communicated to the assured. The assured had no opportunity of knowing of the condition until delivery of the policy, and it could not have been intended that he should be bound by it until either he was told of it or he received the policy.

|  |  |
| --- | --- |
| 4-18 ... |  |

4-19 It is not entirely clear to what extent these cases create an exception to the general rule of implied incorporation of policy conditions into a cover note. In each case, the particular condition was of a usual kind and a standard term in the insurers policies, and it is difficult to justify the two decisions on the ground that it was not one which a reasonable assured could have expected to find. The exception probably therefore extends, on equitable grounds, to conditions requiring the assured to take positive steps of any kind, as opposed to conditions which merely restrict the insurers' liability or the scope of he risks run. (Nicholas Legh-Jones ed., *MacGillvray on Insurance Law, 9th ed*. (London: Sweet and Maxwell, 1997 at pp. 121-123)

Mr. Dolden further submits:

The legislative intent inherent in Section 12 is to bar an insurer from relying on terms not included in an interim binder:

"In holding that the word "issued" in s. 12 meant "issued to the insured", the trial judge equated "issued" with "delivery". He relied primarily on an excerpt from *Couch on Insurance*, cited with approval by Nemetz J.A. in *Okanagan* at p. 674:

... statutes of this character are clearly intended to protect the policyholder by requiring the insurer to place in his or her hands written evidence of the entire contract ...

As found in *Youlden* and *Barnet*, however, the provisions of s. 12 may be satisfied by reference in the document containing the terms and conditions of the policy. This meets the requirement of the section that the terms and conditions are set out in the policy, when issued, and distinguishes those terms from terms that may be added, when "agreed on in writing between the insurer and the insured after the issue of the policy", as provided in s. 12(20).

Physical delivery to the insured is not required. If it were, I would expect the Legislature would have so provided, as it has in ss. 14 and 38 of the *Act*. (***Hwan v. Axa Pacific Insurance Co.*** (2002), 91 B.C.L.R. (3d) (B.C.C.A.) at pp. 58-59)

**87**  I agree with Mr. Dolden's submissions concerning the legal enforceability of warranties. I agree that the warranties in this case although referenced in the interim binder were not contained in the CBM proposal. They therefore constituted a counter-offer, and unless and until Ms. Haworth accepted them they were not enforceable against Ms. Haworth. She had no knowledge of them. She had not agreed to them.

**88**  I also agree with Mr. Dolden that the plaintiff's decision to pay the claim to Haworth was a reasonable and proper one. CGU did an exceptionally thorough investigation of all the surrounding circumstances of the claim. I conclude that a reasonable insurer acting in good faith in the circumstances of this case ought to have paid Haworth's claim under their policy, as CGU did.

**Liability of Metrix**

**Did Metrix owe a duty of care to CGU?**

**89**  I now turn to the question of whether Metrix is liable to the plaintiff in either tort or contract.

**90**  I have concluded that Metrix was appointed a jeweller's block broker for CBM because, in part, it had experience and expertise in the selling of jeweller's block insurance policies. CBM would not sell directly to a retail broker who knew nothing about jeweller's block insurance.

**91**  I have found as a fact that CBM did not require the warranties to be sent out with quotes or binders and I have found that CBM knew blank form warranties were not sent out before the policy was issued.

**92**  I have found that CBM's own procedures never required warranties to be sent out before the policy was issued. The fact that this exposed the insured to a period when warranties were not enforceable seems never to have been discussed or thought about. It was not mentioned in audits or manuals. CBM was lax about many of its procedures.

**93**  The warranties, if not included with the quote, and if broader than the application (as was the case here) are a form of counter-offer as noted above. Consequently, CGU did not have enforceable warranties until the warranties were signed by the insured, as they never were in this case.

**94**  Metrix knew Mr. Durrant submitted the application on a Lloyd's form and that Lloyd's had different warranties. Metrix knew that Mr. Durrant having never previously purchased for a customer, a CGU or GAN jeweller's block policy, would have been unaware of the specific warranties CBM required. Metrix took no steps to inform Mr. Durrant about the broader (than Lloyd's) warranties.

**95**  In hindsight, it is obvious that the insurer should not have left itself exposed to a period of coverage without enforceable warranties. After this loss, CGU as previously noted, quickly changed its binding process to ensure there was no gap in warranty coverage. Prior to the Haworth loss, CGU could have, but did not, ensure its application referred to all its warranties.

**96**  I see no basis to imply as a term of the contract between Metrix and CGU that Metrix was responsible to deliver warranties with the quote. I have found CGU knew Metrix did not do so. I have also found CGU did not instruct Metrix to do so. I have also found CGU did not rely on Metrix to do so. I therefore conclude Metrix is not liable to the plaintiff for breach of contract.

**97**  Does Metrix owe CGU a concurrent duty of care in tort that is broader than its contractual duty? Is Metrix liable in tort for failing to do that which CGU did not bother to do itself, knew Metrix was not doing and did not rely on Metrix to do. What duty of care did Metrix owe CGU?

**98**  In ***Central & Eastern 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=), Le Dain J. summarized his conclusions concerning concurrent liability in tort and contract as follows at [paragraph] 50:

What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

**99**  In the case of ***BG Checo International v. British Columbia Hydro & Power Authority***, [*[1993] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=), at p. 14 the head note neatly summarizes the interaction between liability in contract and tort as follows:

The contract does not preclude Checo from suing in tort. The general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both subject to any limit the parties themselves have placed on that right by their contract. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for ***negligence***. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

**100**  At [paragraph] 16 of ***BG Checo***, McLachlin J. stated:

It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

**101**  Mr. Skorah says a loss caused by CGU's own lax underwriting process cannot be visited upon Metrix in circumstances where CGU did not instruct, rely on, or expect Metrix to obtain the insured's consent to warranties in the binding process. On the facts in this case there is no basis to find that the relationship between Metrix and CBM entailed Metrix having responsibility to monitor CBM's own underwriting practices. This is not the kind of relationship like a solicitor and client or auditor and client where the professional is hired for the professional expertise that the client lacks. CBM and Metrix were on an equal footing as regards the underwriting procedures that flow from taking an application, issuing a quote and binding insurance. I see nothing in the relationship between Metrix and CBM that required Metrix to advise CBM that its underwriting practices were deficient. After the Haworth loss CGU did alter CBM's underwriting procedures. It did not rely on Metrix to tell it to do so. I conclude that Metrix did not owe CGU a concurrent duty of care in tort to advise or alter CGU's underwriting procedures.

**102**  As noted above, the authorities are clear that a warranty would not be binding on the insured or enforceable by the insurer until the insured had agreed to the warranties. That certainty of contract could only be achieved by including the warranties in the initial proposal, or treating the warranties as a counteroffer as was in fact done. Mr. Dolden submits that the insured, Haworth, would not be bound by oral advice concerning the warranties unless she accepted the warranties in accordance with s. 12 of the ***Insurance Act***. No authority was cited to me that would challenge the proposition that an insured is not bound by oral advice that would alter or extend the written terms of the contract, unless she accepted it in writing.

**103**  I accept that the gap in warranty coverage that occurred here would not have been remedied by Mr. Anderson's informing Mr. Durrant orally of the content of the warranties unless Ms. Haworth accepted the warranties. I conclude that it was CGU's responsibility, not Metrix's to design its own underwriting procedures and the scope of Metrix's duty of care did not extend to modifying CGU's own underwriting procedures. I conclude that it was CGU's deficient underwriting procedures, managed, or mismanaged by its agent, CBM, that caused CGU to be on risk without enforceable warranties. Metrix's duty of care to CGU did not include advising on CGU's underwriting procedures. In evidence is an example of Lloyds' insurance quotation that enumerates the warranties in a short hand form. CGU did not provide warranties in whole or short form and the consequences of not doing so is their responsibility. CGU chose not to conform to a higher standard as others in the industry did.

**104**  The plaintiff also says that Metrix breached its standard of care by failing to ensure the warranties were returned by January 22, 2001. The robbery occurred on January 23, 2001. If Metrix had ensured the return of the signed warranties by January 22, 2001, (the return date requested by CBM) CGU contends that: either it could have avoided paying the loss if the warranties were breached, or if Ms. Haworth had brought her businesses practises into compliance with the warranties the robbery may not have occurred.

**105**  Much evidence was led concerning Metrix's delay in sending the warranties and policy to Capri. CBM and CGU set the performance standards concerning the time to return signed warranties and it is very clear that it did not communicate to its brokers that time was a matter of strict compliance. This was proven at trial by a review of a large number of CGU's unrelated files and the performance audits done of CBM by CGU. CGU permitted four months to return the warranties within its written underwriting guidelines. CBM's guideline was six weeks but that time limit was frequently extended. CBM sent their brokers reminders. Although CGU could have cancelled a policy, it never did so. CBM did not require strict compliance with its six week time frame by its brokers. Metrix's delivery of the warranties to Capri in this case was not outside the parameters of performance set by CBM and CGU. Metrix did not breach the performance standards set by CBM and CGU, nor did it breach the duty it owed to CGU and CBM when it took about three weeks to forward the warranties to Capri and did not specify the return date requested by CBM. In the ordinary course, that is if the robbery had not occurred, CBM would have sent a reminder about the return of the warranties to Metrix who in turn would have sent a reminder to Capri. But CBM would not have taken any steps to cancel the policy. CBM routinely accepted the late return of warranties. For these reasons, the plaintiff's submission that Metrix breached the standard of care in failing to return the warranties by January 22, 2001, is dismissed.

**106**  However this finding does not entirely resolve this case.

**Did Metrix owe a duty to CGU to orally communicate the warranties?**

**107**  I have dismissed the plaintiff's claim both for breach of contract and for breach of duty of care for failing to advise or alter CGU's underwriting procedures. It could be argued in the alternative, that Metrix breached its duty of care by failing to orally advise of the warranties, and this breach caused or contributed to the loss of the jewellery during the robbery through Ms. Haworth's failure to implement the provisions of the warranties. The result of CGU's investigation of the Haworth loss was that Ms. Haworth did not know about the warranties and accordingly they were not enforceable. In its investigation of this loss CGU did not have to confront the issue of whether Ms. Haworth could be bound by oral advice about the warranties. Mr. Dolden says in his submissions for the reasons set out above that an insurance contract must be in writing. This was not an issue that was argued at the trial but I agree that that is the effect of s. 12 of the ***Insurance Act***. However, I now shall consider if Metrix ought to have provided oral advice about the warranties to Capri and if its failure to do so caused or contributed to CGU's loss. I turn to the facts relevant to this alternative argument.

**108**  CGU and CBM were in no position to judge whether Capri (Robin Durrant) had knowledge of the CGU's warranties. CBM did not need to know a sub-broker was involved. CBM appointed Metrix because of Metrix's knowledge of jeweller's block insurance, its ability to extract the pertinent information from the jeweller and its knowledge base from which to advise the jeweller of potential warranty compliance issues. Metrix did owe a duty of care to CGU within the scope of these responsibilities.

**109**  Metrix was responsible to, and did, deliver both the quote and the interim binder. Both documents contained wording that the insurance coverage was subject to the terms, conditions, warranties and wordings of the policy to be issued. In both cases the implication of this wording was unknown to Capri and Haworth because neither of them knew the content of the warranties, specifically the opening and closing procedures warranty. I have already concluded that Metrix had no responsibility for CGU's underwriting procedures, and had no responsibility to send out written warranties with the quote or the interim binder for the signature before binding of the insured. However Mr. Anderson seemed to recognize a responsibility to inform an applicant for jeweller's block insurance of the anticipated warranties. He testified that he used a form that he completed with his own direct insurance clients, that is non sub-brokered clients, in which he reviewed the expected warranties. One of the purposes of such a procedure was to ensure the jeweller brought their business into compliance with the warranty requirements of the policy, such as the safe and alarm requirements, and also to determine if compliance was not possible.

**110**  One of the plaintiff's experts, Dirk Moerkens, gave evidence about the standard of care of an insurance intermediary in the role of Metrix. He stated:

In my opinion a reasonable prudent intermediary in the position of Metrix would, as a matter of custom and practice, advise a new-sub-broker of the range and scope of the standard warranty documents typically required at the time an application is first submitted.

**111**  This expert evidence is consistent with Mr. Anderson's own practise.

**112**  As noted already, Mr. Anderson must be taken to have known that Mr. Durrant had no means of knowing that CGU had a unique (to it) opening and closing procedure warranty. All the parties agreed that it was not industry practise for CBM to have any direct communication with Capri, therefore it was only Metrix who could explain the warranties pending delivery of the written warranties in the form specified by CGU.

**113**  I conclude that Metrix did owe a duty of care to CBM and its principal CGU, to communicate the content of the standard warranties to Capri, at least at the binding stage of this transaction, and that Metrix breached this duty of care.

**Did Metrix's breach of its duty of care by failing to orally advise of the warranties cause or contribute to the loss?**

**114**  Robin Durrant is the president of Capri. His responsibilities were primarily to deal with the insurance markets as opposed to the insured clients. He became involved in the Haworth insurance file because of his knowledge of the markets, in London in particular. He eventually submitted one completed Lloyd's proposal for jeweller's block insurance to about five markets as well as to Metrix. He had almost no jeweller's block insurance experience and had never purchased a jeweller's block policy through Metrix. He did know Dave Anderson from other insurance dealings with Metrix. I formed the impression that Mr. Anderson and Mr. Durrant held each other in high regard.

**115**  Mr. Durrant testified that at the time he approached Metrix he would have anticipated the same warranties as were listed on the Lloyd's application form. He had no information about CBM's specific warranties. When he received the CBM quotation for the Haworth jeweller's block policy he reviewed it. He testified that he would anticipate "normal jeweller's block warranties". He said he assumed the warranties were the same as the Lloyd's warranties because of his limited knowledge of jeweller's block insurance. He did not make any enquiry about the specific warranties that would apply. He said "I would need to know warranties so I could explain to the client the implication in terms of their operations." He testified that at the point he received the quote there was no indication that the front and back doors had to be locked when jewellery was moved. He said after the armed robbery he became aware (with "horror") of the warranties. He admitted that his office had not established a procedure to treat warranties (and the necessity for signatures) with priority. He testified that the priority was to "get things bound".

**116**  Mr. Anderson testified about the steps he habitually takes when he is applying for a jeweller's block policy on behalf of his own client, as opposed to a sub-brokered client:

We would go out and see the client, the jeweller, directly in their location; we would sit down with them and complete the jewellers block application; at the time the application was being completed, we would go through the warranties that would be required of them; we would talk about security requirements, et cetera; we'd want to make sure that they are going to be able to comply with the requirement, otherwise there's really no point in them taking out the jewellers block policy; once we have the completed ap, we'd have it signed and we'd come back and then submit it to the markets.

**117**  As noted already, Mr. Anderson's company has designed a form titled "Jeweller's Block - List of Warranties". The form contains the following words:

The following warranties and clauses have been explained to me and I know that they may be or are on my Jeweller's Block Policy. I further understand that failure to comply with any of these warranties and or clauses may VOID my coverage in its entirety.

There follows a list of possible warranties one of which is Opening and

Closing Clause. (a reference to CBM's opening/closing warranty)

**118**  Mr. Anderson must be taken to have known or ought to have known that Robin Durrant had no knowledge about CBM's specific warranties. Mr. Anderson knew that CBM's warranties varied somewhat from Lloyd's warranties. He says he would not have presumed to tell Mr. Durrant that he should tell his client about the warranties because Mr. Durrant was such an experienced broker. Mr. Anderson treated this sub-brokered business differently than he would if Haworth were his own client. There was no basis in fact for his assumption that Mr. Durrant knew of the warranties. I conclude that Mr. Anderson, and thereby Metrix, breached its duty of care in failing to advise either Mr. Durrant or Mr. Rea about the content of the CBM warranties at least by the date the policy was bound.

**Did the plaintiff prove on a balance of probabilities that the defendant's failure to communicate the warranties to Capri caused or contributed to the loss?**

**119**  To succeed the plaintiff must prove that if Metrix had informed Capri about the warranties, Capri would in turn have informed Ms. Haworth and that Ms. Haworth would have altered her opening and closing procedures to comply with the policy, and further that the robbery probably would not have occurred if the door was locked.

**120**  To be clear, this is not a question of remoteness, but rather causation. The test in Canada for whether damages caused by a defendant's negligent behaviour are too remote for liability to be found was set forth by the Manitoba Court of Appeal in ***Assiniboine School Division No. 3 v. Hoffer*** [*(1971), 21 D.L.R. (3d) 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-FG68-G2C6-00000-00&context=), aff'd *(1973) 40 D.L.R. (3d) 480* (S.C.C.). The court found that, "It is now settled that foresight is the test both for duty and for remoteness", and "[i]t is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable." In this case, it is difficult to argue that it was unforeseeable that Metrix's failure to advise Capri and therefore Ms. Haworth of the warranties might lead to a circumstance where the warranties were not implemented and damage ensued. The damages are not too remote for the plaintiff to be held liable; the issue is rather whether the plaintiff has proved on a balance of probabilities that Metrix caused or contributed to the loss resulting from the robbery.

**121**  The test for causation where there are numerous sources contributing to a plaintiff's damage was set out 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=). In that case, the plaintiff had a history of back problems and had twice injured his back in car accidents. On the advice of his doctor, he resumed his regular exercise routine after the second accident and suffered a herniated disc while warming up. The court found the accidents played some causative role in the disc herniation and assessed liability at 25 per cent for this injury. In discussing causation, the Supreme Court of Canada stated that in the cases where the "but for" test is unworkable, for instance where there are multiple factors contributing to a plaintiff's damage, causation can be established where the defendant's ***negligence*** "materially contributed" to the injury, even if it was not the sole cause.

**122**  I turn now to the evidence relevant to the question of whether Metrix's breach of its duty of care caused or contributed to the loss sustained by the plaintiff.

**123**  The inspection report discloses that the back door of the jewellery store was constructed of steel, glass and wood, and was equipped with double cylinder "kawneer steel cross bar for wood door". As well there was an alarm system including a panic alarm that presumably Ms. Haworth could have activated if she heard the back door being broken. At the time of the robbery she and her jeweller were sitting in a back office close to the back door. The inspector did not make any recommendations concerning the adequacy of the door locks from which lack of recommendations, I infer that the doors were adequate to resist break-ins.

**124**  I turn next to an analysis of the evidence of the closing procedures at Haworth Jewellery store. The posted opening and closing times of the store was 9:30 a.m. to 5:30 p.m. However Ms. Haworth testified that as long as there were customers in the store she would remain open. She told Mr. Krywiak, the investigator hired after the loss by CGU, that at about 5:00 p.m. or 5:30 p.m. depending how busy they were, her employees would start moving the jewellery from the display cases into boxes, and onto the trolley. The trolley would be left by her employees in her office. Ms. Haworth told Mr. Krywiak that she took responsibility to move the trolley into the vault before she left for the day. The back door remained open all day because the parking lot, used by customers and staff was at the back of the building. After the store closed, the back door remained open or unlocked until all the staff had left. Ms. Haworth's practise was to lock the door when the employees and customers had all left. I concluded that during the closing period which could begin anytime after five, employees began to move jewellery out of the locked display cases to the trolley and the jewellery remained in unlocked containers for extended periods of time while the back door of the store was unlocked. She testified that her father and grandfather always left the rear door of the store open in the same way that she did.

**125**  Ms. Haworth testified that she could not remember any discussions about the insurer's policy requirement for a seven day, or business week, library of tapes. She did not know she was required to keep a business week library of tapes. She told Mr. Krywiak that her employee, Connie, was responsible for the security requirements. Mr. Krywiak, the investigator was told by Connie that she had nothing to do with the video system, other than purchasing one video tape and turning it on. Connie did not testify. Mr. Krywiak testified that he concluded Ms. Haworth had no concern about the video system and was not responsible about it.

**126**  Ev Rea was formerly the President of Capri. He had known the Haworth family for many years. He looked after Heather Haworth's insurance requirements. He was primarily responsible for dealing with Ms. Haworth while Robin Durrant was primarily responsible for dealing with Metrix. Mr. Rea was not knowledgeable about jeweller's block insurance. He reviewed the quotation received from CBM on about October 30, 2000. He testified that he reviewed the quote to see what warranties applied. He noted the alarm and vault requirements that were specified on the quotation under the heading "comments". He knew that Ms. Haworth had to comply with this warranty and he knew that her existing alarm system was "not up to snuff". He arranged for Chubb to upgrade the alarm system and he informed Metrix that "they were working on it." He testified that he did not discern any other warranties in the quotation. He testified that there was no indication that there would be an opening/closing warranty. He testified that if he had been informed about the opening and closing procedure warranty he would have informed Ms. Haworth about them. He was unaware that there would be a form of warranties requiring Ms. Haworth's signature. He did not personally review the CBM application form with Ms. Haworth which means that he did not take the time to review any representations in the form that would ultimately form part of the policy with her. It was taken out to Ms. Haworth, for her signature, by Mr. Rea's assistant, Jody Hayes.

**127**  If Mr. Anderson had told Mr. Durrant or Mr. Rea about the CBM warranties would Mr. Durrant have told Ms. Haworth about them? Mr. Durrant was not asked this question. Mr. Durrant was sufficiently knowledgeable about insurance that he would have known the importance of telling Ms. Haworth about the warranties.

**128**  Mr. Rea and Mr. Durrant testified that Ms. Haworth was not interested in the details of her insurance. She admitted that she is primarily interested in sales and leaves it to others to look after the business details. She testified at trial that she did not know which staff member was responsible for the surveillance system. Mr. Rea testified that he knew it was necessary to make things "crystal clear" for Ms. Haworth because she didn't pay attention. He said Ms. Haworth was very good at the sales side of her business but was not interested in the details of managing the business. I conclude that Ms. Haworth took no responsibility for the security requirements of her jewellery store, but more significantly she was so reckless about it that she did not delegate full responsibility to any employee. The result was that as a consequence of the efforts of Mr. Rea and Chubb she had upgraded her security system but no employee at Haworth's was charged with responsibility to ensure they knew how the video surveillance system worked or even if it worked, which it did not. When the video system was seized by the police, after the robbery, it was discovered the cameras were not sequencing but rather were frozen on one image. Ms. Haworth's evidence at trial was remarkable because she seemed completely unaccountable for the fact that: not only did she know nothing about her own security system; she did not know which of her employees did know about it; and most surprisingly she did not recognize that it was her responsibility to manage the security systems or specifically designate someone else to do so, which she did not. It is against this background that I would have to infer that if Ms. Haworth had been told of the warranties noted above at [paragraph] 33, she would have altered her long standing businesses practises to comply with all the warranties.

**129**  Capri was responsible to obtain a signed CBM proposal form from Heather Haworth. The form was prepared at the offices of Capri. It contained, as noted above, certain representations that would form part of the policy. Neither Mr. Durrant nor Mr. Rea reviewed the document personally with Ms. Haworth to explain the importance of the representations to her. As noted above, Mr. Rea arranged for his assistant, Ms. Hayes, to obtain Ms. Haworth's signature. Ms. Hayes testified that she did not review the application with Ms. Haworth. Either Capri did not inform Ms. Haworth about the necessity to maintain a business week of surveillance tapes or she ignored the advice because as I have already noted Haworth Jewellers did not maintain the necessary tapes. Similarly when the Lloyds applications were taken there was no effort by Capri to review the representations and warranties with Ms. Haworth despite the fact that the application emphasizes the warranties in bold print. Mr. Rea testified that he took no steps to explain to Ms. Haworth that there would be warranties. This in the face of quite explicit language in the CBM proposal form as follows :

**Premises Protection**

**Is a business week of library tapes in place? X Yes**

**Note: This is mandatory**

**130**  Has the plaintiff proven on a balance of probabilities that Mr. Anderson's breach of his duty of care in failing to tell Capri about the CBM warranties caused or contributed to the loss suffered in the robbery? There is no direct evidence on this point from either Mr. Durrant or Ms. Haworth. The available evidence is that Capri did not review the important representations in either the CBM or Lloyds' proposal forms with Ms. Haworth. As Capri did not review the representations and warranties that it did know about, can I reasonably infer that they would have reviewed the opening and closing warranty (that they did not know about) with Ms. Haworth in a manner that would have sufficiently captured her attention, to cause her to change her long standing business practise of leaving the back door unlocked after closing when she was moving jewellery to the vault from the showcases and in such a way prevented the robbery?

**131**  On all the evidence I conclude, although not without some hesitation, that if Mr. Anderson had reviewed the warranties with Mr. Durrant, Mr. Durrant would probably have told Mr. Rea to inform Ms. Haworth about the warranties and Mr. Rea would have done so. But Mr. Rea would have had to have reviewed the warranties with Ms. Haworth in the clearest and most urgent way to have had any impact on Ms. Haworth. That would not be typical of how Mr. Rea dealt with other warranties and representations in the past. Ms. Haworth did not testify about what changes she would or could have made to comply with the warranties. But more importantly she was reckless about her surveillance system and I conclude from the evidence of those witnesses who knew her, or encountered her, as well as from her evidence at trial that it is possible but not probable she would have complied with the opening and closing warranty had she been informed of it. To find that Ms. Haworth would have complied with the warranties would be largely speculative, and so the plaintiff has not discharge its burden of proof.

**Disposition**

**132**  The plaintiff's case is dismissed. If costs cannot be agreed between the parties, counsel may speak to costs.

GARSON J.

**End of Document**

[***Scott v. Erickson, [2009] B.C.J. No. 1901***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62HT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nelson, British Columbia

N.H. Smith J.

Heard: May 25-29, June 1-5 and 8-10, 2009.

Judgment: September 23, 2009.

Docket: 06-4372

Registry: Victoria

**[2009] B.C.J. No. 1901** | [*2009 BCSC 1298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2R9-00000-00&context=) | [*2009 CarswellBC 2552*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2R9-00000-00&context=) | [*181 A.C.W.S. (3d) 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2R9-00000-00&context=)

Between Carel Scott, Plaintiff, and Paul Dane Erickson, Defendant

(115 paras.)

**Case Summary**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Miscellaneous — Non-pecuniary loss — Affecting social relationships — Action by plaintiff for damages for motor vehicle accident allowed in part — Defendant 100 per cent liable — Plaintiff claimed brain injury led to impaired memory and changed personality, but evidence unconvincing so changes psychological — Plaintiff awarded $85,000 non-pecuniary loss as psychological injury impaired ability to function — Plaintiff awarded $60,000 for past loss of income as her business was unprofitable and she could not work elsewhere — Plaintiff also awarded $35,000 for future loss of income, $8,000 for counselling and $5,520 special damages.**

**Damages — Physical and psychological injuries — Psychological injuries — Emotional and mental distress — Depression — Action by plaintiff for damages for motor vehicle accident allowed in part — Defendant 100 per cent liable — Plaintiff claimed brain injury led to impaired memory and changed personality, but evidence unconvincing so changes psychological — Plaintiff awarded $85,000 non-pecuniary loss as psychological injury impaired ability to function — Plaintiff awarded $60,000 for past loss of income as her business was unprofitable and she could not work elsewhere — Plaintiff also awarded $35,000 for future loss of income, $8,000 for counselling and $5,520 special damages.**

**Tort law — *Negligence* — Causation — Foreseeability and remoteness — Contributory *negligence* — Proof of — Duty of care — Motor vehicles — Action by the plaintiff for damages suffered in motor vehicle accident allowed in part — Defendant was travelling north on two-lane highway and drove across road and parked at mailbox, still facing north — Plaintiff mistook defendant for oncoming traffic and drove off road, into embankment in attempting to stay to defendant's right — Defendant breached duty of care in leaving high beams on while parked facing traffic — No evidence plaintiff had time to correct herself after she drove off road — Defendant 100 per cent liable — Plaintiff awarded $193,240.**

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| Action by the plaintiff for damages suffered in a motor vehicle accident. The plaintiff claimed to have been misled by the defendant's headlights, causing her to drive off a road into an embankment. The plaintiff was travelling south on a two-lane highway. The defendant had been travelling north, but drove across street to community mailbox. He parked in the pull out, still facing north, with his high beams on. The plaintiff testified that she turned a corner and saw the defendant's headlights pointed at her, so she thought he was oncoming traffic and tried to stay to his right, resulting in her driving off the road. The defendant argued that the plaintiff had clearly been inattentive or she could have properly assessed the situation, or noticed when she was on the shoulder. The plaintiff had pain and bruising throughout her body following the accident, but this was resolved in six months. The plaintiff claimed to have suffered a traumatic brain injury that had greatly impaired her concentration and memory. Friends and family testified that the plaintiff's personality had changed and her reasoning skills had deteriorated. The plaintiff attempted to operate a retreat business in the years following the accident, in which she earned approximately $12,000 per year, partially from rental income.  HELD: Action allowed in part.  The defendant was not illegally parked at the mailbox pull out, but he should have known he was close enough to the road that his headlights could be mistaken for an oncoming vehicle. The defendant aggravated this risk by having his high beams on, which impaired the plaintiff's vision. The defendant had breached his duty of care. While the plaintiff should have felt that she was on the shoulder, there was no evidence to demonstrate that she could have righted her vehicle, so the defendant was 100 per cent liable. There had been no consensus among physicians as to whether the plaintiff had suffered a brain injury, so it was no proven. However, the plaintiff had demonstrated that she suffered personality and cognitive changes, so these were clearly psychological. The plaintiff would likely recover with intensive therapy but had suffered a persistent psychological injury that affected her ability to function. The plaintiff was awarded $85,000 in non-pecuniary loss. There was no evidence that the plaintiff's business had any chance of financial success. However, had she not been injured, she would have sought work elsewhere when her business failed to profit. As such, the plaintiff was awarded $60,000 for past wage loss. The gap in earning since 2004, coupled with the fact that the plaintiff was now 62 years old, warranted a future loss of earnings award of $35,000. The plaintiff was also awarded $5,240 for special damages and $8,000 for future counselling. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ31-JKB3-X2FB-00000-00&context=), s. 119, s. 190

Motor Vehicle Act Regulations, [*B.C. Reg. 26/58, s. 4.01*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RCB1-FC1F-M1XG-00000-00&context=), s. 4.06(5)

**Counsel**

Counsel for Plaintiff: A.R. Atwood-Brewka.

Counsel for Defendant: G.L. Harrison, Q.C.

**Reasons for Judgment**

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

**1**   The plaintiff seeks damages for injuries sustained when she drove off a road and over an embankment. She says she was misled by the headlights of the defendant's vehicle, which was facing in the wrong direction while stopped beside the road. Liability and damages are both in issue.

THE ACCIDENT

**2**  Highway 31 is a two-lane road that follows the western shore of Kootenay Lake in south-eastern British Columbia. On October 4, 2004, at approximately 10:30 p.m., the plaintiff was driving south on Highway 31 near Balfour, B.C. The plaintiff was driving a pickup truck owned by her brother, who was one of three passengers in the vehicle. The group was returning to Nelson, B.C. from an evening at Ainsworth Hot Springs -- a drive of about 90 minutes.

**3**  Meanwhile, the defendant had been driving north from Nelson to his home near Balfour, but crossed the road to stop at community mailboxes in a pullout adjacent to the southbound lane. While the defendant retrieved his mail, his sport utility vehicle was still facing north with its headlights on. The plaintiff says the defendant's headlights were on high beam. The defendant concedes that they likely were, although he has no specific recollection.

**4**  When the plaintiff first saw the defendant's headlights, a curve in the road created the illusion that they were ahead and to her left, in the northbound lane. She said that she tried to keep to the right of what she thought was an oncoming vehicle. Although she did not realize it at the time, the actual position of the defendant's vehicle meant that, in order to keep to the right of it, the plaintiff had to steer her vehicle off the road, onto and beyond the shoulder.

**5**  As the plaintiff got closer to the defendant's vehicle, she realized that it was stopped, but still thought it was on the road. Before she realized its true position, her truck went down a steep embankment into what witnesses variously described as a ditch, gully or sinkhole.

**6**  The plaintiff's vehicle landed in an upright position at the bottom of the embankment. The plaintiff recalls her brother, Jon Scott, asking if she was all right. Although she could hear him, she says she was initially unable to answer. She says the defendant came down the embankment and told her that she had apparently seen his lights and become confused. At that point, she says, she became angry and did not reply. The defendant's recollection of that conversation is that he asked the plaintiff if his lights had confused her and she said they had not.

**7**  The applicable speed limit was 80 kilometres per hour ("kph"), but the plaintiff says she had previously noticed she was only travelling at 60 kph. That was her speed when she first saw the defendant's headlights, and she testified that she had slowed down more by the time she went off the road.

**8**  The traffic lanes were marked by a double yellow line in the centre of the road and white fog lines at each edge. The plaintiff says she could not see these lines as she approached the defendant's vehicle. She attributes this, in part, to the fact that the lines were interrupted about 100 metres north of the mailboxes where another road joins the highway. Although the lines resumed after that intersection and before the mailboxes, the plaintiff says her vision was by then impaired by the high beam of the defendant's headlights.

**9**  Jon Scott, who was sitting in the front passenger seat, and Wanda Sage Barrett, who was a backseat passenger, both testified that as the plaintiff drove around a curve they saw a bright light that prevented them from seeing anything else. The third passenger lives in the United States and was not called to testify.

**10**  Doug Greve, who lives nearby and came upon the scene shortly after the accident, also testified that the lights on the defendant's vehicle were very bright and he asked they be turned off. The defendant does not recall seeing or speaking to Mr. Greve.

**11**  The defendant testified that he and his wife stopped to pick up their mail on their way home. He said it is common practice in the community to pull off as he did and he is not aware of any other accidents in the vicinity of the mailboxes. As he was getting the mail from his box, he heard his wife scream, saw lights and heard a crashing sound. He then realized that a car had gone off the road and into the gully, which he said is about 40 feet deep.

**12**  Carol Erickson, the defendant's wife, testified that she saw oncoming headlights which appeared to be coming straight toward her, then disappeared. In the time she observed the lights, she says the plaintiff's vehicle did not appear to be slowing down and, in fact, appeared to be accelerating.

**LIABILITY**

**13**  The plaintiff says the defendant was negligent in parking his vehicle facing oncoming traffic with his headlights on high beam, which he knew or should have known would be confusing or disorienting to oncoming drivers. The defendant argues that the plaintiff was simply inattentive and oblivious to the situation and that she had ample time to determine the true position of the defendant's vehicle and drive safely past it.

**14**  Jonathan Gough, an accident reconstruction expert retained by the defendant, attempted to recreate the scene of the accident under similar lighting conditions. With the defendant's vehicle parked at the mailboxes facing north, Mr. Gough approached that location in a southbound vehicle with a video camera positioned to record a driver's eye view of the road. On the video, Mr. Gough's vehicle approaches the accident scene at the 80 kph speed limit, rather than the 60 kph speed at which the plaintiff says she was travelling.

**15**  Mr. Gough's video confirms, first of all, that the road was very dark, with no illumination other than what was provided by vehicle headlights. It also confirms that, when the lights of the defendant's vehicle are first seen, they indeed appear to be in the oncoming northbound lane.

**16**  As Mr. Gough's vehicle continues to travel in the southbound lane, the defendant's headlights appear to shift across the road. About four seconds after they first come into view, they appear to be directly in front of Mr. Gough's vehicle. After another two seconds, the defendant's headlights are clearly off the road to the right with the centre line and right hand fog line clearly visible. Mr. Gough safely passes the defendant's vehicle about three seconds after that -- a total of about nine seconds after the headlights are first seen.

**17**  Of course, Mr. Gough had the advantage of knowing where the defendant's vehicle was and could confidently remain in the southbound lane as he approached and passed it. The plaintiff did not know the true location of the defendant's vehicle and moved to her right. The video is therefore not an accurate representation of what the plaintiff saw at the time. At the point where the video shows the defendant's vehicle to the right of the fog line, the plaintiff was likely already on the shoulder of the road and headed for the embankment, which is probably one reason she did not see the road lines. I also accept that her visibility was likely impaired by the high beams of the defendant's lights shining directly toward her.

**18**  I find further that the defendant's vehicle was probably somewhat closer to the travelled portion of the road than the video indicates. Mr. Erickson testified that the mailboxes were approximately 20 feet from the road and that he stopped so close to them that he could not fully open his car door. That is the position that he attempted to duplicate for the purpose of Mr. Gough's video. When Mr. Greve was shown a photograph of the defendant's vehicle parked in approximately that position, he said he did not think it was that close to the mailboxes, pointing out that it would make it more difficult to retrieve the mail.

**19**  The defendant stopped regularly at these mailboxes and was clearly familiar with the distances involved. While I accept that he tried to park close to the mailboxes, I do not accept that he deliberately parked his car in a position where the opening door would hit them.

1. **Duty of Care and Breach of Duty of Care**

**20**  The plaintiff argues that the defendant was in violation of s. 190 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*MVA*], which reads:

190 Except when a municipality, a treaty first nation or the Minister of Transportation and Highways permits, a driver must not stop, stand or park a vehicle on a roadway other than on the right side of the roadway and with the right hand wheels parallel to that side, and where there is a curb, within 30 cm of the curb.

**21**  The section is relevant only if the area where the defendant was stopped can be considered part of the "roadway." That term is defined in s. 119 of the *Act* as:

... 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 in original.]

**22**  The definition was considered in *Busch Estate v. Lewers*, [*[1999] B.C.J. No. 1791*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0XX-00000-00&context=) (S.C.). In that case, a portion of highway had been rerouted to connect with a new bridge, but a portion of the old road remained adjacent to the new road surface and the plaintiff collided with a truck that was parked there. Mr. Justice Melvin held at para. 17 that the old road surface could not be considered part of the roadway because it was no longer used for the passage of vehicles:

[17] ... a distinction can be drawn between the passage of vehicles or using a road surface to travel, and an area such as the old road surface which is used for the stopping of vehicles for purposes of obtaining mail or disembarking or embarking passengers.

**23**  The same reasoning applies to the pullout where the mailboxes were located in this case and the defendant cannot be said to have been illegally parked within the meaning of s. 190.

**24**  However, that does not end the inquiry. The question is whether the defendant was in breach of the common law duty of care that he owed to other drivers in the circumstances. It is trite law that, apart from specific statutory provisions, every operator of a motor vehicle owes a common law duty to take reasonable care for the safety other users of the highway. What constitutes reasonable care in a given case depends on what is reasonable in the circumstances.

**25**  Those circumstances included the fact that, although he was not parked on the roadway, the defendant knew or should have known that he was close enough to it that his headlights to be visible to oncoming traffic. He also knew or should have known that there were no streetlights or other sources of light that would help oncoming drivers determine the position of his vehicle.

**26**  In those circumstances, it was reasonably foreseeable that an approaching driver seeing the defendant's headlights would assume they were the lights of an oncoming vehicle in the northbound lane and would attempt to ensure that she stayed to the right of that vehicle.

**27**  In *Findrik v. Chrusch*, [*[1994] B.C.J. No. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1PF-00000-00&context=) (S.C.), the defendant's vehicle had slid off an icy road and was parked on the wrong side with its headlights on. Liability was admitted, but the Court noted at para. 12 that, in the circumstances:

[12] ... If he was unable to move his vehicle to the correct side of the road the obvious proper course of action was to dowse his headlights and activate the hazard lights.

**28**  Similarly, I find that if the defendant had properly turned his mind to the potential hazard he was creating, the proper course would have been to turn off his headlights. If the absence of light from his headlights would have made it more difficult for the defendant to find and open his mailbox, that problem could have been solved with the simple use of a small flashlight.

**29**  The hazard created by the defendant in stopping as he did was aggravated by the fact his lights were on high beam, further interfering with the ability of the plaintiff to properly see and assess the situation. In that regard, the plaintiff relies in part on division 4 of the *Motor Vehicle Act Regulations*, *B.C. Reg. 26/58*, which governs the use of headlights. Section 4.01 says that division applies to vehicles being driven or operated "on a highway" and s. 4.06(5) says:

1. A person who drives or operates a motor vehicle must not illuminate the upper beam of a headlamp if another motor vehicle is within a distance of 150 m from that vehicle, unless the driver has overtaken and passed the other vehicle, so that the high intensity portion of the beam does not strike or reflect into the eye of the other driver.

**30**  Section 1 of the *MVA* broadly defines highway as including:

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;

**31**  In *Busch Estate*, Melvin J. found that the old road surface at issue was not a highway for the same reason it was not a roadway -- it was not used for the "passage" of vehicles. However, he was considering subparagraph (a) and (b) of the definition of highway in the *MVA* and not the extended definition in subparagraph (c). It is at least arguable that the extended definition would cover the pullout where the mailboxes were located because it was an area to which the public had access for the purpose of parking vehicles.

**32**  However, it is not necessary for me to decide that question because I find that, by leaving his lights on high beam, the defendant was in further breach of his common law duty of care. Whether or not he was stopped on a portion of the highway, the defendant clearly knew or ought to have known that he was stopped close enough to the travelled road surface that his headlights would be shining toward oncoming drivers and the vision of those drivers could be impaired if the lights were on high beam.

**33**  I therefore conclude that, in stopping his car in the position he did with his headlights not only illuminated but on high beam, the defendant breached his duty of care.

1. **Contributory *Negligence***

**34**  Counsel for the defendant argues that the plaintiff was wholly or partly responsible for the accident because a driver paying proper attention would have realized the true position of the defendant's vehicle in more than enough time to avoid the accident. He argues that the plaintiff was likely "zoned out" by fatigue or some other reason. This is shown partly, counsel says, by the fact the plaintiff only realized shortly before the accident that she had permitted her speed to drift down to below the speed limit.

**35**  I do not accept the plaintiff's reduced speed as evidence of inattention. It is equally consistent with a cautious reaction to a dark and winding road. There is nothing in the evidence of her passengers to support the assertion she was driving in an inattentive matter and that assertion, in my view, must be rejected as pure speculation.

**36**  The defendant also asserts that the plaintiff at some point panicked and hit the accelerator rather than the brake. The only evidence in support of that theory comes from Carol Erickson, the defendant's wife, who testified that the plaintiff's vehicle appeared to speed up before it disappeared from her view. She also gave evidence of a statement she said was made to her by the plaintiff's passenger, Ms. Barrett.

**37**  Ms. Barrett denied the alleged statement when it was put to her on cross-examination. Ms. Erickson's evidence of what Ms. Barrett allegedly said is therefore hearsay and not admissible to prove any facts about what the plaintiff did or failed to do. As for Ms. Erickson's direct observation, I do not accept that she could have observed the plaintiff's vehicle for a long enough time to accurately assess its speed or any change in speed.

**38**  Defence counsel also argues that a reasonable driver in the position of the plaintiff would have felt the change in surface as her vehicle left the road and would have seen that she was heading toward the vegetation at the roadside. I agree that, even with the confusion caused by the position of the defendant's vehicle and limited vision caused by its high beams, there must have been a point at which the plaintiff could and should have recognized that her vehicle had left or was leaving the road surface.

**39**  However, there is no evidence that permits me to say when or where that point was or what the position and speed of the plaintiff's vehicle was when she reached that point. I therefore cannot conclude that plaintiff would have had sufficient time at that point to stop before she went over the embankment. The defendant has failed to meet the onus of proof in establishing contributory ***negligence*** on the part of the plaintiff.

1. **Injury and Causation**
2. *Evidence of the Plaintiff*

**40**  After the accident, the plaintiff had pain and bruising in her shoulder, back, thighs, and in one foot. These physical symptoms all resolved within three to six months, during which the plaintiff had treatment that included physiotherapy, chiropractic massage, and acupuncture.

**41**  During that time, the plaintiff also experienced constant headaches, which she says improved only gradually to the point that she now has them only occasionally. She also had nightmares about being in life-threatening situations. She says she had very little energy after the accident and that this only began to improve about nine months later. Even now, she says, she has days when she will "hit the wall" and she can never make plans assuming she will have a good energy level on a particular day. She says she also experiences mood swings and sometimes feels helpless and hopeless about the future.

**42**  However, the most significant change that the plaintiff attributes to the accident relates to her concentration and memory. She says that prior to the accident she was gregarious and outgoing, with much of her social and work life centred on interacting with groups of people.

**43**  She says she now finds it difficult to follow conversations involving more than one other person and cannot remember what was said. She has difficulty multi-tasking, which she says was a former strength, and says she becomes easily confused and frustrated. Where she used to be good at solving problems, that now takes longer and she easily becomes overwhelmed.

**44**  She says her memory was very poor after the accident and has gradually improved, but she still has difficulty with verbal instructions. She says she will repeat questions that have already been answered and will forget things she has been asked to do. She says she generally does not feel that she is the person she used to be.

1. *Evidence of Other Lay Witnesses*

**45**  The plaintiff's description of the changes in her personality and ability to function is supported, in varying degrees, by the evidence of other witnesses. Ms. Barrett said the plaintiff appears to lack the "problem solving and creative thinking" ability she used to demonstrate and is not "the happy, positive person I knew."

**46**  Jon Scott said his sister used to be very confident and always had good ideas about how to handle situations. Now, he says, she needs more time to consider matters and will have "one or two ideas when she used to have six or seven and often won't come back [with those ideas] fast enough to be useful." He said she appears to function more slowly, is easily angered, and lives "in a very small world socially."

**47**  Mr. Scott has noted what he describes as a "radical change" in the plaintiff's memory. He said she commonly forgets things and will suddenly draw a blank in conversations. She will promise to get back to him about matters and then forget to do so, sometimes not even remembering the matter having been raised. He said she "has become very undependable, she just doesn't remember."

**48**  Katherine Weir is a registered nurse who has known the plaintiff since the early to mid-90s and served on a committee that hired her for a project related to the co-ordination of services for seniors in Nelson. They remained friends after the completion of that project.

**49**  Ms. Weir said she saw a lot of the plaintiff in the spring and summer prior to the accident and she seemed to be busy, happy, and energetic. Since the accident, she said the plaintiff has lacked her former, vivaciousness, energy, and confidence.

1. *Pre-accident Medical Records*

**50**  The plaintiff denied suggestions on cross-examination that she was having problems with stress, malaise, and fatigue before the accident, but defence counsel drew her attention to references to such problems in her medical records. For example, in May 2003, her family doctor's records reported a complaint of "malaise and fatigue." The plaintiff had no recollection of those complaints or what prompted them. A year later, the plaintiff apparently told an acupuncturist she was experience stress related to the sale of her house and was having some difficulty sleeping. Sleep disruption was reported again in September 2004, well after the house sale had been completed.

**51**  However, as the defendant's own psychiatric expert, Dr. Solomons, pointed out, there is no further description of those symptoms and no indication of any emotional or psychiatric diagnosis prior to the accident.

**52**  The Court of Appeal has provided recent reminders that statements recorded in clinical records are hearsay and admissible only under limited conditions and for limited purposes. Such statements may be admissible for the truth of their contents if they can be brought within the common law exception to the hearsay rule for statements of contemporaneous bodily condition, but it is essential that the statement be shown to be contemporaneous and spontaneous: *Samuel v. Chrysler Credit Canada Ltd.*, [*2007 BCCA 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X443-00000-00&context=). They may also be admissible as admissions against interest, subject always to questions of weight, and may be used to refresh the memory of the doctors who testify: *Bancroft-Wilson v. Murphy*, [*2009 BCCA 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M287-00000-00&context=), at paras. 9 to 11.

**53**  In considering what weight, if any, to give to such statements, it must be remembered that they can rarely be relied upon as complete, verbatim records of what the plaintiff said. More often, they are a summary or paraphrase of what the plaintiff said and may be meaningful only in the context of other facts that may or may not be in evidence. They should certainly not be used by the court to infer the existence of a medical or psychological condition that no medical professional has diagnosed, either at the time or in retrospect.

1. *The Medical Evidence*

**54**  The plaintiff saw her family physician, Dr. Margaret MacIntyre, nine days after the accident. Dr. MacIntyre diagnosed bruising to the head and upper thighs, tenderness in the neck and low back, and restricted range of motion. Dr. MacIntyre was concerned about a possible head injury and referred the plaintiff to a neurologist, Dr. Marian Berry, who diagnosed a post-concussion syndrome and whiplash. A CT scan was normal.

**55**  In January 2005, the plaintiff was assessed by a neuropsychologist, Dr. Jeff Martzke. Dr. Martzke's testing showed deficits in verbal working memory, speed of thought and verbal learning. He attributed his findings primarily to post-traumatic stress disorder but said there may also have been a mild brain injury.

**56**  In March 2005, the plaintiff saw Dr. Andre Piver who provides psychiatric services in the Nelson area although he is not a certified specialist in that field. Dr. Piver said there did not appear to be a significant head injury and the plaintiff's difficulties were "more likely due to psychological factors." He made a diagnosis of post-traumatic stress disorder.

**57**  Dr. MacIntyre testified that in July 2008, the plaintiff was still having "ongoing memory impairment issues and headaches." Although Dr. MacIntyre's clinical notes indicate she made a further referral to Dr. Berry, there is no evidence of Dr. Berry having seen the plaintiff again.

**58**  The plaintiff now lives in California and was assessed there by a neuropsychologist, Dr. Hilda Chalgujian, in January 2009. Her findings on neuropsychological testing were generally similar to those of Dr. Martzke. Dr. Chalgujian identified weaknesses in attention and concentration, particularly in the ability to process new and complex verbal information. She believes the plaintiff suffered a mild traumatic brain injury and related depression.

**59**  Because of the time that has passed since the accident, Dr. Chalgujian believes the "brain has healed as much as it is going to and what we see now is permanent damage to the brain." However, Dr. Chalgujian agreed on cross-examination that any blow to the head the plaintiff received in the accident did not cause a loss of consciousness and, in those circumstances, significant brain injury is less likely, at least on a statistical basis.

**60**  Dr. Vance Makin, a neurologist, assessed the plaintiff at the request of the defendant. He found no neurological abnormalities and noted that the plaintiff either did not lose consciousness in the accident or lost consciousness for only a few seconds. She also did not suffer from amnesia about the period either before or after the accident. In those circumstances, Dr. Makin does not believe the plaintiff suffered any form of traumatic brain injury.

**61**  Dr. Makin's opinion was that the plaintiff suffers from depression and said that impairment of memory and concentration is consistent with that, as is loss of energy. He said the important clinical difference between mild brain injury and depression is that depression is generally, although not always, treatable.

**62**  Dr. Kevin Solomons, a psychiatrist, also assessed the plaintiff at the request of the defendant. He disagreed with the diagnosis of post-traumatic stress disorder, saying neither the history of the accident nor the plaintiff's symptoms meet the established diagnostic criteria for that condition. One of those criteria is a history of fear of death or injury at the time the incident was occurring, but the plaintiff was unaware of what was happening until the incident was over. Dr. Solomons also said the condition is characterized by flashbacks and, although the plaintiff has had nightmares about other life threatening situations, she has not had specific flashbacks to the accident.

**63**  Dr. Solomons does not believe the plaintiff is suffering from clinical depression and says there is no evidence of a brain injury serious enough to produce the plaintiff's long-lasting symptoms. He believes the plaintiff likely suffered a stress reaction to the accident, which resolved around the same time as the physical injuries.

**64**  Dr. Solomons says it is difficult to arrive at a diagnosis that explains the plaintiff's present condition, which he accepts as genuine. Dr. Solomons believes her current symptoms are not related to the accident and are more likely the result of other stresses, such as her lack of employment and regular income since 2002. Although these stresses existed before the accident he said that she became "much more acutely symptomatic" after the accident.

1. *Findings on the Plaintiff's Injuries*

**65**  The medical evidence in this case demonstrates that medicine is not an exact science, particularly where the functioning of the brain is concerned. I accept the evidence of the plaintiff and her collateral witnesses that there has been a significant change in her personality and subtle, but important, changes in some mental functions, such as memory and concentration. This has, in turn, affected her level of confidence although she remains an obviously intelligent and articulate person.

**66**  However, there is no consensus among the experts on a diagnosis that explains what has happened to the plaintiff. I accept the opinion of Dr. Solomons that the plaintiff cannot be said to have a post-traumatic stress disorder, based on the very specific definition of that condition and the recognized diagnostic requirements.

**67**  The results of neuropsychological testing are in some ways consistent with organic brain injury, but there is no medical diagnosis of such an injury or explanation of how it could have occurred. Dr. Berry, the neurologist who diagnosed post-concussion syndrome in the weeks following the accident, has apparently not seen the plaintiff since 2005.

**68**  A more current assessment by Dr. Berry might have been helpful but, in the absence of such evidence, the psychological test results themselves cannot outweigh the opinions of Dr. Makin and Dr. Solomons. They say there is nothing in the history of the accident or the plaintiff's immediate post-accident condition to suggest she could have suffered a brain injury serious enough to still be symptomatic.

**69**  Dr. Makin and Dr. Solomons have different views on whether the plaintiff is suffering from depression but I find she is clearly suffering from a condition that affects her memory, concentration, energy level, and confidence. In the absence of evidence to support a finding of organic brain injury, this condition must have a psychological basis. In my view, it is not necessary to determine, as a matter of medical diagnosis, if the plaintiff's condition is more properly described as depression, stress reaction, adjustment disorder or with some other label.

1. *Causation*

**70**  Dr. Makin offers no opinion on whether or not the plaintiff's condition is caused by the accident. Dr. Solomons says that "there is no causal mechanism by which the accident can be seen to be implicated in either the onset or the persistence of symptoms."

**71**  Dr. Solomons' comment on causation illustrates the difficulties that sometimes arise because of the difference between the medical and legal approaches to that question. As the Supreme Court of Canada stated in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), at para. 34: "Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law."

**72**  The plaintiff was involved in an accident that was clearly upsetting to her at the time. Although the physical injuries were minor, the plaintiff accurately realized in retrospect that the consequences could have been much more serious, both for her and for the others in her vehicle. Her symptoms began immediately after the accident and have continued, with some improvement, since then.

**73**  Although there were some stresses in the plaintiff's life before the accident, the evidence indicates she was able to manage them without the difficulties she now experiences. There is no evidence of any other mechanism or event that can be identified as a cause of the plaintiff's condition and Dr. Solomons agrees that there were probably adjustment difficulties at least in the period immediately following the accident.

**74**  I find that, on a balance of probabilities, the plaintiff's current condition is due to a psychological response or reaction to the accident. Put in other terms, but for the accident she would not be in the psychological state in which she now finds herself.

**75**  It may be that one would normally expect a person who experienced such a reaction to have recovered by now, but the clear fact is that, in the plaintiff's case, her symptoms have persisted. These symptoms have probably made her less able to deal with other pre-existing stresses in her life and those other stresses have likely aggravated her condition.

**76**  Because the plaintiff's condition is likely psychological rather than organic, I find that it can be expected to improve with time and proper treatment. I accept the evidence of Dr. Makin when he says:

In my opinion, there are two equally important aspects to her recovery. The first is that she needs to be re-assured, without equivocation, that her brain is normal. The second is that she needs to be treated vigorously for depression, with counselling and or medication. Based on similar patients in the past, I think her chances of making a full recovery are excellent.

Although the plaintiff had some counselling in the year or two after the accident, she has relied on opinions that suggested an organic injury. She therefore has not had the kind of intensive treatment for a purely psychological condition that Dr. Makin suggests. I expect that, because of the time that has passed, treatment beginning now may be a lengthy process before full recovery can be achieved and there is always a risk that it will not be entirely successful.

**77**  For all of the above reasons, I find that the defendant is 100 per cent liable for the accident and the plaintiff's injuries.

**DAMAGES**

**78**  At the time of the accident, the plaintiff was 56 years old. She has Bachelor's degrees in management and in sociology. During the 1990s and early 2000s, she worked in a variety of community development and project co-ordination positions for government and community organizations. These included serving as regional co-ordinator for the Ministry of Women's Equality in the Kootenay region and developing a women's alcohol and drug day treatment program for the Ministry of Health on Vancouver Island. After the latter job ended, she returned to Nelson and did projects on a contract basis.

**79**  In the two years preceding the accident, the plaintiff had very limited income. She says that is because she was devoting her time to setting up a business called "Retreats for Wellness," which she intended would organize "life coaching" and personal growth retreats. She planned to hold these retreats in British Columbia during the summer and in Arizona or Mexico in the winter. In preparation for that schedule, she sold her house in Nelson shortly before the accident. She says the accident ended those plans.

1. **Pecuniary Damages**
2. *Past Loss of Income*

**80**  In the years prior to the accident, the plaintiff's income was modest. Her tax returns show net business income of approximately $12,000 in 2000. In 2001, the net business income was $14,000, which was reduced for tax purposes to about $12,000 because of a reported negative rental income. She says she had rental income from tenants who shared her house and, although she was capable of earning more income, she was able to live on modest means and chose to do so.

**81**  In 2002, the plaintiff's major source of income consisted of $6,000 in RRSPs cashed in and in 2003 and 2004 she reported net income, consisting largely of rental income, in the range of $4,000.

**82**  The plaintiff says her income was low in the two years prior to the accident because she had received a small inheritance and was working on creating her Retreats for Wellness business. She says she did a "pilot workshop" in Mexico and others in Arizona in early 2004, during which she also investigated potential locations for future retreats. Her tax return for 2004 reports business income of $2,000.

**83**  At some point in early to mid-2004, the plaintiff produced a brochure setting out a schedule of planned retreats on various topics. The titles of these retreats included "Woman's Sacred Midlife Pilgrimage", "Transformation Weekend", and "Opening your Life Purpose and Passion." The brochure referred to five retreats planned in Nelson during the summer and early fall of 2004, three in Nakusp, B.C. in October 2004, three in Mexico during January and February 2005, and nine in Arizona between late February and late April 2005.

**84**  The plaintiff says the summer workshops in Nelson did not take place because she was too busy with matters related to the sale of her house. Two of the three Nakusp workshops had also been cancelled before the accident for other reasons.

**85**  As of the date of the accident, the plaintiff says she was still planning to do one three-day workshop that was to begin later in October. That workshop did not take place and the plaintiff admitted on cross-examination that, as of the date of the accident, only one person had paid the $195 cost to attend. The planned Mexico and Arizona sessions never took place.

**86**  After the accident, the plaintiff says that when she tried to put together brochures and organize workshops, she was unable to figure out dates and sequencing. She says her inability to function in groups makes it impossible for her to lead the kind of workshops she had planned.

**87**  The plaintiff planned that, after selling her house in Nelson, she would live while in British Columbia in a small strata lot subdivision developed by her brother outside of town. She says the plan was to build a foundation then purchase a house that could be moved onto it. The net proceeds from the sale of the Nelson house were $140,000 and the plaintiff says she put $100,000 in an account for the construction project. She planned to have tenants living with her in the house and to collect rent in the range of $1,100 to $1,200 a month. Those plans never came to fruition because, the plaintiff says, she has had to use the proceeds of sale of her Nelson house to live on since the accident.

**88**  The plaintiff says that she has considered a number of possible jobs since the accident and has applied for some without success. She is not confident that she could still do jobs for which she is qualified that involve similar work to what she has done in the past. She currently has no income.

**89**  I am satisfied that the plaintiff's attention and concentration problems since the accident, as well as her low energy and other psychological symptoms, have prevented her from creating or planning a business and from working in alternate jobs.

**90**  The plaintiff has presented income projections for the Retreats for Wellness business suggesting that, but for the accident, the business would have had income, before expenses, in the range of $88,000 for 2005, and more than double that amount for the following year. There is no specific evidence of what the expenses would have been to earn that income and, in any event, the income projections are unsupported by any evidence.

**91**  Where a plaintiff seeks damages for lost income or loss of future earning capacity based on income from a venture that was not yet in operation at the date of injury, the plaintiff must demonstrate more than her own optimistic expectations. There must be some evidence that allows the court to conclude the plaintiff's ambitions were realistic. The nature of that evidence will vary according to the case, but could include evidence from others who operate similar businesses or expert evidence about the market for the proposed services. The only evidence in this case consists of two facts referred to in passing that do not assist the plaintiff.

**92**  The plaintiff's brother, Jon Scott, does some workshops and counselling but says he earns only about $10,000 a year, with about half of that going to expenses. The defendant's wife, Carol Erickson, is a counsellor and yoga teacher and said on cross-examination that she runs workshops both in the Nelson area and in Costa Rica. However, she did not provide any annual income figure. She also said she has been doing that kind of work for many years, so any current income information she provided would not necessarily reflect what the plaintiff could have earned in the early years of a similar enterprise.

**93**  On the basis of the evidence before me, I cannot award the plaintiff any amount for loss of income from the retreats business.

**94**  However, it is clear that the plaintiff could not have survived for long on the very minimal income she was earning in the two years before the accident and, if the retreats business was not successful within a very short time, she was capable of finding some other sources of income and would likely have done so.

**95**  I cannot conclude that plaintiff would have returned to the kind of social services or community development contract work she previously did. There is no evidence that the government funding upon which most of that work depended would have still been available. But, at the very least, she would have completed her new residence and obtained rental income.

**96**  The only measure I have of what the plaintiff likely would have earned from various sources in the last five years is contained in her income tax returns for 2000 and 2001. Those are the years preceding her decision to work on her proposed business. The tax returns show total income in the range of $12,000 a year. If the plaintiff's retreats business was not immediately successful in producing at least that amount of income, I find the plaintiff would likely have been able to do something else to earn it. I therefore award the damages for past income loss in the amount of $60,000.

**97**  Counsel may make written submissions on the question of any deduction that must be made for income tax if they are unable to agree on that issue.

1. *Loss of Earning Capacity*

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

[101] ... 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. ...

**99**  It has frequently been emphasized that the award is for the value of a lost capital asset, not a specific future income stream, and must be assessed in accordance with the factors set out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.): Has the plaintiff has been rendered less capable overall from earning income from all types of employment? Is the plaintiff less marketable or attractive to potential employers? Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open? Is the plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?

**100**  The Court of Appeal has stressed that the consideration of those factors remains subject to the over-riding burden on the plaintiff of showing that future income loss is a substantial possibility: *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=).

**101**  In accordance with those principles, I find that the plaintiff, with treatment of her psychological condition and her own acceptance of the fact she does not have a brain injury, will be theoretically capable of earning income in the future. However, the plaintiff is now almost 62 years old and her prospects of actually finding employment in a new occupation, or returning to the kind of social services contract work she formerly did, will be limited.

**102**  For reasons I have already stated, I cannot conclude that, in the absence of the accident, the plaintiff would now or in the future be earning a large income from her contemplated retreats business, but I find she would have continued to earn at least the modest income that I have accepted for the purpose of awarding past loss of income. The interruption in income that has occurred as a result of the accident has, for practical purposes, made it very unlikely the plaintiff will be able to find employment or re-establish even that level of income before she reaches the normal retirement age.

**103**  Having regard to the nature of the assessment and the contingencies involved, I award damages for future lost earning capacity in the amount of $35,000.

1. *Future Care and Services*

**104**  The plaintiff has spent $2,240 for counselling since the accident. Her counsel says that figure represents a yearly average of $497, and the present value of that amount for the rest of the plaintiff's life is $7,980. In fact, the money the plaintiff spent on counselling was all spent within the first two years after accident. I agree that the plaintiff requires counselling of some form and the suggested amount appears, in the absence of any other evidence, to be reasonable, although I think it would be better spent on more intensive counselling over a much shorter period. I award $8,000 for that purpose.

**105**  I do not accept the plaintiff's submission that there is a need for future neuropsychological testing. That recommendation came for Dr. Chalgujian and assumes an organic brain injury, which I have found does not exist.

**106**  The plaintiff also seeks funds for vocational retraining. In view of what I have said about the plaintiff's limited employment prospects even if she recovers fully, I find there is no basis for such an award.

1. **Non-pecuniary Damages**

**107**  The plaintiff has suffered a persistent psychological reaction to her accident, which has clearly affected her ability to function as she once did in both social and professional settings. She has difficulties with memory and concentration, has difficulty functioning in groups and has suffers from a lack of energy and confidence. She is, in important respects, no longer the person she was and is unable to enjoy most aspects of life as she previously did. However, I have found that she does not have any organic brain injury and her condition is more likely than not to be treatable with the proper interventions.

**108**  Although I did not find the plaintiff to have mild traumatic brain injury or post-traumatic stress disorder, the impact that her psychological condition has had on her life is in many ways similar to what is seen in cases involving those conditions. Those cases therefore can provide some useful guidance in assessing damages.

**109**  In *Chowdhry v. Burnaby (City of)*, [*2008 BCSC 1337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3NS-00000-00&context=), the plaintiff was found to be suffering from post-traumatic stress disorder and depression that would likely be permanent, although with some improvement in the future. He also suffered a traumatic brain injury that was no longer a direct cause of cognitive problems. Non-pecuniary damages were assessed at $200,000.

**110**  In *Clark v. Hebb*, [*2007 BCSC 883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21NF-00000-00&context=), the plaintiff had soft tissues injuries and a mild traumatic brain injury that lasted for two years, headaches and dizziness that persisted for a longer period, and a jaw injury that still required treatment at the time of trial. The Court awarded non-pecuniary damages of $75,000.

**111**  In *Joel v. Paivarinta*, [*2005 BCSC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0XJ-00000-00&context=), the plaintiff was found to have suffered a "very mild" traumatic brain injury and to have psychological difficulties that were caused or aggravated by the accident. Non-pecuniary damages were assessed at $110,000.

**112**  I have considered those and other cases referred to, but of course each case must be decided on its own facts and on the need to compensate that plaintiff for pain, suffering, and loss of enjoyment of life. The accident in this case has had psychological consequences that have, to date, significantly interfered with the plaintiff's enjoyment of life, her ability to function in both social and occupational settings, and her general sense of self worth. On the other hand, the plaintiff's physical pain and suffering were short-lived, she has failed to prove that she suffered an organic brain injury, and the condition she has proved is one from which she is likely to fully recover with proper treatment. Taking all of those factors into account, I find $85,000 to be an appropriate award for non-pecuniary damages.

1. **Special Damages**

**113**  The plaintiff has incurred special damages for counselling and psychological testing in the total amount of $5,240 and is entitled to recover that amount.

**SUMMARY**

**114**  The plaintiff will have judgment for:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past income loss | $60,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of earning capacity | $35,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future counselling | $8,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $85,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | $5,240 |  |

**115**  Unless counsel need to address matters of which I am unaware, the plaintiff will have costs at scale B.

N.H. SMITH J.

**End of Document**

[***Suedat v. Kara, [2014] B.C.J. No. 2441***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M479-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.P. Weatherill J.

Heard: August 18-22 and 25, 2014.

Judgment: October 1, 2014.

Docket: M125776

Registry: Vancouver

**[2014] B.C.J. No. 2441** | 2014 BCSC 1837

Between Sabita Suedat, Plaintiff, and Karim J. Kara, Defendant

(120 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Psychological injuries — Cognitive impairment — Considerations impacting on award — Degree of impairment — Pre-existing injury — Action by plaintiff for personal injury damages allowed — Plaintiff, age 43, was pedestrian struck in crosswalk by defendant in December 2010 — Defendant found wholly liable for collision — Plaintiff was childhood victim of sexual abuse and suffered variety of pre-existing health issues — Baseline analysis established plaintiff's post-accident functioning was at lower level than pre-accident — Plaintiff awarded damages totaling $125,701 comprised of $50,000 for general damages, $15,701 for special damages, $20,000 for past lost earnings potential, $30,000 for future lost earnings potential, and $10,000 for future care costs.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Extent of incapacity — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Special damages — Non-pecuniary loss — Action by plaintiff for personal injury damages allowed — Plaintiff, age 43, was pedestrian struck in crosswalk by defendant in December 2010 — Defendant found wholly liable for collision — Plaintiff was childhood victim of sexual abuse and suffered variety of pre-existing health issues — Baseline analysis established plaintiff's post-accident functioning was at lower level than pre-accident — Plaintiff awarded damages totaling $125,701 comprised of $50,000 for general damages, $15,701 for special damages, $20,000 for past lost earnings potential, $30,000 for future lost earnings potential, and $10,000 for future care costs.**

|  |
| --- |
| Action by the plaintiff, Suedat, against the defendant, Kara, for damages for personal injuries suffered in a motor vehicle accident. In December 2010, the plaintiff was a pedestrian in a crosswalk on a dark and drizzly evening when she was struck by the defendant's vehicle. The defendant testified that the plaintiff suddenly ran into traffic while he was executing a left turn. The plaintiff, age 43, had a tumultuous background. She was a victim of child sexual abuse. She was the sole caregiver for her child, age 19, who required 24-hour care for a degenerative disease. She stopped working in 2003 due to health issues that included a migraine condition and body tremors. Her health issues resolved by 2008 and she sought to start a wellness clinic with a Chinese medical practitioner. The accident resulted in chest and abdomen pain, ankle pain, back and neck soreness, and cognitive and anxiety issues. Her symptoms were ongoing, limiting, and required medication. Liability and quantification of damages were at issue.  HELD: Action allowed.  The plaintiff was substantially in the boundaries of a marked crosswalk when struck by the defendant's vehicle. Had the defendant maintained a proper lookout, he would have been able to stop in time to allow the plaintiff to cross safely. The defendant's explanation for his failure to see the plaintiff in the crosswalk was insufficient. No ***negligence*** on the part of the plaintiff was established. The defendant was 100 per cent liable for the accident. The defendant was required to take the plaintiff as he found her. Despite the plaintiff's difficult upbringing and life circumstances, she was functioning at a level above her post-accident circumstances prior to the collision. Despite the relatively innocuous nature of the impact, the plaintiff had not returned to her pre-accident level of function. The plaintiff was awarded damages totaling $125,701 comprised of $50,000 for general damages, $15,701 for special damages, $20,000 for past lost earnings potential, $30,000 for future lost earnings potential, and $10,000 for future care costs. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 127*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F4-00000-00&context=)(1)(a)(ii)

**Counsel**

Counsel for Plaintiff: D.W. Grunder.

Counsel for Defendant: M. Gibson, A. Meade.

**Reasons for Judgment**

|  |
| --- |
| **G.P. WEATHERILL J.** |

**I. INTRODUCTION**

**1**  The plaintiff claims damages for personal injuries sustained in a pedestrian/motor vehicle collision that occurred on December 7, 2010 at the intersection of Canada Way and Smith Avenue in Burnaby, BC. The plaintiff was crossing Canada Way in the crosswalk when she was struck by a vehicle driven by the defendant ("Accident").

**2**  The plaintiff's life has been replete with challenges starting from when she was sexually assaulted as a young girl and later placed in a number of foster homes. She bore two children from what were ultimately unsuccessful relationships. Her youngest child, Brittany, has Rhett's Syndrome and has struggled to survive her entire 19 year old life. Brittany requires 24 hour a day care. The plaintiff is her primary caregiver.

**3**  In 2008 the plaintiff moved to British Columbia from Ontario because it was a healthier climate for Brittany and because she hoped to be able to start a new life including establishing a business as a wellness instructor and life skills coach.

**4**  The plaintiff claims general damages, special damages, past wage loss, future wage loss, future care costs and loss of housekeeping capacity.

**5**  Although the plaintiff was struck while she was in a crosswalk, liability for the collision is an issue.

**II. THE ISSUES**

**6**  The issues for determination are:

1. Who is liable for the December 7, 2010 Accident between the plaintiff and the defendant's vehicle?
2. If the defendant is liable, what should the plaintiff be awarded for general damages, special damages, past wage loss, future wage loss and future care costs?

**III. LIABILITY FOR THE DECEMBER 7, 2010 ACCIDENT**

**7**  The Accident occurred at approximately 6:45 p.m. on December 7, 2014. The plaintiff had left her home and was walking down Smith Avenue towards Canada Way. She was planning on catching a bus at the bus stop on the southwest corner of that intersection. It was dark and it was drizzling out. The plaintiff had a black umbrella in her hand and was wearing dark clothing.

**8**  The plaintiff testified that she arrived at the northwest corner of the intersection and she pushed the pedestrian walk button. She waited for the lights to change and the walk signal to engage before stepping into the intersection. Her evidence was that she took 2 1/2 steps into the crosswalk and that is her last memory before waking up on Canada Way some distance west of the crosswalk. She marked the location of where she landed on the aerial photograph of the intersection (Exhibit 3A). By my estimate, it was some 10 - 12 car lengths from the crosswalk.

**9**  She woke up on the road surface. She was disoriented. She says she let out five primal screams from deep within her. She got up and walked to the curb and called 911. A man came to her assistance. She recalls that the ambulance came first and then the RCMP. She recalls shaking badly. Her right ankle hurt and she was having trouble weight bearing. Her pelvis hurt. She asked the ambulance attendant to pace her breathing because she felt she was breathing out of sync. She recalls having a brief conversation with an RCMP officer. She felt the officer was racially profiling her. She recalls being taken to Burnaby General Hospital where she stayed for 3 1/2 hours. She says she was ignored most of the time. Her stay at the hospital was unpleasant. She was placed in a back room. She feels she was not taken seriously by the hospital staff. In order to get their attention, she started screaming loudly.

**10**  The defendant testified. He is 71 years of age and semi-retired. He had just dropped his wife off a few blocks away and was driving to the Superstore on Grandview Highway. He was travelling northbound on Smith Avenue intending on turning left onto Canada Way. As he approached the intersection the light was green in his direction. He signalled his intention to turn left approximately half a block from the intersection. He slowed down and drove into the intersection at approximately 10 km/h. He turned left into the left most westbound lane of Canada Way. He saw the plaintiff to his right running with an open umbrella in her hand. He hit the brakes and estimates he was able to reduce his speed to approximately 5 km/h when his vehicle struck the plaintiff. The impact occurred on the left front of his car. On impact, the plaintiff fell on her right side onto the pavement. His evidence was that she remained on the ground for approximately a minute (I am not satisfied it was indeed a minute, but rather the defendant's estimate of one minute was due to his poor estimate of time -- I suspect it was much shorter). She then she got up quickly and walked back to the sidewalk on the northwest corner of the intersection. He pulled his vehicle into the curb of Canada Way and waited for the emergency personnel to arrive.

**11**  When the investigation was complete, the defendant carried on with his trip to the Superstore. There was no evidence of whether his vehicle was damaged to any degree and he was not asked how far away the plaintiff was when she got up. The defendant was unable to recall precisely where his vehicle was when he first saw the plaintiff but he does recall seeing her running across his path.

**12**  He testified that after the plaintiff got up from the street, she appeared to be very upset. She spoke loudly but she was not screaming. He went to her assistance but she told him that she hated him and refused his help. He recalled her making a phone call. He observed her limping as she walked.

**13**  For the most part, I accept the defendant's version of how the Accident occurred over that of the plaintiff. I accept that the defendant was travelling relatively slowly in making his left hand turn although I don't accept his evidence of his speed as being anything more than a guess.

**14**  Section 127(1)(a)(ii) of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* provides that the driver of a vehicle facing a green light:

1. must yield the right of way to a pedestrian lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited...

**15**  On the evidence, and contrary to the plaintiff's evidence that she took two and a half steps from the safety of the sidewalk into the marked crosswalk before she was struck, I find the plaintiff had made a substantial entry into the crosswalk and had nearly crossed two lanes of the westbound Canada Way at the time of impact. Had the defendant maintained a proper lookout, it is likely that he would have been able to stop in time to allow the plaintiff to pass safely in front of him. He did not provide the court with any explanation for his failure to see the plaintiff in the crosswalk (*Petijevich v. Law*, [*[1969] S.C.R. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22WM-00000-00&context=)).

**16**  Once a pedestrian has safely entered a crosswalk, absent any ***negligence*** on the pedestrian's part that could mislead a motorist into thinking he or she could proceed safely, the pedestrian may assume that motorists will yield the right of way to them and will share no responsibility if struck in the crosswalk (*Miksch v. Hambleton*, [*[1990] B.C.J. No. 1810*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2D0-00000-00&context=) (S.C.)).

**17**  ***Negligence*** on the part of a pedestrian in a crosswalk must be proven by the defendant on the balance of probabilities. In *Feng v. Graham* [*(1988), 25 B.C.L.R. (2d) 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-604Y-00000-00&context=) (C.A.), Wallace J.A. stated at page 120:

In my view the plaintiff in the circumstances of this case was entitled to assume that the defendant was going to obey the law and yield the right-of-way to her. Her right to rely on that assumption continued until such time as she knew, or ought to have known, that the defendant was not going to grant her the right-of-way, whereupon the plaintiff's obligation to avoid injury to herself superseded her right to exercise her right-of-way. The onus is on the defendants to establish that the plaintiff knew or ought to have known, that the defendant driver was not going to grant her the right-of-way, and that, at that point of time, the plaintiff could reasonably have avoided the accident.

[Emphasis added.]

**18**  Pedestrians in crosswalks are not required to exercise "extreme vigilance" to ensure they won't be struck (*Jung v. Krimmer* [*(1990), 47 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M150-00000-00&context=) (C.A.), leave to appeal ref'd [*[1991] S.C.C.A. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24NX-00000-00&context=) (S.C.C.)). To prove contributory ***negligence*** on the part of a pedestrian, the defendant must show more than inattention. A defendant must also establish (1) at what distance the pedestrian should have realized from the speed of the approaching vehicle it was not going to yield; (2) it would it have been possible for a pedestrian to avoid being impacted; and (3) that a reasonable person in the circumstances of the plaintiff should have taken evasive action to avoid the impact: *Foreman v. Mortz*, [*2001 BCSC 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G13S-00000-00&context=); *Dionne v. Romanick*, [*2007 BCSC 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4FW-00000-00&context=); *Farand v. Siedel*, [*2013 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y4-00000-00&context=); *Paskall v. Scheithauer*, [*2014 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1DV-00000-00&context=).

**19**  The fact that the plaintiff was wearing dark clothing and using a dark umbrella is not evidence in and of itself that she was contributorily negligent. She was entitled to wear whatever colour and clothes that was appropriate that evening and there was no evidence that her failure to wear light clothing would have prevented being struck (*Achilleos v. Nix*, [*2000 BCSC 1422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B19P-00000-00&context=)).

**20**  The plaintiff was in a marked crosswalk, although probably running. The left front of the defendant's vehicle struck the plaintiff who was moving from the defendant's right to left. The plaintiff was there to be seen.

**21**  In my judgment the evidence falls short of establishing any ***negligence*** on the part of the plaintiff. The defendant is 100% liable for the Accident.

**IV. DAMAGES**

**22**  It is on the background of the plaintiff's pre-Accident medical, social, recreational, psychological and physical background that the court must assess the consequences that the Accident had on her ability to function.

**A. The Plaintiff's Pre-Accident Background**

**23**  The plaintiff was born in Toronto. She is presently 43 years old. She described a hard childhood having been subjected to and endured physical, emotional and sexual abuse since age five. At age 13, she disclosed the abuse to her teacher. She was removed from her home and subsequently lived in five different foster homes until age 16 when she left foster care.

**24**  She dropped out of high school when she became pregnant with her first child. She later went to college taking a two year recreational leadership course as a mature student. She completed that course in 1994. After college, she obtained her GED.

**25**  She has a spotty and somewhat confusing work history. What I could glean from her evidence is that she worked for State Farm Insurance in the public affairs department for approximately 1 1/2 years, for the International Order of Foresters for approximately 1 1/2 years and then from 2000 to 2003, for a husband and wife team of doctors who ran a health care practice in Toronto. In each case, her duties were that of an administrative assistant. She earned $1,500 per month plus "unlimited health care" when she worked for the doctors.

**26**  In 1995, her daughter Brittany was born. At age two, Brittany began showing signs of an abnormal development and she was subsequently diagnosed with Rhett's Syndrome, which is by all accounts a terrible disease with no cure. And it is degenerative. Brittany will require palliative care at some point. Brittany developed epilepsy, chronic respiratory issues, and is physically unable to look after herself. A lift is required to move her in and out of her wheelchair. Cognitively, Brittany has a normal mind but can only communicate with her eyes. She has required 24 hour care for many years. Remarkably, Brittany attended regular school with the assistance of a Certified Education Assistant and was able to graduate grade 12 this year.

**27**  The plaintiff has been Brittany's health care provider, tutor, recreational coordinator and advocate. Caring for Brittany is difficult and emotionally and physically draining. She gets some respite each night because Brittany has a nurse watching over things.

**28**  The plaintiff has had relationships in the past that have not worked out. She was not married to Brittany's father.

**29**  The plaintiff became interested in Eastern Medicine techniques by chance. In the early 2000's her then husband suggested she see a Chinese doctor to deal with back issues she was then having. The treatments this doctor gave her cured her back complaints.

**30**  The plaintiff was intent on learning Eastern medicine and how it could be incorporated into traditional Western medicine to help Brittany and herself. She studied books, learned the teachings of Buddha and constantly engaged herself in discussions with others regarding Eastern medicine techniques.

**31**  She found that she loved the work and the challenge. In 2005, she went to China to learn the technique of "no-touch massage" and Xiu Lian - wisdom based knowledge.

**32**  In 2003, she stopped working with the Toronto doctors because of health issues. She developed a migraine condition, body tremors, a serious food allergy and one side of her face dropped.

**33**  She has not worked since.

**34**  There were numerous investigations conducted by Ontario doctors into her health with seemingly no conclusive diagnosis. The plaintiff's evidence was that these issues resolved by 2006.

**35**  In 2007, she started thinking about a move to British Columbia. There were many reasons for the move including better weather, better health care support, better wheelchair accessibility for Brittany, and her assessment that BC is more receptive to alternative health care than Ontario. She had also developed a network of connections in BC in the world of Eastern medicine.

**36**  There was much planning required before the move could take place, mainly to ensure there would be nurses, health care and education support in place for Brittany when they arrived.

**37**  The move to BC took place in November, 2008. Upon arrival, the plaintiff was accepted for and has received disability under the PWD program. She receives approximately $900 per month. After she pays rent, she is left with $300 per month. She is able to earn up to $800 per month before her disability benefits are affected.

**38**  The plaintiff's evidence was that in the two years before the Accident, her mental and physical health was at the point that she was able to cope quite well. In the months before the Accident, she had developed an alternative and complementary health care business relationship with Dr. Sabrina Chen-See, a Vancouver Family Wellness Chiropractor. She was in the process of starting her own business called Pacific Spirit Wellness ("Pacific Spirit") in association with Dr. Chen-See. The grand opening of their new office in the Fairmont Medical Building on West Broadway in Vancouver took place on November 17, 2010, some three weeks prior to the Accident.

**B. The Plaintiff's Injuries**

**1. Plaintiff's Position**

**39**  The plaintiff's position is that despite the physical, emotional and sexual abuse she endured as a child and despite the other challenges she has had including the difficulties with pre-Accident relationships, neurological issues and raising Brittany, by 2006 she was functioning relatively well. In November 2008, she organized and executed a move to British Columbia and made arrangements for Brittany to be enrolled in the provincial health care system. In the months prior to the Accident, she was energetic and optimistic about developing Pacific Spirit into a successful life coaching and counselling business and had ceased taking prescription medications.

**40**  She described her injuries from the Accident as pain across her chest and into her lower abdomen, a sore left ankle, sore back, neck and cognitive issues including difficulty with concentration, focus, word finding difficulty, memory problems and anxiety.

**41**  In the weeks that followed the Accident she was having significant difficulty looking after Brittany and needed assistance. As time progressed, her symptoms improved. She sought various treatments some of which were helpful. She continues to suffer from pain in her right ankle, pelvis and uterus and pain on the left-side of her body, left-sided ribcage, back and neck. She finds the ongoing pain quite limiting. She takes medications that she was not taking prior to the Accident.

**42**  Cognitive symptoms relate mainly to her concentration and focus. She has lost confidence and continues to be limited by pain.

**43**  The plaintiff's pre-Accident physical and psychological history is relevant to the impact the Accident had on her and to the difficulty she has had recovering from the injuries she sustained. The plaintiff says that she experienced an aggravation of her pre-existing psychological condition and with time, she is hopeful that her symptoms will return to the pre-Accident baseline. As a result of her pre-existing make-up, she was particularly susceptible to experiencing a greater degree of symptoms and functional difficulties than would a person who did not have her psychological make-up.

**44**  Regardless, in the months leading up to the Accident, she was coping with her responsibilities and looking forward to developing her business. Her mindset was positive. The plaintiff argues that she developed chronic pain following the Accident and despite her diligent efforts to try and recover, she remains restricted and her chronic pain is likely to continue indefinitely. The plaintiff seeks general damages of $85,000.

**2. Defendant's Position**

**45**  The defendant's position is that the plaintiff's entire case revolves around her being a reliable historian and witness. The defendant says she was neither.

**46**  The plaintiff relies on the medical opinions of Dr. Eichhorst, Dr. Parhar, Dr. Patel and Dr. Travlos in support of the diagnosis and prognosis of the injuries she says she sustained in the Accident. To the extent that those reports rely on the plaintiff's ability to supply an accurate history of her pre-Accident medical, physical and psychological health, the circumstances of the Accident and her post-Accident symptoms and functions, the defendant argues they should be given little weight because the plaintiff is not a reliable historian or witness. The defendant points to examples:

1. on direct examination the plaintiff had a good recall for specific details that were intended to assist her claim including details of events in Ontario in the 1990s and early 2000s. However, many of her answers on cross-examination were non-responsive and on occasion she was argumentative and uncooperative.
2. the plaintiff gave evidence of a severe migraine and "pseudo-seizure" condition with an insidious onset in 2003 that forced her to leave her job. After numerous investigations, she says it spontaneously resolved. Yet, in 2008, she was referred to Dr. Tyndel, a neurologist in Toronto. She provided him with a long list of symptoms that she was experiencing. Despite the plaintiff's lack of memory concerning the details of the various assessments that were undertaken in Ontario to determine the cause of her migraine and pseudo-seizure condition, she was able to confirm that Exhibit 8 was an accurate listing of those symptoms she had experienced.
3. Although her position is that she continues to experience physical and cognitive impairment, she attended trial for three consecutive days without any indication of physical discomfort. She also gave her evidence in an articulate fashion although argumentative to some degree.
4. she was collecting disability benefits for depression at the time of the Accident yet denied suffering from depression. Her evidence was that she did not feel she was "clinically depressed" but was on disability because she was having a tough time finding a job.
5. She minimized the effects of her pre-Accident medical history including a 1989 motor-vehicle collision (where she was an un-seat belted passenger in a vehicle that was t-boned and her head hit the glass) and the effects of a March 2009 fall in the bathroom resulting in a broken nose and head injury.
6. She exaggerated evidence she felt would assist her case, including suggesting that she was thrown upwards of 40 metres after being struck by the defendant's vehicle.
7. When confronted with post-Accident medical records containing inconsistent versions of the circumstances of the Accident she supposedly related to her various treating professionals, she responded that she could not recall having had those conversations.
8. she stated that for one year after the Accident, she was unable to get off the couch or toilet without assistance, was unable to bathe without assistance and needed a cane to get around. However, according to Mr. Pham, one of her witnesses, she was able to lead meditation sessions in her home. This is also inconsistent with her telling Dr. Eichhorst that, within 6 months of the Accident, she was hiking three to five kilometers without difficulty. Likewise, it is inconsistent with her evidence that she attended various appointments during that time.
9. Dr. Travlos' opinion is that she was using the cane in an effort to validate her injuries.
10. she also consistently advised her post-Accident medical practitioners that she had no relevant pre-Accident medical history. For example, she reported to Dr. Patel that she was emotionally healthy in the seven years dating up to the Accident, failing to mention that she was on disability for depression at the time of the Accident.

**47**  The defendant argues that the plaintiff is simply unwilling to accept medical opinions that are not in accordance with her own views of her health be it pre or post-Accident.

**48**  The defendant argues that although the plaintiff likely sustained injuries from being struck by the defendant's vehicle, she is such an unreliable witness that her evidence about the effects have had on her post-Accident life cannot be accepted. As was stated by Chief Justice McEachern in *Price v. Kostryba*, [*[1982] B.C.J. No. 1518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) at para. 4 citing his own decision *Butler v. Blaylock,* [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=) decided 7 October 1981, Vancouver No. B781505 (unreported):

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**49**  The defendant argues that at most, the plaintiff sustained a mild concussion, now resolved, a grade one soft-tissue injury and an aggravation of her pre-existing psychological condition including depression. Any ongoing symptoms the plaintiff have are not related to the Accident. The defendant argues that a non-pecuniary damage award of $30,000 is appropriate.

**3. The Medical Evidence**

**50**  Four medical/legal reports were tendered on behalf of the plaintiff:

1. Dr. N. Eichhorst, the plaintiff's family doctor since January 17, 2011;
2. Dr. Gurdeep Parhar, General Practice, Occupational and Disability Medicine who first assessed the plaintiff on May 31, 2013;
3. Dr. Jamie Patel, psychologist who first saw the plaintiff on October 17, 2013; and
4. Dr. Andrew Travlos, physiatrist, who assessed the plaintiff November 4, 2011, February 3, 2012 and May 18, 2012.

**51**  The defendant tendered two medical/legal reports:

1. Dr. Auby Axler, psychiatrist; and
2. Dr. Wayne Pisesky, orthopedic surgeon.

**52**  Neither of the defence experts met or assessed the plaintiff. Their reports and opinions were based on a review of the pre and post-Accident medical records and reports provided to them.

**53**  All of the medical experts testified and were cross-examined on their reports and opinions. All agreed that, in forming their opinions, they relied upon the history that the plaintiff provided to them directly, or in the case of the defence experts, the doctors who prepared the records/reports that they reviewed. Fundamental to these opinions is the assumption that the information provided by the plaintiff was accurate.

**54**  On balance, I did not find the medical opinions overly contentious. They were helpful in establishing the plaintiff's current level of physical, psychological and cognitive functioning.

**55**  In evidence is a consultation report dated March 25, 2008 from Dr. Tyndel, the plaintiff's treating neurologist in Scarborough Ontario, directed to Dr. Moss, the plaintiff's family doctor. The report relates to an assessment for "seizure like activity" (Exhibit 8). The plaintiff provided Dr. Tyndel with a long list of symptoms/events (approx. 39) related to non-epileptic seizures, migraines, physical and cognitive problems. In cross-examination, she stated that she did not know why she would have seen Dr. Tyndel in 2008 because she was moving to BC later that year. Although she stated that she didn't recall the visit, she agreed that she must have seen him. She did acknowledge the list of symptoms in Exhibit 8 stating that they were all from the time she was suffering from migraines, which she claims resolved in 2006.

**56**  Of the six medical reports filed in evidence, I found the reports of Drs. Patel and Travlos to be the most helpful in understanding who the plaintiff was before the Accident (Dr. Patel) and the effects the injuries have had on the plaintiff post-Accident (Dr. Travlos).

**57**  Dr. Patel is a psychologist. She initially met the plaintiff on October 17, 2013 and at that time diagnosed that she was suffering from adjustment disorder with depressed mood and a post-traumatic stress disorder. After a period of psychological intervention and treatment, Dr. Patel's current opinion is that the plaintiff continues to suffer from post-traumatic stress disorder (chronic) and an adjustment disorder with depressed mood in partial remission. It is Dr. Patel's opinion that the Accident triggered these psychological conditions. Her symptoms do not fully meet the criteria for somatic symptom disorder. She describes the plaintiff as a vulnerable person prior to the Accident, but was nonetheless able to successfully relocate to British Columbia, arrange for her disabled daughter to be taken care of, was socially connected, and made plans to commence her own counselling business.

**58**  On this background of vulnerability, Dr. Patel believes the Accident triggered her post-traumatic stress disorder and adjustment disorder with depressed mood. Dr. Patel first assessed the plaintiff on October, 17, 2013. She has been providing psychological counselling from time to time to the date of trial. Her report states:

Based on my initial interviews with Ms. Suedat, and the questionnaire data, I was of the initial opinion that Ms. Suedat's symptoms met the criteria for an Adjustment Disorder with Depressed Mood, and Posttraumatic Stress Disorder. Since my initial assessment, I had provided a brief trial of psychological intervention. Currently, I am of the opinion that she still meets the criteria of Posttraumatic Stress Disorder (chronic) and an Adjustment Disorder with Depressed Mood in partial remission...

Based on my psychological treatment sessions with Ms. Suedat, I do find that she struggles with chronic pain, however, her symptoms do not fully meet the criteria for a Somatic Symptom Disorder...

Her history of childhood trauma is suggestive that Ms. Suedat is a vulnerable individual; however, prior to this accident of December 7, 2010, she demonstrated the ability to be a caretaker for her disabled daughter, successfully relocate provinces, and make plans to set up her own business...

Although Ms. Suedat's background suggests some vulnerability, it is my opinion that Ms. Sudat's current trauma symptoms are referable to her accident of December 7, 2010, and that in the absence of this accident she would not have developed Posttraumatic Stress Disorder or an Adjustment Disorder with Depressed Mood...

With respect to her prognosis, Ms. Sudat's emotional recovery is likely to be affected by a number of factors, such as her physical improvement, the availability of medical and psychological interventions, and the absence of having other traumatic events. As far as Ms. Suedat's short term prognosis is concerned, that is for the next four to six months, it is somewhat guarded; but, with psychological intervention, her functioning can be improved. A long-term prognosis of a positive psychological recovery is achievable contingent on the availability of psychological and medical interventions and a positive response to her medical intervention.

**59**  Dr. Travlos is a physiatrist who saw the plaintiff on three occasions, November 4, 2011, February 3, 2012 and May 18, 2012 on referral from Dr. Eichhorst. Dr. Travlos had arranged for a follow-up assessment on November 20, 2012 but the plaintiff did not attend. Based on his initial assessment, Dr. Travlos felt that, at most, she sustained a mild concussion. Because her cognitive condition was deteriorating, he felt there were non-Accident related psycho-social issues contributing to her mental health. When he last saw her, the plaintiff was making progress with her recovery. He stressed to her the importance of the plaintiff getting exercise.

**60**  Dr. Travlos' comments:

1. Concussion

...she had relatively good recall of the events other than a few seconds at most. Ms. Suedat's history to Dr. Patel was that she did not recall being hit and her next memory was waking up on the ground, which is not quite consistent with early history. What is, however, of relevance is that the nursing records from Burnaby Hospital noted that she was screaming at the scene, and she indeed informed Dr. Patel that she screamed five times before calling 9-1-1 herself. All this information shows variable recall, as normally expected for anybody and not just due to the effects of a concussion. All one can say is that at most Ms. Suedat suffered a few seconds of amnesia, following which she had full cognitive capacity to make decisions and plans, such as to get herself out of the road and into safety and then call 9-1-1. These are not decisions made by a confused individual, even though she may have felt confused. It is my opinion that at most Ms. Suedat suffered a very mild concussion.

Ms. Suedat's cognitive symptoms following the accident may have reflected the presence of a concussion but were more likely caused by other factors, in particular given the fact that she noted that she deteriorated with time (rather than the expected recovery even from a concussion). Diagnosis such as sleep deprivation, pain, post-traumatic stress disorder and depression are all factors that compound the presence of cognitive alteration. This is of relevance, in that despite the fact that I had suggested to her that she needed counselling all along, she only really sought counselling from Dr. Patel at Chuck Jung Associates almost three years after the accident. At that time, she was diagnosed with post-traumatic stress disorder, a condition that has the best success of treatment when treated early on.

...It is my opinion that Ms. Suedat's primary presentation is not that related to a concussion although one could not rule out at least some symptoms from it.

1. Psycho-social

Ms. Suedat clearly has long-standing emotional health issues. Her statement to Dr. Patel that she was only willing to go back seven years in terms of her mental health history is telling. She described a significant traumatic childhood and adolescence, and these are all factors that one cannot ignore in terms of the ongoing presence of symptoms. An individual's ongoing mental health issues come with a history that paints a picture of their vulnerability, along with their managing and coping abilities. ...As stated from the beginning, it was my opinion Ms. Suedat was in need of ongoing therapy and counselling, despite her mistrust of Western medicine. It is of relevance that she responded very favourably to anti-depressant medication, but felt unable to continue taking them.

1. Pains

Ms. Suedat's pains when first seen were fairly non-specific and covered her abdomen and groin region. Her back examination, however, revealed multiple areas of tenderness and at the time I thought that she might have had a chronic pain condition known as fibromyalgia but she did not quite have enough tender points to make up the diagnosis. ...It appears to me...that her areas of pain and her pain overall severity had increased from the last time I saw her. This would fit the pattern of an individual with somatic symptom disorder. The latter is a disorder of pain, previously known as chronic pain disorder, in which individuals have chronic ongoing pain with or without the presence of underlying organic causes.

It is of note that Ms. Suedat was using a quad-cane when I first saw her. A quad-cane is a cane with four feet on it, and one typically used by frail, elderly people to assist with balance, as they cannot really balance enough with one cane. It would be hard to explain Ms. Suedat's choice of this type of cane for support, other than to display an outward behaviour of pain and disability.

...The behavioural presentation was again repeated when she was asked to walk without the cane. She then started to walk as if she was newly blind person with her hands reaching out variably in space to assist with her balance despite the fact that there was no underlying neurologic source or cause for instability such as a neuropathy, a spinal cord injury, vision loss, or other such entity that would perhaps necessitate such a need. The only explanation was that this was an outward display of disability for her perceived instability of balance.

The best treatment for patients with chronic pain such as Ms. Suedat is proper treatment of their mental health issues, improved sleep and physical mobilization and activation.

1. Causality

It would appear to me that Ms. Suedat was an individual with significant susceptibility to difficulties and problems following a new event for injury.

1. Prognosis

Ms. Suedat's prognosis depends materially on the prognosis of her mental health.

1. Function

It was, and remains, my opinion that she was capable of being more active than she displayed. ...I would expect her to be able to return back to normal as soon as her mental health improves.

**61**  I accept the opinions of Drs. Patel and Travlos. Due to her psychological make-up, the plaintiff was a vulnerable individual who was extremely susceptible to decompensation after a traumatic event such as the Accident. I find that the Accident has exacerbated the plaintiff's pre-Accident psychological condition. But for the Accident the plaintiff would not likely have suffered the psychological disorders diagnosed by Dr. Patel.

**62**  She has met the onus of establishing that the Accident triggered her psychological disorder: *Yoshikawa v. Yu* [*(1996), 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) (C.A.); *Andrews v. Mainster*, [*2014 BCSC 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61YC-00000-00&context=).

**63**  The plaintiff was described by Dr. Eichhorst as eccentric. I agree that is an appropriate characterization of her presentation. However, she is who she is and the fact that she has reacted to the events of December 7, 2010 in a manner that many would consider unusual does not, necessarily, make her claim illegitimate. If her symptoms are genuinely felt and she is not consciously exaggerating or feigning -- and I find that to be the case -- she is entitled to compensation for the losses she has suffered.

**64**  Both Drs. Travlos and Patel agree that the key to a positive future for the plaintiff is successful treatment of her mental health. Both are optimistic for her future.

**65**  Although I do not accept portions of the plaintiff's evidence and I agree with the points made by the defendant as summarized in paragraph 46 of these reasons, on balance I am satisfied that the plaintiff did suffer a triggering of a psychological condition that developed into a psychologically based pain disorder. I am satisfied that the plaintiff's somewhat eccentric reaction to being hit in the Accident was sub-consciously based and was not something that she was able to control.

**C. Discussion**

**66**  The defendant must take his victim as he finds her. Despite the relatively innocuous nature of the impact, the plaintiff has not yet returned to her pre-Accident level of function. Simply put, the plaintiff was the wrong person to hit. She had a fragile psychological makeup and was susceptible to long lasting issues from an Accident of this nature.

**67**  In order to determine the consequences of the Accident, it is important to establish the base line of who plaintiff was prior to the Accident, where should would have been, physically, psychologically, socially, recreationally and spiritually but for the Accident, and compare that to how she is functioning physically, psychologically, socially, recreationally and spiritually as a result of any injuries the Accident may have caused. The Accident can be said to have caused the plaintiff's injuries if it materially contributed to the occurrence of the injuries. If it falls outside the *de minimus* range it will be considered material (*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=)).

**68**  I am satisfied that despite the plaintiff's difficult upbringing and life circumstances, she was functioning at a level that was above what it has been since the Accident.

**69**  The lay witnesses called by the plaintiff, whose evidence I accept, all describe her before the Accident as a happy, vibrant, energetic person who was full of ambition to move forward with her life. They say she is now quiet, reserved with far less energy. In short, a different person. However, they say that she has improved cognitively with the passage of time to the point that she is now able to communicate better than she could initially after the Accident.

**70**  Starting in 2003, she immersed herself in Eastern Medicine culture, Feng Shui and other modes of Eastern medicine, seeking to learn as much as she could. She wanted to impart what she learned on others through meditation and life skills classes.

**71**  Respecting the plaintiff's pre-Accident health status, Drs. Eichhorst, Parhar, Patel and Travlos did not have the benefit of reviewing medical records pre-dating the Accident. Instead, they relied on the plaintiff being accurate in providing her medical history.

**72**  Unfortunately, I find that she was not.

**73**  Drs. Axler and Pisesky had the benefit of reviewing the plaintiff's pre-Accident records from Ontario. Those records paint a picture of a plaintiff who was struggling in life both physically and psychologically. The plaintiff claims that all of these investigations were for a migraine condition and pseudo-seizures which were completely resolved by 2006.

**74**  Contrary to the plaintiff's evidence, I find that in the months and years leading up to the Accident, many of her pre-Accident issues were ongoing, at least to some degree. She was not as symptom free as she suggests.

**75**  I am, however, satisfied that, she was functioning at a level that allowed her to establish a new life in B.C., become socially engaged and take steps to start a new business. The level of that function was reduced by the Accident.

**1. General Damages**

**76**  There is a lack of reliable evidence on the severity of the impact between the plaintiff and the defendant's car. Despite the plaintiff's suggestion that she was thrown 40 meters, I find that she was not. The impact was nothing like that.

**77**  There was no evidence of damage, or lack of damage, to the defendant's vehicle. The plaintiff suffered no bruising, bleeding, swelling or broken bones. The attending police officer, Constable Hadwin, did not take any photographs at the scene. His recollection of any investigation he may have done was vague and unhelpful.

**78**  I have considered the submissions of counsel and the authorities provided by them. Authorities provided by the plaintiff include: *Andrews; Johal v. Meyede*, [*2013 BCSC 2381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X18M-00000-00&context=); *Martin v. Nova Scotia (Worker's Compensation Board)*, [*[2000] N.S.J. No. 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1WF-M35K-00000-00&context=) (C.A.); *Stephenson v. Lee*, [*2009 BCSC 1617*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2HC-00000-00&context=); *Zhang v. Law*, [*2009 BCSC 991*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0JS-00000-00&context=) and *Tsalamandris v. MacDonald*, [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=). Authorities provided by the defendant include: *Abdalle v. British Columbia (Minister of Public Safety and Solicitor General)*, [*2012 BCSC 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1P5-00000-00&context=); *Frayne v. Alleman*, [*2006 BCSC 1988*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S43W-00000-00&context=) and *Healey v. Chung*, [*2014 BCSC 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61SR-00000-00&context=).

**79**  I have also considered the factors that the court should consider when assessing the plaintiff's general damage claim. *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), leave to appeal ref'd [*[2006] S.C.C.A. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=) (S.C.C.)

**80**  In sum, despite all of the issues and challenges the plaintiff had over her lifetime, the evidence suggests that in the two years leading up to the Accident, she was coping. She had a number of challenges and stressors in her life that continued to exist, including depression (for which she was on a provincial disability), managing Brittany's daily needs and attempting to establish a new business.

**81**  The effect the Accident has had must be measured on how it has affected her, and not how it may have affected the average individual. The defendant is not entitled have a perfect plaintiff.

**82**  Although by many standards the Accident would be considered relatively minor, I find that the Accident has had a significant impact on the plaintiff and will continue to have an impact on her until her mental health issues have been addressed. Given the long-standing pre-Accident history of mental health issues, I find that she would have had issues with her mental health continuing into the future in any event of the Accident. The Accident exacerbated her mental health condition and has made her less functional than she would otherwise have been. Taking these factors into account, I assess her damages under this head at $50,000.

**2. Special Damages**

**83**  The plaintiff submitted a book of special damages containing various invoices and a summary of her special damages claim. It was marked as Exhibit 7. Some of the amounts claimed in the summary are not supported by invoices and have not been proven.

**84**  Starting in October 2011 and running into February 2012, the plaintiff's previous lawyer hired an occupational therapist and rehabilitation assistant to assess the plaintiff and commence a physical rehabilitation program for her. The program included a pool program. The plaintiff stated it was beneficial. The plaintiff claims reimbursement of six accounts from Turning Point Rehabilitation Consulting Ltd. totalling $10,406.76. I have reviewed these accounts and am satisfied that they were reasonably incurred by the plaintiff for her rehabilitation and they will be allowed.

**85**  The plaintiff also seeks reimbursement of expenses incurred for home care services provided by KARP Home Care from October, 2011 through February 2012. Although the plaintiff claims that there were five invoices from KARP home care dated October 31, 2011, November 30, 2011, December 31, 2011, January 31, 2012 and February 15, 2012, the December and January invoices (apparently $448 each) are not in evidence and therefore have not been proven. I am satisfied that the remaining home care expenses were reasonably incurred in the circumstances of the plaintiff's efforts to overcome her injuries and they will be allowed in the sum of $672.

**86**  The plaintiff also claims for the cost of Anoosha Agahkani Vanora Wellness counselling sessions in the amount of $268.80 for two sessions of counselling: December 7, 2011 and December 14, 2011. That sum is allowed. The plaintiff's summary of special damages includes 14 other sessions from November 30, 2011 through February 15, 2012, however no invoices for those other sessions are in evidence and they have therefore not been proven.

**87**  The plaintiff seeks reimbursement for five physiotherapy sessions in December, 2011 and January 2012 at Planet Ice South Coquitlam Physiotherapy. My review of the invoices discloses that these physiotherapy treatments were for a vestibular therapy assessment and treatments. I am not satisfied that the plaintiff has proven a need for vestibular therapy from injuries arising out of the Accident so this claim is dis-allowed.

**88**  The plaintiff's claim for four sessions of physiotherapy from Burnaby Heights Physiotherapy totalling $88 is also dismissed because no receipts or proof of that expense are in evidence.

**89**  The plaintiff's claim for taxi expenses to and from treatment is allowed in the amount of $1,423.80. This sum is the total amount of the invoices proven. In addition, the plaintiff has proven $435 in bus passes that I am satisfied relate to the various bus trips she needed to transport herself to and from her various appointments.

**90**  In October, 2013 and continuing to the date of trial, the plaintiff sought and received psychological counselling from Dr. Patel. The evidence from Dr. Patel and the plaintiff was that these counselling sessions were and continue to be helpful. Given my findings regarding the plaintiff's psychological injuries from the Accident, the cost of these sessions was a reasonable expense and they are allowed in the amount of $1,910, the total amount of the receipts in evidence.

**91**  The plaintiff's claim for a ROHO Cushion in the amount of $530.10 is also allowed. It was purchased on March 18, 2011 on the recommendation of the plaintiff's therapist. The plaintiff's evidence was that it helped with the management of the pain she was experiencing.

**92**  The plaintiff has also claimed for the cost of a City of Burnaby Pool pass. This claim is also allowed in the amount of $55.33, which is the amount that has been proven.

**93**  The total special damages proven and allowed are $15,701.79.

**V. PAST WAGE LOSS/PAST LOSS OF EARNINGS OPPORTUNITY**

**94**  The plaintiff seeks an award of $81,000 in gross past loss of earnings from the date of the Accident to the start of the trial. This claim is based upon the assumption that had the Accident not occurred, she would have gradually developed Spirit Wellness into a business such that by 2014, she would have been working full time and earning $38,500 annually. This sum is the statistical average annual earnings of Family, Marriage and other Related Counsellors (NOC 4153).

**95**  I accept that when the plaintiff moved to B.C. she was coping as best she could, albeit with ongoing psychological issues. Shortly before the Accident, she was attempting to launch Pacific Spirit in conjunction with Dr. Chen-See. The grand opening of their new office was on November 17, 2010. The plaintiff was part of that opening. She had entered into an "Independent Contractor Agreement" with Dr. Chen-See whereby she would have the use of one treatment room, use of clinic facilities, and a door plaque. They agreed to operate independent of each other and to obtain their own business licenses and liability insurance.

**96**  At the time of the Accident, the plaintiff did not have a business licence to operate Pacific Spirit.

**97**  While I accept the plaintiff had taken the first steps in developing Pacific Spirit into a growing business, I do not accept that but for the Accident, Pacific Spirit would have been a profitable venture and would have earned $38,500 per year. Firstly, by virtue of the contract she had with Dr. Chen-See, she was obliged to pay 40% of revenue earned to a maximum of $2,000 per month as her share of the cost of using one treatment room, the clinic facilities (telephone, living room, storage room etc.) and the use of landlord supplied washrooms, fitness room, lunch room and meeting room. In addition, she would have had other normal business expenses such as supplies, advertising, accounting etc.

**98**  Secondly, she is Brittany's primary caregiver and would have restricted her hours of business to accommodate Brittany's schedule. Brittany graduated from grade 12 in June, 2014. From the time of the Accident to June, 2014, the plaintiff would have been able to work part-time hours during the week days developing Pacific Spirit while Brittany was in school. I find it doubtful, however, that she would have been able to devote the time and energy that would have been required since the Accident to annually gross $38,500 by 2014 as she suggests.

**99**  I am, however, satisfied that the Accident has deprived the plaintiff of the opportunity to gradually developing Pacific Spirit into a business. For the reasons stated, I am not satisfied that 25% of full-time earnings ($38,500) in 2011, 50% of full-time earnings in 2012, 75% of full-time earnings in 2013 and 100% of full-time earnings in 2014 is the appropriate measure of her loss. An assessment rather than a calculation is required.

**100**  Considering Pacific Spirit was at best a fledgling business with no revenues prior to the Accident, the contractual arrangements with Dr. Cheng-See, and considering the plaintiff's personal circumstances (including Brittany and the plaintiff's ability to earn a maximum of $800 per month while on disability), I assess the plaintiff's past loss of earnings opportunity at $20,000 net of tax. This amount is loosely based on average earnings since the Accident of $900 per month after deducting her obligations to Dr. Cheng-See and then taking into account positive and negative contingencies for the fact that Pacific Spirit was in its infancy with an unknown future.

**VI. LOSS OF FUTURE EARNING CAPACITY**

**101**  For the plaintiff to succeed under this head of damage, she must prove that, due to the injuries she suffered in the Accident, there is a "*real and substantial possibility"* that she will suffer a future loss of earnings. Once that possibility has been established, the assessment of that future loss can be made on the earnings approach or the capital asset approach (*Perren v. Lalari,* [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=)).

**102**  The plaintiff argues that absent the injuries she sustained in the Accident, she would have been at liberty to pursue her career as a life coach/counsellor. She testified that she is still hopeful that she will be able to resume her career; it is unknown when she will be able to start.

**103**  Drs. Eichhorst, Parhar, Travlos and Patel provided their respective opinions concerning the plaintiff's prospects of being able to return to the workforce as follows:

1. Dr. Eichhorst:

It is my understanding that the patient was self-employed as an eastern Medicine Counseling Care Provider. Despite attempts and ambitions to return to work, she has been unable to do so since the accident and remains unable to work due to reported cognitive impairments of memory, concentration, and energy to be able to integrate information from her clients in a meaningful way. Significant time has passed from the time of her accident. My prognosis for full competitive return to employment remains guarded.

1. Dr. Parhar:

Given that the underlying physical, psychological and cognitive problems are likely permanent, which resulted from the pedestrian/motor vehicle collision of December 7, 2010, I think it would be reasonable to conclude that the occupational limitations they have resulting in will also likely be permanent.

Thus, at the current juncture, I would be of the opinion that Sabita is unlikely to be able to return to work as a healthcare practitioner for the foreseeable future. I also believe it would be challenging for her to find any suitable employment given her occupational limitations such as those that resulted from her physical, psychological and cognitive conditions that were caused by the pedestrian/motor vehicle collision of December 7, 2010.

1. Dr. Travlos:

At the end of the day, Ms. Suedat's prognosis depends materially upon the prognosis of her mental health. I would defer to my colleagues in Psychiatry and Psychology for their further opinions regarding the prognosis of her mental health. This is also clearly interdependent upon her psychosocial situation and the stresses and difficulties that she has had in life in general and in particular those related to her disabled daughter.

At the time of my assessments of Ms. Suedat, it was, and remains, my opinion that she was capable of being more active than she displayed. I would encourage her to increase her activity level, and from my perspective she is capable of doing activities around the home. Indeed, she must be encouraged to be as active as she can tolerate. I would not specifically restrict her activities for simple daily activities and I would encourage her to do non-dangerous recreational activities as well. She will have limitations in terms of her socialization because of issues pertaining to feeling poorly, lack of energy, anxiety, etc., but again the prognosis here depends on her mental health treatment and I would expect her to be able to return back to normal, assuming her mental health improves.

1. Dr. Patel:

With respect to her prognosis, Ms. Suedat's emotional recovery is likely to be affected by a number of factors, such as her physical improvement, the availability of medical and psychological interventions, and the absence of having other traumatic events. As far as Ms. Suedat's short term prognosis is concerned, that is for the next four to six months, it is somewhat guarded; but, with psychological intervention, her functioning can be improved. a long-term prognosis of a positive psychological recovery is achievable contingent on the availability of psychological and medical interventions and a positive response to her medical intervention. I feel that as long as she continues to suffer from her physical injuries, limitations, and pain, the symptoms of depression and anxiety will be perpetuated. Ms. Suedat's emotional recovery is likely to be affected by a number of factors, such as her physical improvement, the availability of psychological and medical interventions, and the absence of having other traumatic events.

**104**  I agree with Drs. Travlos and Patel that the plaintiff's ability to function well in the future will depend to a large degree on her mental health. In my judgment, to the extent the plaintiff suffered physical injuries in the Accident, they have long since resolved and any physical pain she continues to experience is psychologically based.

**105**  I am satisfied that with ongoing treatment, the plaintiff's mental health will improve and she will be able to function in her chosen vocation to the same extent and in the same capacity that she would have been functioning but for the Accident. I am satisfied that the plaintiff has proven on a balance of probabilities that there is a real and substantial possibility that she will suffer a loss of earnings in the future as a result of her mental health disorder that was triggered by the Accident. She is entitled to an award for that loss.

**106**  In assessing the award, positive and negative contingencies must be considered.

**107**  Relying on Pearlman J.'s decision in *Andrews*, the plaintiff seeks $150,000 for loss of future earnings which she says represents roughly two years of projected earnings as a counsellor.

**108**  In considering the medical evidence respecting the plaintiff's future, I give more weight to Dr. Travlos' opinion than I do to the opinions of Drs. Eichhorst and Parhar, both of whom accepted the plaintiff's history regarding the Accident as correct. They were not privy to the plaintiff's pre-Accident medical history. I agree with Dr. Travlos that once the plaintiff has had the benefit of mental health counselling, she will return to her pre-Accident function. I expect she will be able to resume her pre-Accident vocational abilities and be back to developing her counselling practice within the next 12 - 18 months.

**109**  Nevertheless, she has been put behind by four years to date, and it will be another year before she is up to speed. The evidence satisfies me that she was beginning to establish a business presence in the field of counselling and, with her personality, would likely have been modestly successful, although I doubt that she would have earned anything like what she suggests.

**110**  She was on provincial government disability since moving to BC in 2008 and would likely to have continued to be on disability for the foreseeable future.

**111**  In my judgment, her earnings would have averaged in the $1,000 - $2,000 per month range had the Accident not happened. Projecting that into the future and taking into account that the opportunity she had to build her business has been delayed by the Accident, I assess damages under this head at $30,000.

**VII. FUTURE CARE COSTS**

**112**  It is difficult to be precise about what the plaintiff's future care expenses and requirements will be. Nevertheless, the court is required to fix the amount based on the evidence presented at trial, adjusting for reasonable contingencies (*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=)). The award must be based on what is reasonably necessary to attempt to put the plaintiff in the same position she would have been in had the injury(s) not occurred (*Langulle v. Nguyen,* [*2013 BCSC 1460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B29G-00000-00&context=)). Beyond the need for medical justification for the items claimed, there should be evidence that the plaintiff will likely use the recommended care *(Langulle*; *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=))

**113**  Psychological counselling has been recommended by Drs. Eichhorst, Patel and Travlos.

**114**  Specifically, Dr. Patel recommends an initial regime of 42 psychological treatments over the next 30 months to manage the plaintiff's mental condition. These treatments would twice per month for 12 months and then once per month for 18 months. She recommends the plaintiff then be reassessed.

**115**  I agree with these recommendations.

**116**  The evidence is that the cost is $185 per treatment. The total cost will be $7,770. In addition, I find that she will experience flare-ups on occasion and will benefit from follow-up sessions. All things considered, I award $10,000 for future counselling sessions.

**117**  The plaintiff also claims for future cost of physiotherapy ($2,600), cushions ($530) and home care assistance ($5,200). Given my findings that her ongoing complaints relate to her psychological health and not her physical health, her claim for these items is disallowed.

**VIII. SUMMARY**

**118**  In sum, the defendant is 100% responsible for the December 7, 2010 Accident. The plaintiff is entitled to damages as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| a. | General damages: | $50,000.00 |  |
| b. | Special damages: | $15,701.79 |  |
| c. | Past Loss of Earnings Potential: | $20,000.00 |  |
| d. | Loss of Future Earnings Potential: | $30,000.00 |  |
| e. | Future Care Costs: | $10,000.00 |  |
|  | Total Damages: | **$125,701.79** |  |

**119**  The plaintiff is entitled to interest on special damages and past loss of earnings potential in accordance with the *Court Order Interest Act.*

**120**  Subject to matters of which I am unaware, the plaintiff is also entitled to costs.

G.P. WEATHERILL J.

**End of Document**

[***Wallman v. Doe, [2014] B.C.J. No. 53***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1D9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G. Weatherill J.

Heard: November 4-8, 12, 18-22, 25-29, December 2-6, 9-11,

16-20, 2013.

Judgment: January 17, 2014.

Docket: M084600

Registry: Vancouver

**[2014] B.C.J. No. 53** | [*2014 BCSC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X1WY-00000-00&context=) | [*30 C.C.L.I. (5th) 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X1WY-00000-00&context=) | [*237 A.C.W.S. (3d) 557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X1WY-00000-00&context=) | [*2014 CarswellBC 108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X1WY-00000-00&context=)

Between Daniel Wallman, Plaintiff, and John Doe, Jack Doe Company Ltd., Insurance Corporation of British Columbia, Rajinder S. Gill, British Columbia Transit, Whistler Transit Ltd., Defendants

(528 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Head injuries — Concussion — Psychological injuries — Depression — Action by Wallman for damages for personal injuries sustained in a motor vehicle accident allowed in part — Wallman, a 53-year-old emergency room physician, was driving in snowy conditions when a snowplough slid into his path — When Wallman stopped his vehicle, a bus rear-ended him — Wallman took no steps to identify the snowplough or its driver and the case against the defendant ICBC was dismissed — However, the bus driver was negligent — Wallman suffered from a concussion caused by the accident and continued to suffer from post-concussion syndrome — He was awarded $5,944,712 in damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Expenses and expenditures — Therapy or rehabilitation — Child care — Non-pecuniary loss — Action by Wallman for damages for personal injuries sustained in a motor vehicle accident allowed in part — Wallman, a 53-year-old emergency room physician, was driving in snowy conditions when a snowplough slid into his path — When Wallman stopped his vehicle, a bus rear-ended him — Wallman took no steps to identify the snowplough or its driver and the case against the defendant ICBC was dismissed — However, the bus driver was negligent — Wallman suffered from a concussion caused by the accident and continued to suffer from post-concussion syndrome — He was awarded $5,944,712 in damages.**

|  |
| --- |
| Action by Wallman for damages for personal injuries sustained in a motor vehicle accident. Wallman, a 53-year-old emergency room physician, was driving in snowy conditions when a snowplough slid into an intersection, blocking his way. When Wallman stopped his vehicle, a Whistler Transit bus rear-ended him. The collision did not cause much physical damage to the vehicles but Wallman claimed to have suffered a debilitating concussion. He had not returned to his pre-accident work as a physician or as a real estate developer and he took the position that he never would be able to do so. The transit defendants submitted that the snowplough was at least partly to blame. The defendant ICBC submitted that the transit defendants were to blame. The snowplough and its driver were never identified.  HELD: Action allowed in part.  Wallman took no steps to identify the snowplough or its driver. Although the snowplough was partly to blame for the accident, the case against ICBC was dismissed. The accident did not take place because it was inevitable. It took place because the bus driver's conduct did not meet the expected standard of care. Prior to the accident, Wallman had a long history of functioning at a high level. He now had cognitive and communication difficulties, low energy and was unable to work effectively. He also suffered from episodes of anxiety and depression. Wallman established that he suffered from a concussion caused by the accident and that he continued to suffer from post-concussion syndrome. He was awarded $5,944,712 in damages, which included $210,000 in non-pecuniary damages, $1,445,023 for past income loss, $3,665,169 for loss of future earning capacity from his medical practice, $500,000 for loss of future earning capacity from real estate, $90,231 in special damages and $34,289 for the cost of future care. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 24*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-47Y1-F06F-21ND-00000-00&context=), s. 24(5), s. 105

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 128*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F5-00000-00&context=)(1), s. 144, s. 162

**Counsel**

Counsel for the Plaintiff: J. Scott Stanley, Kevin Gourlay.

Counsel for the Defendant Insurance Corporation of British Columbia: P. Arvisais.

Counsel for the Defendants Rajinder S. Gill, British Columbia Transit and Whistler Transit Ltd.: Scott B. Stewart, Ken Armstrong.

A. INTRODUCTION

B. THE PLAINTIFF'S CASE

1. The Plaintiff, Dr. Daniel Wallman (2) Dagmar Roth (3) Dr. Paul Walden (4) Anne Townley (5) Dr. Douglas Carrie (6) Kathryn Seely (7) Dr. Thomas Jacobs (8) Charles (Ross) Genge (9) Dr. Ron Stanley (10) Dr. Willem Vroom (11) Dr. Monica Rempel (12) Joseph LeBlanc (13) Simon Learmouth (14) George Martin (15) Dr. Kevin Bush (16) Dr. Neil Wells (17) Dr. Karin Kausky (18) Laurie Nelson (19) Shari Linde (20) Dr. Hugh Anton (21) Dr. Philip Teal (22) Dr. Ronald Remick (23) Dr. Briar Sexton (24) Joseph Hohmann (25) Tracy Berry (26) Darren Benning
2. THE CASE FOR THE TRANSIT DEFENDANTS
3. John Wong (2) Leanne Taylor (3) Rajinder Gill (4) Francesca Cole (5) Randy Butts (6) Scott Burley (7) Robin Brown (8) Donald Pohl (9) Mark Sawa (10) Darrin Richards (11) Dr. Hedi Oetter (12) Dr. John Corey (13) Dr. Derryck Smith (14) Dr. Alister Prout (15) Lisa Marginson (16) Mark Gosling
4. THE CASE FOR ICBC

E. THE PLAINTIFF'S REBUTTAL EVIDENCE

1. Donald Rempe
2. ANALYSIS
3. Liability
4. Was Gill Negligent? (b) Was the Snow Plow Driver negligent? (c) *Insurance (Vehicle) Act*, Section 24(5)
5. Causation (3) Damages
6. Non-Pecuniary Damages
7. Past Income Loss from Medical Practice
8. Future Loss of Earning Capacity from Medical Practice
9. Future Loss of Earning Capacity - Real Estate Investments
10. Special Damages
11. Cost of Future Care
12. CONCLUSION

**Reasons for Judgment**

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| --- |
| **G. WEATHERILL J.** |

**A.** **INTRODUCTION**

**1**  Occasionally a seemingly innocuous event can have tragic consequences.

**2**  On the morning of December 4, 2006, the plaintiff, an emergency room physician, was driving his Honda Accord ("Honda") eastbound on Lorimer Road from his home in Whistler, British Columbia to the Whistler Health Care Centre ("WHCC"). It was cold and snowing. The roads were slippery. The traffic light at the intersection of Lorimer Road and Highway 99 (the "Intersection") was red in his direction. The plaintiff stopped.

**3**  When the light turned green, the plaintiff began to move forward. However, a highway snow plow truck ("Snow Plow") proceeding northbound on Highway 99 slid into the Intersection, blocking the plaintiff's eastbound route.

**4**  The plaintiff stopped. A Whistler Transit bus that had been following the plaintiff's vehicle (the "Bus") did not stop and rear-ended the plaintiff's vehicle (the "Accident").

**5**  The collision did not cause much physical damage to the vehicles. However, the plaintiff's life changed instantly and dramatically. He claims to have suffered a debilitating concussion. He has not returned to his pre-Accident work either as a physician or as a developer of real estate rental properties. He asserts that he will never again be able to do so. He claims significant damages.

**6**  The defendants, British Columbia Transit ("BCT"), Rajinder Gill ("Gill") and Whistler Transit Ltd. ("WTL"), (collectively the "Transit Defendants") say the Snow Plow is at least partly to blame. The Snow Plow and its driver have not been identified. The defendant, Insurance Corporation of British Columbia ("ICBC"), a nominal defendant pursuant to section 24 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, says that the Transit Defendants are to blame.

**7**  There is no suggestion of any contributory ***negligence*** on the part of the plaintiff.

**B.** **THE PLAINTIFF'S CASE**

**8**  The plaintiff read into evidence excerpts from Gill's examination for discovery:

1. On the morning of December 4, 2006, he was a relatively new bus driver for WTL having started in November 2006. He had little experience driving in snow.
2. He was driving the Bus eastbound on Lorimer Road. There was only one eastbound travel lane. He had driven that route approximately seven or eight times previously.
3. It had been snowing all morning and snow had accumulated on the roadway. Gill knew there was ice on the roadway under the snow. There was a slight down-slope to Lorimer Road as it approached Highway 99. This was the most snow Gill had ever experienced while driving a bus.
4. Gill saw the Honda approximately 100 feet ahead of him. He saw that the traffic light at the Highway 99 Intersection was red. He saw that the Honda had come to a complete stop. The Bus was still moving.
5. Gill saw the traffic light turn from red to green. He saw the Honda proceed forward approximately five to six feet and then come to a full stop because the Intersection was blocked by the northbound Snow Plow which had slid into it.
6. The Bus was unable to stop and the bicycle rack mounted on the front of the Bus struck the rear of the Honda. The Honda was pushed further into the Intersection. Thereafter, the Honda did not stop but continued through the Intersection after the Snow Plow had passed.
7. Gill and the plaintiff stopped on the east side of the Intersection, exchanged information and continued on their respective ways. Gill did not get out of the Bus. He did not inspect the vehicles for damage.

**9**  The following witnesses testified as part of the plaintiff's case:

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|  | **(1)** | **The Plaintiff, Dr. Daniel Wallman** |  |

**10**  The plaintiff is a 53-year-old physician. He obtained his medical degree from McMaster University in the mid-1980s. He worked in various hospitals in British Columbia until 1992 when he moved to Whistler to work as an emergency room physician at the WHCC.

**11**  The plaintiff was born and raised in Ontario to parents who engrained in him the value and rewards of hard work and property ownership. He learned home maintenance skills at an early age.

**12**  He excelled in school. In grade six he was moved to his school's enrichment program. He was the Canadian Junior Checkers Champion at age 13. He taught himself to play chess and shortly thereafter placed third in the Canadian Junior Chess Championship.

**13**  The plaintiff excelled in sports. He was his school's "Athlete of the Year" in grade 12.

**14**  During high school, university and during the summers in between, the plaintiff worked at various jobs, mostly labour intensive.

**15**  In 1983, the plaintiff earned an undergraduate degree in honours chemistry from Queen's University, finishing second in his class. That summer, he attended a French-language immersion course in Quebec where his met his spouse, Dagmar Roth. He and Ms. Roth now have three children, Mathew born in 2004 and twins, Nicholas and Isabella born in 2008.

**16**  The plaintiff decided upon a career as an emergency room physician at the WHCC because he loved the "high velocity trauma", the challenges and the busyness of the emergency room. He also liked the orthopaedics of sports-related injuries. The job gave him an opportunity to learn and develop his medical skills. The plaintiff found the job at WHCC to be gratifying and fulfilling. He was proud of his accomplishments over the years, especially helping make a difference in the lives of his patients. He received thank-you letters from around the world. He had no plans to retire.

**17**  The plaintiff typically worked approximately 60 hours per week at WHCC, 18 shifts per month. He was Chief of Staff in the mid-1990s. Thereafter he was President of the Medical Staff for four to five years. From 1997 until the Accident, the plaintiff was the medical advisor to the Whistler Ambulance Service.

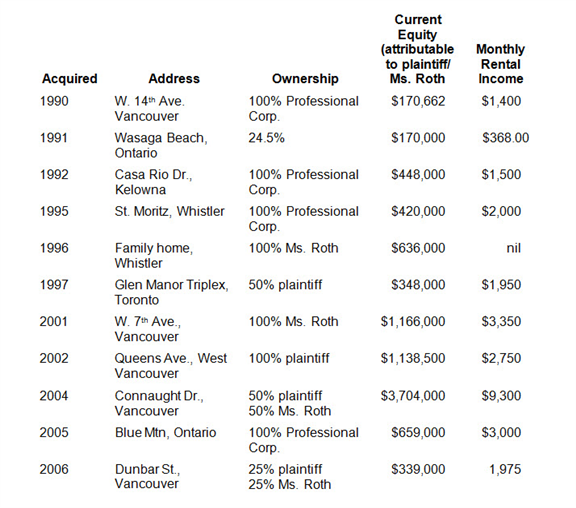
**18**  The number of shifts the plaintiff worked did not change after the birth of his son, Matthew in 2004. Although he and Ms. Roth were planning to have more children, he loved his work and had no plans to reduce his work hours.

**19**  Financially, the plaintiff was very astute. He was a voracious reader of financial papers and publications. He loved detail. One of his strengths was math.

**20**  The plaintiff and Ms. Roth purchased their first home in 1990. They subsequently moved twice, each time purchasing a new home and keeping the previous home for use as a rental property. They also acquired an interest in a family cottage at Wasaga Beach Ontario as well as other properties that they built or renovated and use as revenue properties. The plaintiff enjoyed the creativity involved in the design and seeing his renovation ideas come to fruition. He was the person primarily responsibility for the maintenance and repair of these properties.

**21**  The plaintiff's plan prior to the Accident was to purchase and renovate approximately one property per year for as long as he continued to work at WHCC.

**22**  The following is a summary of the plaintiff's real estate acquisitions prior to the Accident:



**23**  The plaintiff's pre-Accident health was good. His vision was excellent, he had lots of energy and he was an efficient sleeper needing only six to seven hours per night. He seldom took naps during the day. He has, however, suffered from asthma for many years, for which he takes prednisone, sometimes self-prescribed.

**24**  In the late 1980s, the plaintiff injured his back in a car accident. In January 2004, the plaintiff hit his head during another car accident, which resulted in neck spasm and carpal tunnel syndrome in his arms. The plaintiff testified that both injuries had completely resolved by the summer of 2006.

**25**  Prior to the Accident the plaintiff had never been diagnosed as having suffered a concussion injury.

**26**  On cross-examination, counsel for the Transit Defendants pointed to ICBC's telephone records, which indicated the plaintiff was complaining of carpal tunnel syndrome problems in his hands arising from the January 2004 accident as late as November 24, 2006, ten days before the Accident. The plaintiff's recollection of those telephone calls was that he had called ICBC to obtain information about the protocol if, in the future, his carpal tunnel symptoms returned and he was required to have surgery and miss work. He believes that the person at ICBC who made the telephone notes misunderstood or misinterpreted what he had said.

**27**  Regardless, none of the plaintiff's pre-Accident conditions or injuries resulted in the plaintiff missing work.

**28**  The plaintiff enjoyed sports. He played baseball and hockey, skied, hiked and worked out in the gym. None of these activities were curtailed by the birth of Matthew.

**29**  On the morning of December 4, 2006, the plaintiff left his home to attend an intubation course being held at WHCC. It was a cold and snowy day. He drove eastbound on Lorimer Road. There was black ice on the road. He stopped at the Intersection because the traffic light in his direction was red. He saw the Snow Plow travelling northbound on Highway 99. The traffic light facing the plaintiff turned green but he was unable to proceed through the Intersection because the Snow Plow had slid into and was blocking it. The plaintiff heard the sound of a roaring engine behind him. There was a bang and he immediately saw a flash of white light. He believes that his head must have "whipped forward and back" but has no memory of whether or not it did.

**30**  The plaintiff's memory of the rest of that day is patchy. He has a vague recollection of being on the Bus and speaking to the driver but does not remember what was discussed. He has no recollection of preparing and having Gill sign a statement regarding the Accident (the "Statement"). He confirmed that the Statement was written mostly in his handwriting and that one of the telephone numbers he wrote on it was an old residential telephone number from ten years earlier, not his current telephone number. However, he agreed on cross-examination that the old telephone number remains an active facsimile number in his house.

**31**  He has no memory of speaking to a WTL representative on the Bus' radio or on the telephone later that day.

**32**  He does not recall driving to WHCC. He does recall attending the intubation course after the Accident, one that he had prepared for and had been looking forward to attending, but was confused and could not follow what was going on. He did not feel well. He went home at the lunch break and fell asleep on his couch. He returned to the course in the afternoon, felt horrible and returned home. He has no recollection of anyone from WTL attending WHCC to speak to him that day.

**33**  On cross-examination the plaintiff was questioned about the account of the Accident he gave during his examination for discovery and as recorded by various medical specialists with whom he had consulted. No two versions are identical. Some versions indicate he had a recollection that is missing or denied in others. The plaintiff's explanation is that, on each occasion, he was trying his best to piece together what he remembers happening with what he thought must have happened, even though he had no memory of the latter. For example, he testified that he has no memory of moving his vehicle after being struck or of preparing and having Gill sign the Statement. However, he knows those things must have happened because his vehicle was moved and the Statement was prepared.

**34**  That evening, Ms. Roth took the plaintiff to WHCC to be examined. Dr. Rempel, a colleague at WHCC, diagnosed a concussion and advised the plaintiff to take some time off work.

**35**  During the days, weeks and months following the Accident, the plaintiff was nauseated, confused and disoriented. His vision was blurred and he was seeing double. He was sensitive to light and noise. He had trouble remembering even simple things such as telephone numbers. He had constant, unbearable headaches. He easily became irritable. He had trouble understanding what was wrong with him. He was upset that he was unable to work. He was concerned that he might lose his medical license and skills as well as the trust of his colleagues. He minimized his symptoms in an attempt to convince his colleagues that he was fit to return.

**36**  He felt exhausted and slept most of the day. He had graphic nightmares, which he described as always involving violence and blood.

**37**  The plaintiff has no recollection of speaking to a representative of ICBC on December 19, 2006. He made no attempt to identify the driver of the Snow Plow, other than to retain the services of a lawyer who placed a small advertisement in the local Whistler newspaper asking that witnesses to the Accident come forward.

**38**  Shortly after the Accident, Dr. Stanley, another WHCC physician, arranged for the plaintiff to undergo a CT scan at Lions Gate Hospital in North Vancouver. On the drive to the hospital he became nauseated and threw up.

**39**  The plaintiff continues to suffer from most if not all of the foregoing symptoms. He has low-grade headaches that occasionally develop into migraines, although they are now less intense and more infrequent. His memory has improved but is not what it was before the Accident. He is not as confused and dizzy as he was during the first years following the Accident but still suffers from those symptoms. His sensitivity to noise and light has improved somewhat.

**40**  The plaintiff continues to have difficulty thinking, concentrating, remembering things and multi-tasking, all of which he testified were his fortes prior to the Accident. He cannot seem to concentrate on more than one thing at a time. He has trouble figuring things out and following simple instructions. He has blurred and double vision. He gets headaches and becomes irritable when he is tired.

**41**  The plaintiff's daily life struggles include regularly forgetting or losing his wallet, glasses, cars keys and cell phone.

**42**  The plaintiff provided the Court with several examples of becoming uncharacteristically distracted while minding his young children with the result that their safety was jeopardized.

**43**  The plaintiff has difficulty initiating activities. On good days, he is able to spend up to 2 hours on the computer or 30 minutes doing physical activity, such as gardening and yard work. However, he finds that he becomes "symptomatic" - his headaches return, he develops a cognitive fog and he becomes fatigued, disoriented and irritable.

**44**  On cross-examination the plaintiff was shown video surveillance of him doing various activities:

1. January 18, 2008: Carrying his four year old son Matthew on his shoulders up three flights of stairs.
2. July 20 & 21, 2010: Using a wheelbarrow and digging with a shovel to plant a cedar hedge at his Connaught Avenue property. This gardening activity did not appear to be particularly strenuous, yet the plaintiff paused several times to rest. He explained during his redirect examination that this activity resulted in him suffering a "brutal" migraine and he was required to pace himself in order to control his symptoms. In contrast, prior to the Accident it would have been inconceivable for him to have needed to rest while performing such a task.
3. July 23, 2010: With his children and nanny at Brandywine Falls Provincial Park. He is seen carrying Mathew on his shoulders, but resting often. He explained that the nanny was present because he is not sufficiently attentive to his children. Indeed, one scene shows his two-year-old daughter running along a path parallel to the water with the plaintiff seemingly oblivious that she had gone. The nanny chased after her.
4. August 28, 2010: Playing in the water at Wasaga Beach in Ontario and riding on a jet ski with his son. The jet ski ride was far from vigorous.
5. September 3, 2010: Doing various non-vigorous errands in Ontario, such as filling a car with gasoline.

**45**  As a result of the Accident, the plaintiff has lost his acumen for math and detail. He provided the Court with several examples of instances where he wrote cheques with the wrong amount or date, or forgot to sign the cheque altogether. He has had duplicate cheques he wrote returned to him. His computer journal entries are now of poor quality and contain mistakes.

**46**  Although the plaintiff has paid his taxes, he has not filed income tax returns for himself or for his professional corporation, Dr. Daniel A. Wallman Inc. ("Professional Corporation"), or completed financial statements for that corporation for several years. He testified that he finds the computer work associated with preparing the required financial ledgers and other information for his accountant onerous. It makes him symptomatic. It takes him months to correlate the financial information. He has not allowed others to do it for him because finds it difficult to accept a diminishing role in respect of matters that he feels he should be able to take care of himself.

**47**  Initially, after the Accident, the plaintiff denied that there was anything wrong with him. He felt ashamed that he was not the productive person he was before the Accident. He wanted to return to work and to the life that he had made for himself.

**48**  Between November 2007 and June 2008, the plaintiff tried working in the Squamish Hospital as a surgical assistant, a job requiring no decision making on his part. He performed a total of 13 surgical assists. He could not concentrate. His hand-eye coordination was off. His suturing was amateurish. He found that his headaches, fatigue, disorientation, cognitive fog and irritability would return. He used the wrong codes for billing purposes. Two incidents caused him to cease this work. The first was being stopped by the police for erratic driving of which he was completely unaware. The second was when he arrived to assist late due to his inability to organize himself and the surgeon had to replace him with another doctor. In 2010 he performed one more surgical assist, but did not bill for it.

**49**  In 2008 the plaintiff began working as a physician in a walk-in clinic in West Vancouver. He did so in an attempt to build up his tolerance as a stepping stone towards a return to work at WHCC. He worked approximately twenty shifts of four hours length during the fall of 2008 and spring of 2009. He was excited and thrilled to be working again. However, he found that two hours into his shift, he began to "fog over", have difficulty following what was being said to him, experience migraines and lose his coordination. He would be tired and disoriented for several days after a shift and would rest as much as possible. There was an incident in October 2008 where he prescribed a narcotic to a substance abuse patient. The plaintiff left the room then returned and prescribed the same drug to the same patient a second time. It was bizarre behavior that was completely out of character for the plaintiff. He has no idea why it happened. The incident made him begin to question his judgment. By November 2008, he decided to take a break from the walk-in clinic, due mostly to fatigue.

**50**  In the spring of 2009, the plaintiff once again started working at the walk-in clinic. He continued to become symptomatic. On one occasion he froze and could not deal with a particular patient's relatively routine medical issue. He worked a few more shifts in January and February 2010 but stopped due to his symptoms.

**51**  The plaintiff attempted many different treatments for his problems, some conventional, some unconventional. He has documented having paid $45,507.24 for these treatments. He has tried many different prescription drugs, some of which have helped while others have not. Some of his medications were self-prescribed, a practice that the plaintiff agreed was frowned upon by his profession. Some of the drugs he tried had severe side effects. He did not keep any of the receipts for the purchase of these drugs. On cross-examination the plaintiff was shown records of his medication regime and consumption of prescription medicines. He was unable to explain why some of his prescriptions did not appear to have been filled while others were filled many weeks or months later. He speculated that he could have been given samples by the various prescribing physicians but he could not remember. He also speculated that he may have lost the prescriptions and did not want to ask for replacements for fear that his doctor would think he was not capable of returning to work.

**52**  The plaintiff was concerned about taking some medicines (anti-depressants) because of the stigma associated with them, and others (Trazodone) because of their addictive nature. He did take them reluctantly.

**53**  After many treatments by an Occupational Therapist ("OT"), Lori Nelson, and a psychologist, Dr. Jung, the plaintiff is learning to accept his limitations and that he will not be able to return to work as a doctor. He is beginning to understand that he has a brain injury and intends to do what he can to deal with it. He plans to continue with his OT and psychologist sessions.

**54**  The plaintiff testified that, since the Accident, he has been unable to perform most of the maintenance and repair tasks required for his various rental properties. A handyman, Joseph Leblanc, handles those tasks for him. He pays Mr. Leblanc $20 per hour and allows him to live in one of the plaintiff's rental units at a rent discounted by approximately $1000 per month.

**55**  The plaintiff has not made any new investments in real estate since the Accident. He finds the process of researching properties and creating a vision of what he could do with them too overwhelming and stressful. He is no longer able to create designs for the properties. He gets caught up in minute issues. Even thinking about it and trying to run the numbers exhausts him.

**56**  In approximately 2010, the plaintiff and Ms. Roth hired a full-time live-in nanny to assist with the children and household chores. They pay her $1,900 per month. They never contemplated the need for such assistance prior to the Accident.

**57**  Since the Accident, the plaintiff no longer participates in sporting activities on a regular basis. He does not play hockey or baseball. He tried to ski once but only lasted one half day. He skates with his children but finds he has little endurance.

**58**  On February 1, 2007, the plaintiff began to receive disability benefits from various insurers, totalling $8,042 per month. He will continue to receive these benefits until age 65. He has recently begun to receive CPP Disability Benefits, some of which will be clawed back by other insurers once they receive the appropriate information from the plaintiff.

**59**  From his demeanour in the witness stand, particularly during cross-examination, it was obvious to me that the plaintiff easily becomes fatigued and confused. Overall, I found the plaintiff to be an honest, credible, sincere and forthright witness. His explanations for inconsistencies in various accounts and documents were logical and made sense. I do not doubt the plaintiff's veracity as a witness, especially his descriptions of his symptoms and the changes in his life, personality and capabilities since the Accident.

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|  | **(2)** | **Dagmar Roth** |  |

**60**  Ms. Roth is the plaintiff's wife. They met thirty years ago in Quebec. They moved to Whistler in 1992.

**61**  Ms. Roth was an elementary school teacher for 17 years until 2004 when Mathew was born.

**62**  Ms. Roth testified about her life with the plaintiff before the Accident. She described him as one of the most well-rounded, intelligent people she has met. He had an enormous amount of energy, stamina and tenacity. He thrived on working long hours and never missed a day of work due to illness. He never once complained of a headache.

**63**  Although the plaintiff worked long hours, he was not motivated to do so by money. Rather, his motivation was the challenge associated with being a doctor and an investor in real estate.

**64**  The plaintiff slept no more than 6 to 7 hours per night and worked an average of 60 to 70 hours per week. He worked even longer hours during the busy winter months. There was no change in the plaintiff's hours of work after the birth of Matthew in 2004. During the summer months, when the WHCC was less busy, the plaintiff spent more time planning, designing and renovating his various rental property projects.

**65**  Prior to the Accident the plaintiff was strong and in very good health both physically and emotionally. He did not wear eyeglasses. Although he had some lower back pain from a car accident in the late 1980s, it never curtailed his activities. The carpal tunnel syndrome caused by a car accident in January 2004 did not seem to affect the plaintiff's abilities and had fully resolved prior to the Accident. In particular, the plaintiff was unaffected by it during the major renovation to the Dunbar property in 2006 on which he worked many hours.

**66**  The plaintiff's productivity was very good. When he set out to do something, it was done effectively and efficiently. He did everything to the best of his ability and was hard on himself when he fell below this standard or made a mistake. Ms. Roth denied that she perceived the plaintiff to be someone with an "obsessive" personality. Rather, he was driven and liked to get things done efficiently and right. He set a high standard for himself.

**67**  The plaintiff was extremely curious and was interested in detail. He strived to learn something new every day. He had amazing insight and was able to accurately and quickly assess the people around him.

**68**  The plaintiff had an incredible memory, particularly for numbers. He never used a calendar or organizer, as he was able to keep everything he needed in his head. He was the main educator of their investment group. He condensed a complex investment strategy into easily understood language for his fellow investors.

**69**  Ms. Roth testified that the plaintiff was "the brains" behind their real estate strategies and investments. He found the investment opportunities, did the financial due diligence, arranged and structured the financing, did the designs and general contracting and was heavily involved in much of the actual construction work.

**70**  Beginning with the acquisition of their West 7th Avenue property in Vancouver in 2001, the plaintiff developed what became a good rapport with various construction sub-contractors in Vancouver. This relationship was strengthened by the renovations of their subsequently-acquired properties on Queen's Avenue, Connaught Avenue and Dunbar Street. In Ms. Roth's words, "we were really getting on a roll" building relationships with construction trades people who had knowledge of designs, ideas and specifications.

**71**  At the time of the Accident, the plaintiff and Ms. Roth had planned to acquire new properties for renovation and rental at a rate of approximately one per year.

**72**  Prior to the Accident the plaintiff liked entertaining and was a very good host.

**73**  The plaintiff approached being a father as he did everything else -- fully committed. He was anxious to teach Matthew checkers and chess and to involve him in his construction projects.

**74**  On the day of the Accident, the plaintiff returned home from WHCC at lunch time. He did not greet Ms. Roth or Matthew but rather went straight to the couch to lie down. This was very odd behaviour. Ms. Roth testified that he seemed distant and vague which was also out of character for the plaintiff. He did not mention that he had been in an accident. Approximately 45 minutes later, the plaintiff uncharacteristically left the house without any communication with Ms. Roth or Matthew. He returned home later that afternoon and again went straight to the couch to lie down without saying anything. He refused to eat dinner, complaining of nausea.

**75**  After dinner, Ms. Roth checked on the plaintiff. He said he had been in an accident but provided few details. His speech was subdued and without flow. He said he was tired.

**76**  Ms. Roth immediately took the plaintiff to the WHCC where Dr. Rempel diagnosed a concussion and advised him to cancel his shifts. Ms. Roth had to arrange for others to cover his shifts because the plaintiff was unable to do so.

**77**  Ms. Roth helped the plaintiff to complete forms and questionnaires relating to the Accident for insurance purposes but felt that what the plaintiff was telling her to write was what he thought had happened rather than what he actually remembered happening. She has yet to receive a "straight answer" from the plaintiff regarding the details of the Accident.

**78**  In the week following the Accident, the plaintiff's condition did not improve. He slept approximately 13 hours at night and napped during the day. He complained of violent nightmares, headaches, nausea and dizziness. He was agitated, moody and irritable. He mixed up simple words. He was forgetful and withdrawn.

**79**  The plaintiff no longer interacted with Matthew the way he had prior to the Accident.

**80**  During a meeting with an ICBC adjuster, the plaintiff lost his composure and began to cry, which was very unusual behaviour for him.

**81**  In the months and years that followed, the plaintiff's symptoms continued. He did not seem to have any insight into his condition. He refused to recognize his limitations and continually pushed himself beyond his capabilities resulting in his symptoms flaring up and him "hitting the wall and crashing". He was irritable and unkind to Ms. Roth. Living with him became unbearable. Their relationship deteriorated to the point where Ms. Roth was considering bringing it to an end.

**82**  In 2010, a few of the plaintiff and Ms. Roth's close friends met to celebrate the plaintiff's 50th birthday. This event proved to be a turning point. Ms. Roth testified that their friends' speeches about and accolades for the plaintiff made her realize that she had to do more to help the plaintiff.

**83**  Ms. Roth credits Ms. Nelson with the significant changes she has since seen in the plaintiff. He now seems to understand his condition and is better able to manage it using the strategies Ms. Nelson has provided. He still cannot function for a full day and needs constant rest. However, he is able to function cognitively for one to two hours and physically for approximately 30 minutes if he rests between activities. However, his former drive and stamina are still not present.

**84**  The plaintiff's symptoms are minimized and he tends to feel better if he maintains a routine, manages his energy output, does not exceed his limitations and rests. If he does not, his symptoms return. He is slowly learning to cope.

**85**  Changes in routine are difficult for the plaintiff. He becomes anxious and his symptoms of irritability and fatigue tend to flare up.

**86**  Despite the improvements Ms. Roth has seen in the plaintiff, he continues to be easily distracted and forgetful. He mixes up words when communicating, repeats himself and finds it difficult to concentrate, all of which results in him becoming increasingly agitated, frustrated and exhausted. He often becomes emotional, has difficulty following a line of thought and goes off on tangents.

**87**  The plaintiff is very inefficient at paperwork and financial matters. He wastes time and uses it illogically. He has trouble multi-tasking and initiating tasks or activities.

**88**  The plaintiff remains involved in the maintenance and management of the rental properties, but to a much lesser degree than he did prior to the Accident. He does whatever he can within his limitations.

**89**  The plaintiff is devastated that he is no longer able to work as an emergency room physician. His attempts to return to work doing surgical assists and at the walk-in clinic exhausted him. His symptoms of headaches, irritability, moodiness and inability to communicate flared up such that it would take him several days to recover from each shift.

**90**  The plaintiff is shattered by the knowledge that his children are growing up with a father who has no role or reputation in their community.

**91**  The plaintiff and Ms. Roth's social life has changed substantially since the Accident. The plaintiff no longer engages with people as smoothly as he did prior to the Accident. He is often inappropriate in his interactions and does not "filter out" what not to say. Socializing has become stressful for Ms. Roth. It is kept to a minimum as a consequence. Vacations are stressful and difficult due to the number of decisions that need to be made and the disruption to plaintiff's routine.

**92**  In Ms. Roth's view, the birth of their twins in 2008 was a blessing that has given the plaintiff reason to carry on.

**93**  Ms. Roth worries about the safety of her children when they are under the sole care of the plaintiff. She gave several examples of lapses in judgment on the plaintiff's part that resulted in a child becoming lost or injured. Ms. Roth was feeling incredibly burdened by having to assume the plaintiff's previous role in the family as well as her own. In May 2010, they hired a nanny, Ms. Flory Galigao, to assist. For the first few months she worked part time. Since September 2010 she has been a full-time live-in nanny. She does many of the household chores and assists the plaintiff when he has care of the children. In Ms. Roth's words, Ms. Galigao "helps us function".

**94**  As they get older, the children are beginning to help out with small chores around the house.

**95**  Ms. Roth expects that she will continue to require a nanny at least until the children are in school. The nanny is paid $16,800 per year net of her room and board.

**96**  The plaintiff continues to take Advil, Tylenol, Ativan and Trazodone to alleviate his symptoms. He is not presently taking physiotherapy or massage therapy. He discontinued psychological counselling for approximately 15 months and has not returned to speech therapy despite a recommendation by Ms. Linde, a registered speech pathologist, that he do so.

**97**  Ms. Roth testified that, but for the Accident, the plaintiff would likely have continued to work his previous work hours at WHCC and to manage their real estate investments. Ms. Roth would have been the primary caregiver for the children.

**98**  I found Ms. Roth to be a sincere, straightforward witness who gave her evidence in an open, genuine, heartfelt and credible fashion. I accept her evidence in its entirety.

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|  | **(3)** | **Dr. Paul Walden** |  |

**99**  Dr. Walden and the plaintiff worked as colleagues at WHCC for many years.

**100**  Dr. Walden testified that the plaintiff was the hardest working physician at WHCC, working 18 shifts per month, several more than any other physician. The plaintiff staunchly protected his shifts and refused to give them up for other doctors.

**101**  Dr. Walden described the plaintiff as an excellent emergency room physician. He was well liked and respected. The plaintiff seemed to love the fast-paced work and tolerated it well. Unlike other physicians at WHCC who would transfer patients to other doctors at the end of a shift, if the plaintiff started with a patient, he finished the job even though his shift may have ended.

**102**  Dr. Walden testified that, as far as he was aware, the plaintiff had no physical or health issues prior to the Accident and certainly nothing that seemed to slow the plaintiff down. The plaintiff never mentioned any issue regarding numbness in his hands.

**103**  He described the plaintiff as a "gracious host" at social occasions, someone who was engaging, was full of laughter and obviously enjoyed life.

**104**  Dr. Walden saw the plaintiff on December 4, 2006 at the WHCC intubation course shortly after the Accident. Although the plaintiff did not seem confused, he was definitely quieter and less engaged than usual.

**105**  Dr. Walden testified that the plaintiff is no longer the person he was prior to the Accident. For several years after the Accident the plaintiff insisted that his injury would resolve and that he would soon be back at work. However, it was obvious to Dr. Walden that the plaintiff had changed. In Dr. Walden's words, "something was gone". The plaintiff looked pale and dishevelled. He was quiet. His eyes were sullen and had a vacant look. It was as though his energy had been drained from him. There was no longer any laughter. Dr. Walden thought that the plaintiff was depressed.

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|  | **(4)** | **Anne Townley** |  |

**106**  Ms. Townley is a nurse who worked at WHCC from 1992 to 2006. She testified that it was usually a busy, congested and noisy environment.

**107**  She testified that the plaintiff was passionate about and proud of his work. He worked more and longer shifts than any of the other physicians at WHCC. If not on call, the plaintiff readily attended the WHCC if an additional doctor was needed. He always seemed to have a high energy level and was willing to work in the middle of the night if needed. He was very reliable.

**108**  She testified that the plaintiff excelled at assessing injuries, suturing and fixing broken bones. He was always compassionate and was never angry with patients or WHCC staff, with whom he had a very good rapport.

**109**  Ms. Townley testified that, as far as she was aware, the plaintiff had no health or physical issues prior to the Accident.

**110**  She recalls that, on the day of the Accident, she was at work at WHCC and received a telephone call from the plaintiff. He sounded confused and vague. He was not himself. She suggested that he come to the clinic for an assessment. He did not arrive until after her shift had ended and she had left.

**111**  The plaintiff has not worked at the WHCC since the Accident.

**112**  Ms. Townley has seen and chatted with the plaintiff on occasion since the Accident. He would tell her that he was going to be returning to the WHCC soon, but he never did. On each occasion he seemed vague, confused and lacked energy. He "shuffled" rather than walked. His pre-Accident personality was gone. He was not his former self.

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|  | **(5)** | **Dr. Douglas Carrie** |  |

**113**  Dr. Carrie is an anesthesiologist who works in the Vancouver area.

**114**  He first met the plaintiff in 1991 when they worked together at a hospital in Inuvik.

**115**  When Dr. Carrie returned to Vancouver in 1992 for his anesthesiology residency at the University of British Columbia, he began to see the plaintiff socially and they and their respective spouses became good friends. The group went on several vacations together.

**116**  Dr. Carrie described the plaintiff as a confident individual who was extremely adept socially prior to the Accident. The plaintiff seemed to understand people and their personalities. He was a natural host.

**117**  The plaintiff was very enthusiastic about his work at the WHCC. He seemed to enjoy the "rapid-fire" nature of emergency room work. He was very astute in his comments about his patients. He did not seem to slow down after his first child was born in 2004.

**118**  The plaintiff took on ambitious house renovation projects that seemed to turn out well for him.

**119**  Dr. Carrie described the plaintiff as an enthusiastic skier and member of Whistler's Ski Patrol where his role was "Doctor on Mountain", a role he discontinued in 2004 after his son was born.

**120**  Dr. Carrie is aware that the plaintiff had chronic lumbar back pain prior to the Accident that bothered him from time to time but he observed that it did not seem to interfere with his ability to function.

**121**  The plaintiff was the major advocate of and driving force behind the formation of an investment club comprising the plaintiff, Dr. Carrie, their respective spouses and two other couples. The plaintiff was always extremely well prepared for his presentations at their meetings and was a skillful interrogator of others who made presentations.

**122**  The plaintiff has not been the same since the Accident. He seems to be "off". He fatigues easily and withdraws from conversations.

**123**  The plaintiff became less interested in the investment club. He appeared indecisive and less capable of handling its day-to-day management and accounting. He was not as skillful at critiquing the presentations of others. His presentations lost their "wow" factor and became rather dull and uninspired.

**124**  The plaintiff is less enthusiastic about life and less capable socially. He misreads situations that confront him. He is much less confident that he used to be. His concentration seems to fade in and out.

**125**  The plaintiff's energy level is reduced. The plaintiff has declined Dr. Carrie's invitations to go skiing and golfing.

**126**  The plaintiff continues to be a skilled host but his guests are careful not to stay too long.

**127**  Dr. Carrie testified that he has not noticed any improvement in the plaintiff in the last several years, and that the plaintiff has not returned to normal.

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|  | **(6)** | **Kathryn Seely** |  |

**128**  Ms. Seely is Dr. Carrie's wife. Prior to the Accident she and her husband frequently socialized and travelled with the plaintiff and Ms. Roth.

**129**  Ms. Seely described the plaintiff as an energetic, engaged, gregarious and jovial person who loved life and being around people prior to the Accident. He was interested in and supportive of Ms. Seely in her career as a lawyer and later as the advocate for the Canadian Cancer Society.

**130**  As a host, the plaintiff was energetic, generous and full of spirit. He was the educator within their investment club, and his presentations always surpassed those of the other members.

**131**  Ms. Seely never observed the plaintiff having any physical or cognitive difficulties prior to the Accident.

**132**  She saw the plaintiff approximately one week after the Accident. She described him as a different person. He was tired, grimaced with pain, spoke slowly and appeared confused.

**133**  In the months and years that followed, she noticed that the plaintiff took longer to do things and was slow and deliberate in his communication, as though he was trying not to lose his train of thought. He repeated himself. He fatigued easily and needed quiet time on his own. He was forgetful and unable to focus on too many stimuli at once. He was impatient.

**134**  Ms. Seely stated that those observations of the plaintiff continue to the present, although Ms. Seely does not socialize with the plaintiff as much as she used to.

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|  | **(7)** | **Dr. Thomas Jacobs** |  |

**135**  Dr. Jacobs and the plaintiff met in medical school in 1984. They became good friends.

**136**  Dr. Jacobs testified that, prior to the Accident, the plaintiff was jovial and full of energy. He loved the excitement and unknowns of his work as an emergency room physician. He prided himself on this memory, which Dr. Jacobs described as "unbelievable". As far as Dr. Jacobs knew, the plaintiff had no physical or cognitive impairments.

**137**  Prior to the Accident, the plaintiff and Dr. Jacobs occasionally went bike riding, skiing and on vacations together. They also played hockey and golf together.

**138**  In early 2006, Dr. Jacobs learned of an opportunity to purchase the house on Dunbar Street as a real estate investment. He asked the plaintiff whether he would like to participate. In May 2006, the property was purchased by Dr. Jacobs, the plaintiff and their respective wives in equal shares. Thereafter, the house was completely gutted and renovated at a cost of approximately $130,000. The plaintiff designed the renovation based on the renovation of his West 7th Avenue property. Dr. Jacobs and the plaintiff performed most of the physical work for the demolition. The plaintiff never complained of or appeared to have any problems with his hands. Dr. Jacobs and the plaintiff handled the bookkeeping and accounting for the investment.

**139**  Dr. Jacobs testified that the plaintiff is significantly different from how he was prior to the Accident. He is subdued, less jovial and does not seem to want to talk to people. He has much less energy. His memory is poor, particularly with respect to details. They have not participated in any sports together.

**140**  Dr. Jacobs has had to assume full responsibility for the bookkeeping and accounting in connection with the Dunbar property.

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|  | **(8)** | **Charles (Ross) Genge** |  |

**141**  Mr. Genge is a retired R.C.M.P. officer and is currently an investigator for the Royal Bank of Canada. Mr. Genge met the plaintiff while stationed at the Whistler R.C.M.P. detachment. He, the plaintiff and their respective wives became close friends. They were the driving forces behind the formation of the "Conundrum" investment club.

**142**  Mr. Genge testified that, prior to the Accident, the plaintiff was a fun, positive and engaging man who was a loyal friend. He had a high level of energy and always seemed to be involved in many different activities at once, worked long hours and was involved in real estate and stock investments as well as sporting activities. He always got things done. He did not seem to have much idle time and never expressed to Mr. Genge any desire to scale back his activities.

**143**  The plaintiff's acumen for numbers was extraordinary. He made detailed presentations at the investment club with qualitative and quantitative analyses of investments and provided the template for the club's investment strategies.

**144**  Mr. Genge observed the plaintiff in the WHCC both on and off duty as a police officer. He described the plaintiff as a very professional, thorough and engaged physician who handled difficult medical situations very well. It was obvious to Mr. Genge that the plaintiff loved and was passionate about his job. There was never a hint that the plaintiff was disgruntled or had a desire to retire.

**145**  The plaintiff's pre-Accident health was good. Mr. Genge never observed anything that suggested to him that the plaintiff was suffering from any physical or cognitive problems.

**146**  Mr. Genge saw the plaintiff three or four months after the Accident. In Mr. Genge's words: "he was a changed man...completely different than the man I had known". He was quiet, disengaged, detached and withdrawn. He was no longer gregarious.

**147**  Since then, Mr. Genge has continued to see the plaintiff approximately four to six times per year. The plaintiff has not improved. He complains of fatigue and withdraws from social occasions to lie down, which he had never done in Mr. Genge's presence prior to the Accident. He is much less proficient with numbers and seems to lose his train of thought. He is forgetful and unable to engage in a cohesive, thorough discussion. He goes off on tangents. He is much less focused and precise with things he is doing than he was prior to the Accident.

**148**  In Mr. Genge's words, when he and his wife are together with the plaintiff and Ms. Roth, the plaintiff is "fourth in the room" whereas prior to the Accident he was the primary person in the room.

**149**  In 2013, it took the plaintiff many months to deal with the dissolution of the investment club despite knowing that Mr. Genge needed to receive the payout of his investment for his son's education.

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|  | **(9)** | **Dr. Ron Stanley** |  |

**150**  Dr. Stanley received his medical degree in 1982 and has been working at the WHCC since 1987, formerly as Chief of Staff. He interviewed and hired the plaintiff in 1992 as an emergency room physician. The position requires someone who is not only qualified medically but who is physically and mentally sharp and can think quickly on his or her feet.

**151**  In Dr. Stanley's view, the plaintiff proved to be an outstanding acquisition for the WHCC. His attendance record was excellent. He worked more shifts than any other doctor at WHCC. He was the first person that Dr. Stanley called in if the emergency room needed help. He was reliable, energetic and knew the procedures and his skills. His suturing skills were among if not the best Dr. Stanley had seen. He got along well with his patients and the WHCC staff. He was a regular and active participant in the professional development programs held at WHCC. His opinions were well regarded by his colleagues.

**152**  Prior to the Accident, Dr. Stanley considered that the plaintiff was in excellent health. He did not believe that the plaintiff had any physical or mental impairment. On cross-examination, Dr. Stanley recalled that the plaintiff had complained of numbness and tingling in his right hand. The plaintiff was referred to a neurologist who diagnosed carpal tunnel syndrome.

**153**  There is no mandatory retirement age at WHCC. Dr. Stanley never had any discussion with the plaintiff regarding his retiring or moving away from Whistler.

**154**  Socially, the plaintiff was outgoing and energetic. He was excellent both as a host and as a guest at social occasions and had a natural ability to converse. He was "a great guy to know and work with". He was one of the smartest people that Dr. Stanley associated with. He was also physically active.

**155**  Dr. Stanley recalls that he treated the plaintiff in January 2004 after he had been involved in a car accident. Although the plaintiff said he had hit his head, Dr. Stanley made no diagnosis of a concussion.

**156**  Dr. Stanley also treated the plaintiff on December 7, 2006, the day after the Accident. The plaintiff presented as pale and in pain. He complained of headaches, a low energy level, insomnia, confusion, nausea and neck and upper back pain. Dr. Stanley felt he was getting worse after the Accident rather than better. He diagnosed a concussion and referred him for an immediate CT scan at Lions Gate Hospital in North Vancouver to determine whether the plaintiff was suffering from anything that could be treated surgically. The CT scan was negative.

**157**  In the months and years that followed, Dr. Stanley has seen the plaintiff only occasionally, approximately twice per year. He described the plaintiff as "totally different". He is not as energetic. He seems disinterested and without focus. He never responded to several invitations to attend functions, including professional "journal club" discussions. He tends to ramble in his conversations and change the topic without getting to the point. Dr. Stanley now finds that he becomes frustrated when speaking to the plaintiff.

**158**  The plaintiff has never returned to work at WHCC. Each year, the plaintiff's privileges at WHCC have been renewed because it was felt that he might be able to return in the future, albeit at least initially in a much reduced and shadowed role. The current consensus is that he will never return to WHCC.

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|  | **(10)** | **Dr. Willem Vroom** |  |

**159**  Dr. Vroom is the senior deputy registrar at the College of Physicians and Surgeons of British Columbia. He sent a letter to the plaintiff in October 2008 intended to notify the plaintiff that the same patient had been prescribed a controlled drug by more than five physicians within a 30-day period.

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|  | **(11)** | **Dr. Monica Rempel** |  |

**160**  Dr. Rempel is a family and emergency room physician who received her medical degree from the University of British Columbia in 1994. Since 1996, she has worked exclusively as an emergency room physician, initially at both Squamish Hospital and WHCC and now exclusively at WHCC.

**161**  Dr. Rempel worked with the plaintiff at WHCC prior to the Accident. She described him as an extremely hardworking doctor who never missed work, indeed, he was aggressive about wanting to work. He was well respected at WHCC and in the community. He received more thank-you cards, flowers and chocolates from patients than the rest of the WHCC physicians combined. The plaintiff loved his work at WHCC and usually had a smile on his face.

**162**  Dr. Rempel did not observe any physical impairment on the part of the plaintiff prior to the Accident. He never spoke about retirement.

**163**  Dr. Rempel was the plaintiff's treating physician during the evening of December 4, 2006, when he and Ms. Roth attended the WHCC. He did not look well. He was confused about the Accident. During her examination, she checked his limbs for numbness or weakness. The plaintiff had no complaints in this regard. She diagnosed that the plaintiff had suffered a concussion in the Accident. She advised him to rest at home and to take one week off from work.

**164**  Dr. Rempel has only seen the plaintiff occasionally since the Accident. On those occasions he has appeared dishevelled, sullen and low on energy. His voice had an uncharacteristically flat tone.

**165**  For several years after the Accident, the plaintiff continued to insist that he would return to WHCC. His shifts continued to be scheduled, with other doctors filling those shifts. Ultimately, his shifts were no longer scheduled, however his WHCC privileges continue to be renewed annually because the WHCC emergency doctors believe that removing them would be detrimental to the plaintiff's recovery.

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|  | **(12)** | **Joseph LeBlanc** |  |

**166**  Mr. LeBlanc is a caretaker and handyman who began working for the plaintiff in 2005 at the Connaught Avenue property. He has continued to do renovations and odd jobs for the plaintiff on his various properties ever since. He lives in one of the units at the plaintiff's Connaught Avenue property, working as the resident caretaker in exchange for discounted rent.

**167**  Mr. LeBlanc testified that, prior to the Accident, the plaintiff was an outgoing, friendly, positive and happy person who seemed to thrive when amongst people. The plaintiff knew what he wanted with respect to his properties and got things done. He was not one to second guess. He seemed to have limitless energy, doing many jobs well simultaneously. It seemed to Mr. LeBlanc as though there was nothing the plaintiff was incapable of doing. He never complained to Mr. LeBlanc of any physical issues or disability.

**168**  Mr. LeBlanc testified that the plaintiff has not been the same since the Accident. He seems unhappy, withdrawn and not as comfortable with people. He is indecisive, struggles and takes much longer to get things done than he did before. He is now frustrating to work with and to be around. He forgets to buy supplies that Mr. LeBlanc requests. He makes mistakes that he would never have made prior to the Accident.

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|  | **(13)** | **Simon Learmouth** |  |

**169**  Mr. Learmouth has been a tenant in the plaintiff's Whistler condominium since 2000. Before the Accident he saw the plaintiff approximately once per year at the condominium as well as occasionally around the Whistler community. He described the plaintiff as an outgoing person with high energy and a good sense of humour. The plaintiff was punctual and thorough with any repairs to the condominium.

**170**  When Mr. Learmouth first saw the plaintiff after the Accident, the plaintiff seemed to be "stunned", subdued, vague, lethargic and slow. He repeated himself. He was not the outgoing energetic person he had been prior to the Accident.

**171**  Mr. Learmouth gave examples of attempts by the plaintiff to perform modest repairs at the condominium after the Accident which demonstrated that the plaintiff was confused and took much more than a reasonable time to complete the tasks.

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|  | **(14)** | **George Martin** |  |

**172**  Mr. Martin is a certified general accountant. He has been the plaintiff's accountant since 1999. At that time, the plaintiff was five years behind in the filing of his income tax returns. Mr. Martin prepared and filed them.

**173**  Since 1999, the plaintiff has typically filed his tax returns in batches, once every two to three years. Although he does not file his tax returns on time, he does submit his income tax payments on time.

**174**  Mr. Martin testified that, prior to the Accident, the plaintiff had an exceptional command of the details of his various personal and investment transactions. Mr. Martin saw this as a unique trait among his clients, many of whom are physicians. In Mr. Martin's words, the plaintiff's ability to not only recall but also to manage details by knowing where they fit, years after the fact, was "amazing". He described the plaintiff's energy during their meetings as "relentless". He was as mentally sharp at the end of a three-hour meeting as he was at the beginning of it. He never seemed to get bogged down in a problem. His ability to assimilate information and make decisions was "impressive".

**175**  The plaintiff incorporated his medical practice in 1999 and various of his assets were transferred into the Professional Corporation by way of a "section 85 rollover" which allowed the plaintiff to access the equity in certain of his real estate holdings and investment portfolio, tax free. He used that equity to acquire additional real estate investments.

**176**  The plaintiff created "predictive models" for his stock and real estate investment strategies that Mr. Martin found to be remarkably accurate.

**177**  For the period 2000 to 2010, the plaintiff's personal real estate investments had net losses during five years and net gains for the other five years.

**178**  Mr. Martin testified that, after the Accident, he observed that, although the plaintiff continued to have considerable ability to recall the details of transactions, he no longer seemed to possess the ability to manage those details. He cannot recall where particular expenses fit. He becomes jumbled in his communication and frustrated with his inabilities in this regard. He has difficulty making decisions and becomes "paralyzed". He becomes fatigued and unfocused during their meetings.

**179**  On cross-examination, Mr. Martin confirmed that the real estate investments owned by the Professional Corporation have had losses for tax purposes each year. However, Mr. Martin attributes some of the loss to depreciation expense.

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|  | **(15)** | **Dr. Kevin Bush** |  |

**180**  Dr. Bush is a plastic surgeon at various Vancouver hospitals. In addition, since 1999 he has run a clinic in Whistler where he receives patient referrals from WHCC. Prior to the Accident, Dr. Bush received several referrals from the plaintiff, whom he described as a "high energy, bubbly" individual. The plaintiff never complained to Dr. Wells of any personal health issues or concerns.

**181**  After the Accident the plaintiff changed. He lost his confidence and outgoing personality.

**182**  On one occasion in 2007, the plaintiff assisted Dr. Bush during a surgical procedure at the Squamish Hospital. Dr. Bush found that the plaintiff's coordination and quality of work were below expectations. The plaintiff had a tremor in his hands and had difficulty grasping the suturing needle. The plaintiff's short-term memory was poor. Dr. Bush had to repeat instructions several times. The surgery was successful but it took the plaintiff much longer to perform tasks assigned to him than it should have.

**183**  Although the plaintiff had only been scheduled for one surgical assist, Dr. Bush gave him the opportunity to continue with other surgeries that same day. The plaintiff advised that he was unable to continue due to a headache and fatigue.

**184**  Dr. Bush is concerned about using the plaintiff for surgical assists in the future because of the quality and speed of the plaintiff's suturing and his poor memory.

**185**  On cross-examination, Dr. Bush agreed that numbness and/or paresthesia in the plaintiff's hands could explain the motor skill issues Dr. Bush witnessed.

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|  | **(16)** | **Dr. Neil Wells** |  |

**186**  Dr. Wells is a plastic surgeon who works with Dr. Bush at their Whistler clinic. He also practices at St. Paul's Hospital and Vancouver General Hospital, the referral centers for WHCC.

**187**  Dr. Wells knew the plaintiff prior to the Accident through his work in Whistler and through various patient referrals he had received from him. He described the plaintiff as one of the more enthusiastic and energetic emergency room doctors he has met. He also described the plaintiff's referrals as consistently accurate and very good.

**188**  The plaintiff never complained to Dr. Wells of having any personal health issues or concerns.

**189**  After the Accident the plaintiff performed one surgical assist for Dr. Wells at Squamish General Hospital. Dr. Wells described the plaintiff's skills as "poor", "clumsy" and "slow". He had expected a much higher level of competence from an emergency-room doctor. At the end of the procedure, the plaintiff reported being fatigued.

**190**  Dr. Wells testified that using the plaintiff for surgical assists in the future would not be advantageous to Dr. Wells although, if asked, he would be prepared to use the plaintiff as part of his transition back to work as an emergency room physician.

**191**  Dr. Wells agreed that numbness and/or paresthesia in the plaintiff's hands could explain the plaintiff's clumsiness in the operating room.

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|  | **(17)** | **Dr. Karin Kausky** |  |

**192**  Dr. Kausky is a family and sports-medicine physician. She obtained her Doctor of Medicine degree from the University of Toronto in 1988, completed a family practice residency at the University of Western Ontario in 1990, obtained her Certificate of the College of Family Physicians designation from the College of Family Physicians of Canada in 1990 and obtained a Diploma in Sports Medicine from the Canadian Association of Sports Medicine in 2007. She has been practicing medicine in Whistler since 1993. She is heavily involved with Alpine Canada and the Canadian National Ski Cross Team and related entities. One of her specialties is concussion injuries.

**193**  Dr. Kausky was qualified as an expert in family and sports medicine with additional expertise in the diagnosis and treatment of concussions.

**194**  Dr. Kausky has known the plaintiff since 1993 when she began practising in Whistler. They were colleagues at WHCC. Although they did not often work on the same shift, they frequently did rounds together. The Whistler medical community is small and she knew the plaintiff well.

**195**  She described the plaintiff as a very enthusiastic participant in the WHCC with an excellent reputation in the community for giving good medical care.

**196**  Dr. Kausky became the plaintiff's family and treating physician after the Accident. Her first consult with him was on December 27, 2006. She noted that he was easily distracted and hard to keep on topic. He seemed to have a decreased ability to process information. His voice inflection had flattened.

**197**  Dr. Kausky's opinion is that the plaintiff suffered a concussion during the Accident. She bases her opinion on the following definition of a concussion:

"an alteration of brain function following either a direct blow to the head or a transmitted force to the head. It is a metabolic injury to the brain rather than a structural or anatomic injury - an injury to how the brain uses or metabolises energy."

This definition if found in P. McCrory et al, "Consensus Statement on the Management of Sports Concussion: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012" (2013) 47 Br. J. Sports Med. 250. Dr. Kausky described this as the most widely accepted consensus statement in North America.

**198**  Dr. Kausky also testified with respect to the following, more outdated definition of mild traumatic brain injury ("MTBI") from J. Carroll et al, "Methodological issues and research recommendations for mild traumatic brain injury: the WHO Collaborating Centre Task Force on Mild Traumatic Brain Injury" (February 2004) 43 Suppl. J. Rehabil. Med. 113 at 115:

MTBI is an acute brain injury resulting from mechanical energy to the head from external physical forces. Operational criteria for clinical identification include: (i) 1 or more of the following: confusion or disorientation, loss of consciousness for 30 minutes or less, post-traumatic amnesia for less than 24 hours, and/or other transient neurological abnormalities such as focal signs, seizure, and intracranial lesion not requiring surgery; and/or (ii) Glasgow Coma Scale score of 13-15 after 30 minutes post-injury or later upon presentation for healthcare.

**199**  She explained that this definition is inapplicable to the plaintiff's situation because it is a reference to neuro-imaging, which looks for a different injury, for example a bleed.

**200**  Dr. Kausky explained that a patient's inability to process information, as opposed to an inability to repeat learned information, is symptomatic of an alteration in brain function. The plaintiff demonstrated such an inability.

**201**  In Dr. Kausky's opinion, the plaintiff continues to suffer from post-concussion syndrome with accompanying symptoms such as a headache approximately 70% of the time, 1 to 2 migraine headaches per week, markedly decreased energy, a sleep disorder, decreased memory, decreased concentration and capacity to cope with stressors, an inability to multi-task, a balance disorder and vestibular dysfunction.

**202**  Dr. Kausky agreed on cross-examination that she was relying on the plaintiff's self-reporting for much of her diagnosis but pointed out that the plaintiff's reports were consistent with his objective symptoms.

**203**  She testified that the plaintiff tended to minimize his symptoms, resisted her attempts to put limitations on his activities and wanted to return to work as soon as possible. He did not react well to Dr. Kausky's recommendation that he rest both mentally and physically.

**204**  Despite Dr. Kausky discouraging the plaintiff from returning to work, he did some surgical assists and some shifts at a walk-in clinic. Neither of those attempts to return to work was successful, as Dr. Kausky had predicted.

**205**  Dr. Kausky has told the plaintiff that he is not capable of returning to work as a physician due to his cognitive deficits, his inability to multi-task, his sleep disorder and his persistent headaches. It is her opinion that the plaintiff is unlikely to succeed in any occupation requiring higher cognitive function and multi-tasking in an environment with multiple stimuli.

**206**  Although she has seen some improvement in the plaintiff's energy, memory and sleep disorder, it is Dr. Kausky's opinion that the plaintiff's recovery has plateaued. Any future improvement will likely be small and slow. He will likely require ongoing manual therapy (physiotherapy, massage therapy, chiropractic therapy) and a personal trainer. He may also require occupational therapy, counseling and the assistance of a neuropsychologist.

**207**  Dr. Kausky pointed out that the plaintiff's symptoms will vary from day-to-day. She agreed on cross-examination that he would likely be able to perform activities such as yard work, carrying a child and jet skiing but opined that his ability to perform those activities would be intermittent rather than sustained.

**208**  Dr. Kausky was an impressive witness who testified in a straightforward and credible manner. She handled herself extremely well on cross-examination. I have no hesitation accepting her evidence.

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|  | **(18)** | **Laurie Nelson** |  |

**209**  Ms. Nelson has been an occupational therapist since 1982. She specializes in assisting in the rehabilitation of brain-injured people.

**210**  Ms. Nelson met the plaintiff prior to the Accident when her son attended WHCC with a complicated fracture and when she needed emergency attention for a broken tailbone. She described the plaintiff as calm, thorough and supportive throughout. He provided excellent medical care to her and to her son.

**211**  After the Accident, Ms. Nelson was retained to provide rehabilitation advice and assistance to the plaintiff. She visited the plaintiff at his Whistler home in late 2010 and early 2011. He demonstrated fatigue, pain, problems with thinking, poor decision-making and difficulty processing information. He had difficulty bringing his thoughts to a conclusion without direction. He seemed to be unable to initiate thoughts or actions on his own. The plaintiff demonstrated limited awareness of and insight into his cognitive problems.

**212**  Ms. Nelson recommended that the plaintiff see a psychologist, that Ms. Roth obtain education on traumatic brain injuries in order to better manage the plaintiff and that the plaintiff begin a gym exercise program with the assistance of a rehabilitation assistant to increase his endurance and productivity.

**213**  Initially, the plaintiff's focus was solely on his return to work. He saw no need for rehabilitation strategies or to limit his activities or pace. His reaction to Ms. Nelson was that if she was unable to resolve his difficulties so he could return to work, she was not of much value to him. He has subsequently developed better insight into his problems and now calls on Ms. Nelson for assistance.

**214**  Ms. Nelson developed various strategies and coping mechanisms to assist the plaintiff to pace himself, prioritize his activities, become more productive and manage his daily life activities.

**215**  Ms. Nelson continues to see the plaintiff approximately every three months. He is better than he was in 2010, but continues to struggle with decision making and pacing himself.

**216**  Ms. Nelson and a rehabilitation assistant, Tracey Fisher, created a gym program for the plaintiff. The plaintiff worked in the gym with Ms. Fisher twice per week and on his own once per week. Ms. Nelson observed that the plaintiff consistently had difficulty pacing himself and seemed to overestimate his abilities. She attempted to teach him to slow down and pace himself. The plaintiff attended 96 gym sessions with Ms. Fisher but stopped them in June 2012. Ms. Nelson plans to reinstitute the gym sessions when the plaintiff has his life better under control.

**217**  Ms. Nelson was an impressive lay witness who gave her evidence in a credible, objective and professional manner.

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|  | **(19)** | **Shari Linde** |  |

**218**  Ms. Linde is a registered speech pathologist. She was qualified as an expert in speech and language pathology and communication disorders.

**219**  In December 2010, Ms. Linde subjected the plaintiff to a battery of tests that are recognized and widely used by professionals in her field. Her expert report is dated December 27, 2010.

**220**  Although some of the tests were based upon normative data for people with ages well below that of the plaintiff, others were standardized on a population that included individuals of the plaintiff's age. All of the tests provided Ms. Linde with a general indication of the plaintiff's communication abilities.

**221**  Generally, the plaintiff's performance on the tests was either "below average" or "poor". Ms. Linde noted that the plaintiff tended to work very quickly on the tests and made some errors due to inattention to detail.

**222**  The plaintiff demonstrated difficulty with higher-level reasoning, providing adequate detail when giving rationale for decisions, memory of verbal information and verbal and written communication.

**223**  Based upon her 19 years of clinical experience (16 years at the time she tested the plaintiff), the plaintiff's test results and Ms. Linde's observations of him, Ms. Linde is of the opinion that the plaintiff has challenges with communication, including difficulties remembering new information and generating ideas verbally.

**224**  Ms. Linde recommends that the plaintiff participate in up to 50 hours of speech-language treatment over his lifetime, the current rate for which is $125 per hour.

**225**  Ms. Linde was an impressive, objective and professional witness who did well during intense cross-examination. I have no hesitation accepting her opinions regarding the plaintiff's communication deficits.

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|  | **(20)** | **Dr. Hugh Anton** |  |

**226**  Dr. Anton is a physiatrist with extensive experience in the evaluation and treatment of patients with mild traumatic brain injuries. He was qualified without objection as an expert in that field.

**227**  Dr. Anton provided the Court with four expert reports.

**228**  In the first, dated January 20, 2011, Dr. Anton opined that the plaintiff suffered a MTBI (or cerebral concussion) in the Accident, as well as a possible injury to his vestibular (balance) system. He also opined that the plaintiff developed a post-concussive syndrome after the Accident secondary to his MTBI which has contributed to his ongoing symptoms and associated activity limitations and disability. In his opinion, it is probable that the plaintiff's ongoing symptoms have arisen from the direct effects of his MTBI. Psychological factors such as anxiety and depressed mood have complicated the plaintiff's post-Accident situation. Dr. Anton recommended that the plaintiff:

1. be referred to a sleep disorder specialist to determine whether his sleep issues could be treated medically;
2. be screened for anterior pituitary dysfunction;
3. see a neuropsychologist to better identify the severity and nature of any residual cognitive impairments with particular regard to his previous work environment;
4. try stimulant medications to assist in his fatigue issues;
5. obtain psychological counselling;
6. see an occupational therapist with experience in MTBI; and
7. work with a kinesiologist to establish an exercise program to improve his tolerance for activity.

**229**  Dr. Anton opined that the plaintiff would likely not be able to tolerate returning to work as an emergency room physician because it is cognitively demanding and requires functioning at a high level with a high degree of energy at a sustained and consistent level.

**230**  In his second report dated January 28, 2011, Dr. Anton opined that the plaintiff was not competitively employable in any type of work.

**231**  Dr. Anton's third report is dated September 15, 2011. His opinion regarding the plaintiff having suffered a MTBI during the Accident was unchanged. He opined that the plaintiff's ongoing symptoms and cognitive problems were likely the result of the interactive effects of several factors, including residual impairments from his MTBI, the effect of psychological factors on cognitive performance, headaches and fatigue. He opined that these contributing factors likely arose from the direct and secondary effects of the plaintiff's Accident-related injuries. He opined that there will be no further neurological recovery from the plaintiff's brain injury, that he will not be able to return to work as emergency room physician and that he will probably not be able to consistently and durably participate in any other type of medical practice in the future. At best, the plaintiff will be able to work only part time with flexible hours.

**232**  Dr. Anton's fourth report is dated April 22, 2013. His opinion regarding the plaintiff's injuries and prognosis did not change. He opined that the most likely explanation for the plaintiff's persisting symptoms is a complex interaction of:

1. the plaintiff being one of the small group of people who experience permanent sequelae after a MTBI;
2. an untreated psychological condition such as depression, post-traumatic stress disorder or anxiety disorder; and
3. another medical condition such as sleep disorder (unlikely), the effects of pain on cognitive function or an endocrine disorder.

**233**  Dr. Anton was an impressive witness who gave his evidence and expressed his opinions in a clear, logical and exceedingly objective fashion. I accept his opinions in full and unreservedly.

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|  | **(21)** | **Dr. Philip Teal** |  |

**234**  Dr. Teal is an expert in the field of neurology and has extensive experience in the treatment of patients with traumatic brain injuries. He was qualified without objection as an expert in that field.

**235**  Dr. Teal was the plaintiff's treating neurologist from shortly after the Accident until 2010. During that period, he examined the plaintiff on seven occasions. At the various consultations, the plaintiff reported that some of his symptoms (mood, headaches, thinking and memory) were improving, although they were still not normal. This was the case until the consultation on March 2, 2010, when the plaintiff reported that he was doing poorly in many respects.

**236**  Subsequently, in 2010, Dr. Teal was retained to provide a medical-legal report for the plaintiff. In that capacity, he prepared two reports, one dated March 3, 2011 and the second dated July 18, 2013.

**237**  The plaintiff's symptoms, as reported to Dr. Teal, were consistent over the period of his clinical treatments and evaluations for medical-legal purposes, although his symptoms did vary in frequency and intensity.

**238**  Dr. Teal's opinion is that the plaintiff suffered a MTBI with chronic post-concussion syndrome as a result of the Accident, which was the triggering event for all of his symptoms. Dr. Teal bases his opinion on the symptom complexes the plaintiff experienced shortly after the Accident and their persistence (with some variability), his short period of absolute posttraumatic amnesia for the events immediately following the Accident and his patchy memory of subsequent events over the next hour. He examined those factors in the context of the temporal relationship between the onset of his symptoms and the Accident, the consistency of the symptoms and the plaintiff's pre-Accident history of no headaches and of being able to function and multi-task at a very high level. Dr. Teal made this diagnosis at the first consultation on March 7, 2007, and it has not changed.

**239**  Dr. Teal testified that he does not make such diagnoses lightly. He reached his opinion despite the fact that it is uncommon for individuals who sustain a MTBI to have persistent post-concussion symptoms years after the traumatic event.

**240**  In Dr. Teal's opinion, the plaintiff has persisting residual cognitive impairment as a result of his MTBI and its sequelae. In addition, Dr. Teal's view is that the plaintiff sustained Benign Positional Vertigo and a Grade I or II whiplash-associated disorder.

**241**  The only change in Dr. Teal's opinion over time was with respect to the plaintiff's ability to return to work as a physician. In his March 3, 2011, report Dr. Teal expressed the opinion that the plaintiff would be able to resume work in the future in some capacity as a physician but that any such future employment would require a paced environment with controlled hours. However, in his July 18, 2013, report, Dr. Teal opined that the plaintiff is not able to resume work as an emergency room physician due to the intensity of the work, the need to multitask, the stress of the environment and the need for rapid judgment, good concentration, attention and memory.

**242**  Dr. Teal, too, was an impressive witness whose opinions were thorough, given objectively and of great assistance to the Court. I accept his opinions in their entirety.

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|  | **(22)** | **Dr. Ronald Remick** |  |

**243**  Dr. Remick is a clinical psychiatrist specializing in mood disorders. He was qualified without objection as an expert in that field.

**244**  Dr. Remick had a consultation psychiatry practice at Whistler from 2001 to 2012. The plaintiff referred patients to him from time to time. Accordingly, he knew the plaintiff professionally prior to the Accident.

**245**  Dr. Remick described the plaintiff's personality prior to the Accident as bright, inquisitive and energetic. He considered the plaintiff to be a very competent emergency room physician.

**246**  After the accident Dr. Remick became the plaintiff's treating psychiatrist at the request of Dr. Kausky. He saw the plaintiff as a patient for the first time on April 22, 2008. He testified that the plaintiff was significantly and dramatically different than he had been prior to the Accident. The plaintiff was markedly anxious, disorganized, overwhelmed and frustrated. He seemed to have lost confidence.

**247**  Dr. Remick's initial assessment of the plaintiff was that he had suffered a significant brain injury, that his symptoms were consistent with post-concussive syndrome and that his condition was neurological rather than psychiatric. He suggested that the plaintiff try different psychiatric medications to see if they would help his condition.

**248**  Dr. Remick continued to see the plaintiff clinically four or five times per year until November 22, 2010. Throughout, the plaintiff was extremely reluctant to take any medication. The plaintiff reported that, due to side effects, he was not tolerating the drugs Dr. Remick had recommended or prescribed for his anxiety and depressive condition. Moreover, they provided little if any benefit for him. It appears that the plaintiff did not follow many of Dr. Remick's instructions or recommendations regarding use of prescription medicines. The ones he did use were taken reluctantly. In this regard, Dr. Remick noted that 15 to 20% of his patients are physicians. He has found that many of them have difficulty accepting the role of patient and routinely insist on controlling their own treatment. The plaintiff's conduct was not unusual.

**249**  By November 2010, Dr. Remick concluded that there had been no significant change in the plaintiff and that none of the various medications for the plaintiff's anxiety and depressive symptoms had worked. He suggested that the plaintiff undergo a psychological assessment to determine whether his condition was psychological rather than biological.

**250**  The constellation of the plaintiff's symptoms is such that, in Dr. Remick's opinion, the plaintiff has a cognitive disorder (post-concussive syndrome) due to the Accident as well as possible depressive and anxiety disorders. Dr. Remick conceded that he has only a limited understanding of post-concussive syndrome and would defer to the opinion of a neurologist.

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|  | **(23)** | **Dr. Briar Sexton** |  |

**251**  Dr. Sexton is a neuro-ophthalmologist. She was qualified without objection in that field.

**252**  The plaintiff was referred to Dr. Sexton by his optometrist. She examined him on December 20, 2011. She found that the plaintiff was suffering from convergence insufficiency (the eyes involuntarily drift outward as an object approaches the face). This is not a natural phenomenon. In Dr. Sexton's opinion, it was caused by trauma associated with the Accident.

**253**  Although sight tends to degrade with age, Dr. Sexton is of the opinion that the plaintiff's near-sightedness was accelerated by the Accident.

**254**  In Dr. Sexton's opinion, most patients who suffer from a concussion have vision problems.

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|  | **(24)** | **Joseph Hohmann** |  |

**255**  Mr. Hohmann is a vocational rehabilitation consultant with over 35 years of experience in that field. He was qualified without objection as an expert in the field of vocational rehabilitation.

**256**  Mr. Hohmann was retained to provide an assessment of whether the plaintiff would be able to actively return to the competitive labour force and, if so, at what skill level.

**257**  Mr. Hohmann assessed the plaintiff on February 15, 2011 for approximately five hours. He interviewed him, administered the General Aptitude Test Battery (GATB) related to aptitude (but not dexterity) and reviewed the plaintiff's employment records and various medical reports that were made available to him. All of those reports were tendered in evidence in this proceeding with the exception of that of Dr. Riar, a psychiatrist, dated September 20, 2010. Mr. Hohmann's expert report is dated March 8, 2011.

**258**  The plaintiff's GATB scores as found by Mr. Hohmann placed the plaintiff in the low and low-average range of cognitive ability.

**259**  Based upon the plaintiff's history, the length of time he has had his symptoms, his difficulties during surgical assists and at the walk in clinic, as well as the opinions of Drs. Anton, Remick and Wilkinson, Mr. Hohmann is of the opinion that the plaintiff is not capable of working competitively. Any employment will be limited to jobs that are of a non-complex, routine nature.

**260**  In particular, the plaintiff will have difficulty functioning as a physician at a competitive level. He may be suited to employment in the clerical field, assisting occupations in the support of health services or sales occupations, where the employer accommodates the plaintiff's limitations. The plaintiff is not suited to physically-oriented jobs.

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|  | **(25)** | **Tracy Berry** |  |

**261**  Ms. Berry is an Occupational Therapist who was qualified without objection as an expert in that field, including in future care and life planning assessment.

**262**  Ms. Berry assessed the plaintiff at his Whistler home on January 11, 2011. Her first expert report is dated March 1, 2011. She assessed the plaintiff again on November 11, 2011. Her second expert report is dated December 7, 2011.

**263**  During her first assessment of the plaintiff, Ms. Berry administered standardized cognitive screening tests. He scored low on the sustained-attention and divided-attention (multi-tasking) tasks but normal on the complex-sustained, alternating-attention and selective-attention tasks. She testified that she had difficulty keeping the plaintiff on topic. He was "tangential", easily distracted and appeared fatigued and overwhelmed. She was unable to complete her testing of him.

**264**  By the time of her second assessment, the plaintiff had received occupational therapy from Laurie Nelson and counselling from a psychologist. He still appeared to Ms. Berry as easily fatigued and distractible but seemed to be coping better generally.

**265**  Ms. Berry provided a cost-of-future-care and life-planning assessment for the plaintiff based upon her assessments of him, her interview of Ms. Roth, her review of the reports of Dr. Wilkinson (neuropsychologist), Dr. Anton, Dr. Kausky, Dr. Remick, Dr. Riar (psychiatrist), Dr. Teal, Dr. Iverson (psychologist) and Ms. Linde (Drs. Wilkinson and Riar did not provide evidence in this proceeding) and consultations with Ms. Nelson and Dr. Chuck Jung (treating psychologist who also did not provide evidence in this proceeding).

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|  | **(26)** | **Darren Benning** |  |

**266**  Mr. Benning is an economist with expertise in calculating the present values of future losses and expenses. He was qualified without objection to give opinion evidence in that field of expertise.

**267**  Mr. Benning prepared three expert reports:

1. July 23, 2013: Calculating the present value of the future care costs set out in Tracy Berry's reports. Mr. Benning conceded on cross-examination that his childcare calculations assume the plaintiff will need child care assistance until his youngest child reaches 5-6 years old. He assumed this would be until November 4, 2013 (the start of the trial) rather than the commencement of school year in September. To that extent he agreed that his calculations may be overstated.
2. July 29, 2013: Calculating the plaintiff's past income loss and the present value of his future income loss. Mr. Benning assumed that the plaintiff would have received no increase in income or future earnings after the Accident. His calculations also include the impact of negative labour market contingencies such as involuntary disability and reduced hours due to part time work. His calculations do not assume voluntary withdrawal from the workforce due to retirement prior to the age of 70.

Mr. Benning also calculated the present value of a future income loss from real estate development and management assuming a loss of either $25,000 or $50,000 per year to age 70.

1. Sept. 16, 2013: Calculating the present value of increased real estate holdings of an additional $7.0 million in equity by the time the plaintiff reached age 65.

**C.** **THE CASE FOR THE TRANSIT DEFENDANTS**

**268**  The following witnesses were called as part of the Transit Defendants' case:

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|  | **(1)** | **John Wong** |  |

**269**  Mr. Wong is an adjuster who has been employed in that capacity by ICBC for the past 23 years. Mr. Wong met the plaintiff on February 12, 2004, in connection with his January 2004 accident.

**270**  Mr. Wong authorized repairs to the plaintiff's vehicle. The plaintiff indicated that he was in no rush to have the repairs made but would do so at some time in the future. The plaintiff also told Mr. Wong that he was very concerned about pain and numbness in his hands. The plaintiff expressed concern that, if the numbness persisted, his career might be shortened but stated that he would let his claim "slide" if the numbness resolved.

**271**  Mr. Wong advised the plaintiff of his entitlement to temporary total disability benefits but the plaintiff indicated he was not interested in such benefits.

**272**  Mr. Wong noted that the plaintiff was not concerned about money issues and that an income loss claim by the plaintiff was not anticipated. Mr. Wong felt it was unlikely that the plaintiff would make an injury claim.

**273**  On August 13, 2004, Mr. Wong left a message on the plaintiff's home answering machine advising that if, the plaintiff did not require anything further, the file would be closed.

**274**  On January 28, 2005, the plaintiff called Mr. Wong to advise that he had lost his vehicle repair form. ICBC sent him a new form. The plaintiff complained of soreness to his neck but did not mention any problems with his hands.

**275**  There is no evidence in ICBC's file that the plaintiff ever applied for accident benefits in connection with the January 2004 accident.

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|  | **(2)** | **Leanne Taylor** |  |

**276**  Ms. Taylor is an operations manager employed by ICBC. In November 2006 she was working for ICBC as a claims manager.

**277**  She testified that, on November 24, 2006, she received a telephone call from the plaintiff. He advised her that he had not yet repaired the damage to his vehicle from the January 2004 accident and now wanted to do so. Her note of the telephone call indicates the plaintiff also advised that he was having problems with his hands, that he had been diagnosed with traumatic carpal tunnel syndrome and that he would like to pursue a claim in respect of that injury.

**278**  Ms. Taylor advised the plaintiff that, as the accident occurred more than two years earlier, his claim was statute barred.

**279**  On cross-examination, Ms. Taylor agreed that there was nothing in the plaintiff's file to indicate that he had completed or signed an application for insurance benefits in respect of the January 2004 accident. She also agreed that the plaintiff did not indicate what the problems with his hands were or advise of any symptoms.

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|  | **(3)** | **Rajinder Gill** |  |

**280**  Gill testified with the assistance of an interpreter.

**281**  Gill came to Canada from India in 1990. After working at various jobs, he was hired by WTL in October 2006, his first job as a bus driver. He received training and started driving a bus on his own shortly before the Accident. On the day of the Accident, Gill was driving a route he had never driven before. It had been snowing all night, it was "freezing" and the road conditions were very slippery - the worst that Gill had experienced while driving a bus. He knew that he was required to take extra care.

**282**  Gill pulled into a bus stop located approximately 250 meters from the Intersection. He testified that he saw the Honda pass him as he was stopped. However, on cross-examination, counsel put to him the transcript of his examination for discovery on November 16, 2010. At that time, he had testified that he did not remember whether the Honda passed him while he was at the bus stop. Despite this earlier evidence, Gill maintained that he remembered seeing the plaintiff's car pass him at the bus stop.

**283**  Gill testified that he accelerated from the bus stop "slowly" to 10 to 15 km/h, and that he did not exceed 15 km/h. He knew the road proceeded downhill toward the Intersection. He also knew that he would have to prepare to stop because he could see that the traffic light was red as he was approaching the Intersection. He began to apply his brakes because the Bus was sliding on the road. Despite his examination for discovery evidence that he accelerated up to 18 km/h, which evidence he admitted was true, Gill refused to accept that he could have exceeded 15 km/h because of the road conditions.

**284**  Gill testified that he saw the Honda come to a stop at the red traffic light at the Intersection when he was approximately 50 to 60 feet away. The Bus kept moving towards the Intersection.

**285**  During cross-examination, Gill testified he was unable to say how far back from the Intersection's stop line the Honda had stopped because the roadway was covered in snow. However, at his examination for discovery, he testified that the Honda had stopped five to six feet behind the stop line.

**286**  The traffic light turned green and the Honda began to move forward. Gill released the brakes on the Bus. After the Honda had moved forward approximately 5 to 7 feet it came to a stop because the Snow Plow had slid into the Intersection.

**287**  It was suggested to Gill on cross-examination that, if the Honda had stopped 5 to 6 feet from the stop line when the light was red, and had moved only 5 to 7 feet after it turned green before stopping for the Snow Plow, it had only barely entered the Intersection when it stopped. However, Gill was adamant that the Honda "had crossed the posts where the lights are and gone into the Intersection". (I note it is apparent from the photographs of the Intersection that the posts for the traffic lights for eastbound traffic are located across the Intersection on the eastern side of it. It is possible that Gill was referring to posts for the lights for southbound traffic which are located on a triangular median located on the southwest side of the Intersection, but this is not clear).

**288**  During cross-examination Gill could not identify the Intersection from photographs that were put to him. The best he could say was that some of the photographs "looked like" the Intersection.

**289**  Gill testified that he did not see the Snow Plow until it had entered the Intersection because he was focusing on the Honda. He testified that the Snow Plow did not stop but proceeded through the Intersection and that he saw it for only "two to three seconds".

**290**  Gill attempted to stop but the Bus slid and rear-ended the Honda. He testified that the Bus was skidding and that he was nervous. He was "pumping the brakes". At one point during his cross-examination he testified he was not looking at the Honda - later he said that he was.

**291**  Gill testified that the impact pushed the Honda forward five to seven feet. The Honda continued through the Intersection after impact and stopped on the other side. He gave no evidence regarding how hard the impact was.

**292**  Gill testified that the Bus came to a dead stop after impact and did not move forward. By this time the traffic light had turned amber. Gill waited for the light to turn green before proceeding through the Intersection and stopping in front of the Honda.

**293**  The plaintiff came on to the Bus. He prepared the Statement which Gill signed, spoke to WTL on the Bus' radiophone, said he was "OK" and left.

**294**  Gill testified that the plaintiff did not appear to him to be confused.

**295**  At the close of his cross-examination, Gill admitted he was struggling to recall the events of the Accident and that it is possible he does not remember. In particular he admitted he has no memory of how fast he was travelling and was guessing at the Bus' speed.

**296**  Gill was confused and forgetful about a statement he had given to an insurance adjuster two weeks after the Accident. At first, he did not recall giving a statement. Later, he recalled giving it at his home in Surrey British Columbia and that his wife had been the interpreter. The statement was then shown to him. It had been provided by him in Whistler, not at his home in Surrey and a co-worker had been the interpreter, not his wife. He denied that the statement had been read to him before he signed it despite it stating just above his signature: "This statement of 5 pages is being read to me and my co-worker Hardeep Johal is acting as my Punjabi interpreter."

**297**  Gill was not a reliable witness. Although he tried to recall the events of seven years ago, he had great difficulty doing so and resorted to filling in the blanks in his memory with facts that he later admitted he did not remember. He repeatedly contradicted himself in respect of the Bus' speed, distance and proximities.

**298**  Gill's evidence was of little assistance to the Court.

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|  | **(4)** | **Francesca Cole** |  |

**299**  Ms. Cole was the triage nurse on duty at WHCC who made a preliminary assessment of the plaintiff when he attended the clinic on the evening of December 4, 2006.

**300**  She assessed the plaintiff as "alert and oriented". His vital signs were stable and his level of consciousness was such that she assigned him an Acuity Level of 4 out of 5, Level 1 being assigned to those in the most need of urgent care.

**301**  Ms. Cole agreed on cross-examination that, unless a patient has a decreased level of consciousness or is vomiting, urgent treatment for a concussion injury is not required.

**302**  Ms. Cole has known the plaintiff since she began working at WHCC in 1995. She described him as a good and enthusiastic emergency room physician with high energy and a love for his job. She confirmed that, until the Accident, the plaintiff worked longer hours relative to the other physicians at WHCC.

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|  | **(5)** | **Randy Butts** |  |

**303**  Mr. Butts is an experienced estimator employed by ICBC. He inspected the Honda on December 7, 2006. He found cosmetic damage to the rear bumper but no structural or misalignment damage. The total repair cost was $673.10.

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|  | **(6)** | **Scott Burley** |  |

**304**  On December 4, 2006, Mr. Burley was employed by WTL as an assistant manager. At approximately 9 am he received a call from Gill on the Bus' radio advising of the Accident. The plaintiff also spoke on the radio and informed Mr. Burley that he could be contacted at WHCC.

**305**  Mr. Burley attended WHCC and was given a copy of the Statement. He was advised that the plaintiff was not available to speak to him.

**306**  Mr. Burley spoke with the plaintiff on the telephone at approximately noon that day. The plaintiff advised him that he had a headache and was not feeling well. Mr. Burley spoke with the plaintiff on the telephone later that day and was advised that the plaintiff was not available to meet with him to discuss the Accident.

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|  | **(7)** | **Robin Brown** |  |

**307**  Mr. Brown is a professional engineer with both Bachelor's and Master's degrees in Engineering. He was qualified without objection as an engineer with expertise to give opinion evidence in accident reconstruction.

**308**  Mr. Brown inspected and took measurements of the relevant components of the Bus on December 16, 2006, and of the Honda on January 18, 2007.

**309**  Mr. Brown assumed that the orientation of the impact between the Bus and the Honda was straight on.

**310**  Mr. Brown found no damage to the bike rack attributable to the Accident. The damage to the Honda was limited to surface scuffing and minor surface gouges on the rear bumper.

**311**  He opined that the localized nature of the damage to the Honda bumper was such that impact was likely between the protruding bolt on the Bus' bike rack and the bumper. He therefore assumed that the forces of the impact were point forces and had not been distributed across entirety of the bumper as would have been the case if the impact had been straight bumper to bumper. However, on cross-examination he acknowledged he had been unable to find any evidence of an impact between the bumper and the bolt. He also agreed that the paint missing from the bumper must have been transferred somewhere, but he did not observe any such paint on the bike rack.

**312**  Relying on published studies of impacts between vehicles and poles, Mr. Brown opined that the damage to the bumper of the Honda is most consistent with an impact speed change of less than 5 km/h.

**313**  On cross-examination Mr. Brown agreed that if the impact had been a distributed impact across the bumper, rather than a localized impact between the protruding bolt and the bumper, the speed change at impact would possibly have been higher than the 5 km/h he estimated.

**314**  Mr. Brown was unable to correlate some of the damage to the bumper to the impact he assumed took place.

**315**  On questioning by the Court, Mr. Brown agreed that he would expect less damage to the Honda from the same impact forces if it the road surface was icy because the Honda would have accelerated forward much easier than it would have on a dry surface.

**316**  I found Mr. Brown to be an objective and helpful witness.

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|  | **(8)** | **Donald Pohl** |  |

**317**  Mr. Pohl is a mechanical engineer who has expertise in and was qualified to give opinion evidence on accident reconstruction, including low-speed crash testing.

**318**  Mr. Pohl attempted to reconstruct the Accident in his Edmonton shop using an exemplar bike rack similar to the one mounted on the front of the Bus, which he affixed to a rigid barrier. He also obtained an exemplar 2004 Honda Accord vehicle together with three used rear bumper assemblies, each comprising a plastic bumper cover, foam impact absorber with a solid plastic insert in the center of the bumper and a metal impact bar.

**319**  Mr. Pohl conducted six crash tests during which the exemplar vehicle was pushed by his staff members at various low speeds into the solidly mounted exemplar bike rack. The damage to the exemplar bumpers caused by the impact was then compared to the damage to the Honda depicted in photographs he had been provided.

**320**  All of the test impacts were "linear" or longitudinal. Mr. Pohl did not conduct any tests where the impact was at an angle because, in Mr. Pohl's opinion, the damage to the Honda's rear bumper was indicative of a predominantly longitudinal force.

**321**  Mr. Pohl assumed that:

1. the bike rack was not damaged in the Accident;
2. the lowest most protruding point of the bike rack, a bolt in the center of the face plate, (the "protruding bolt") as measured by Mr. Brown, was 54 cm from the ground as mounted on the Bus;
3. only the bike rack mounting brackets and face plate came into contact with the Honda; and
4. the bumper assembly of the exemplar vehicle was identical to that of the Honda.

**322**  Mr. Pohl was unable to duplicate the bumper scuff marks shown in photographs of the Honda with the protruding bolt 54 cm above the ground so he adjusted the exemplar bike rack such that the protruding bolt was 47 cm above the ground. This resulted in crash test bumper damage at the same approximate height and locations as shown in the photographs of the Honda.

**323**  The first three crash tests were conducted at 3.4 km/h, 4.8 km/h and 5.4 km/h, respectively. They resulted in the bottom flange of the exemplar bike rack deforming. Mr. Pohl concluded that the exemplar bike rack was mounted too high. He lowered it such that the protruding bolt was 37 cm above the ground.

**324**  The final three crash tests were conducted at 5.6 km/h, 4.5 km/h and 3.1 km/h, respectively. Based upon the damage to the exemplar bumper covers and deformation of the foam impact absorbers from these test impacts, Mr. Pohl concluded that a crash test impact at 3.1 km/h best replicated the damage to the Honda. In other words, Mr. Pohl is of the opinion that the Honda was accelerated forward at a velocity of 3.1 km/h during the Accident.

**325**  Mr. Pohl concluded that several marks on the Honda were unrelated to the Accident because he could not replicate them. They had a "feathered" appearance which, in his opinion, is not typical in a rear-end impact.

**326**  Mr. Pohl was aware that the trunk of the Honda was found to be misaligned after the Accident. However he did not attempt to replicate that damage because there was no damage to the Honda suggestive of trunk misalignment caused by the Accident and because, in his opinion, such misalignment is inconsistent with a "minor rear-end impact". In his experience "a significant impact is required to produce trunk misalignment".

**327**  On cross-examination, Mr. Pohl agreed that none of the marks on the Honda's bumper were consistent with it having been impacted by the protruding bolt and, accordingly, that the protruding bolt probably was under the Honda's bumper at the time of impact and did not contact the Honda.

**328**  He also agreed that it is possible there could have been two impacts between the Bus and the Honda and that the marks on the Honda's bumper that he could not replicate were consistent with a double impact. He also agreed that if the Honda was stopped and the Bus was moving it would have taken more energy to stop the Bus than the Honda. He agreed during questioning by the Court that the "feathered" the markings were indeed consistent with an angular force.

**329**  Mr. Pohl also agreed that his tests did not take into consideration that the foam impact absorbers in the bumper would be less pliable and less likely to deform in cold weather, although he opined that the foam would be more brittle in colder temperatures.

**330**  Mr. Pohl did not examine either the Honda or the actual bike rack that was mounted on the Bus. He agreed on cross-examination that the foam impact absorber in the Honda could have been of a different constitution than the exemplar foam impact absorber.

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|  | **(9)** | **Mark Sawa** |  |

**331**  Mr. Sawa has both a Bachelor's and Master's degree in Mechanical Engineering and is an expert in accident reconstruction. He was qualified without objection as an expert in that field.

**332**  Mr. Sawa conducted what is known as a Monte Carlo Simulation to calculate and predict the probability of the Accident occurring given several variables and ranges of variables. The 18 variables he used are:

1. the plaintiff's perception response time to the traffic light changing from red to green;
2. the total distance moved by the plaintiff's vehicle while it accelerated forward in response to the green light and braked in response to the Snow Plow blocking its path;
3. the rate at which the plaintiff's vehicle accelerated from its stopped position;
4. the amount of time that the plaintiff's vehicle coasted while the plaintiff moved his foot from the accelerator to the brake pedal;
5. the deceleration rate for the plaintiff's vehicle braking to a stop in an emergency fashion in response to the Snow Plow;
6. the maximum speed attained by the plaintiff's vehicle after accelerating for the green light and before braking for the snow plow (calculated);
7. the time taken by the plaintiff's vehicle to accelerate and decelerate (calculated);
8. Gill's perception response time to the traffic light changing from red to green;
9. the initial travel speed of the Bus;
10. the acceleration rate for the Bus after the traffic light turned green;
11. the grade of the roadway;
12. Gill's perception response time to the plaintiff's vehicle stopping in response to the Snow Plow;
13. the amount of time that Gill took to move his foot from the throttle to the brake pedal;
14. the amount of time that Gill accelerated (calculated);'
15. the maximum speed attained by the Bus after accelerating (calculated);
16. the time lag between when Gill applied the brake pedal and when the air brakes fully engaged the brakes at the wheels;
17. the distance required for the Bus to avoid the collision (calculated); and
18. the distance available for the Bus to avoid the impact.

**333**  Mr. Sawa ran the Monte Carlo Simulation for 2,000 different permutations and combinations of the foregoing variables using randomly generated values for the variables within their expected ranges.

**334**  Assuming the Bus was coasting after the light turned green and an initial gap of 30 feet between the Bus and the Honda when the light turned from red to green, the simulation showed a 93% probability that the Accident would have occurred. Assuming an initial gap of 40 feet, the simulation showed a 28% probability that the Accident would have occurred.

**335**  Assuming that the Bus accelerated after the light turned green, the simulation showed a 100% probability of a collision occurring regardless of whether the initial gap was 30 or 40 feet.

**336**  Assuming an initial gap of 100 feet, approximately 42% of the iterations resulted in a collision.

**337**  If the roadway was more icy than snowy, a collision would have been more likely.

**338**  On cross-examination, Mr. Sawa agreed that, if the facts he was asked to assume were shown not to have existed, his simulation approach would be inaccurate. He also agreed that his simulations did not take into account many of scenarios that could have occurred, such as Gill's perception or reaction time being outside of the typical ranges he used. Moreover, he agreed that his calculations were based on Gill's perception time starting when the Honda had come to a full stop and that they would have been entirely different if Gill started to react when the Honda's brake lights came on or when Gill perceived the Snow Plow sliding before it entered the Intersection. Mr. Sawa agreed that Gill would have had an unobstructed view of the Snow Plow well before it entered the Intersection.

**339**  Mr. Sawa also admitted during cross-examination that his simulations were not based on a distance from the rear of the Honda of 25 to 30 feet and a Bus speed Bus of 8 or 9 km/h when Gill first applied his brakes despite Mr. Sawa having been asked to assume those facts. He did not do so because his simulation would have shown that the Bus stopped before hitting the Honda. He testified that, since the Bus did collide with the Honda, those assumed facts could not be valid.

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|  | **(10)** | **Darrin Richards** |  |

**340**  Mr. Richards is a professional engineer with Bachelor's degrees in Mathematics and Mechanical Engineering as well as a Master's of Science degree in Bioengineering. He has expertise in performing biomechanical analyses and calculating the magnitude of forces experienced by vehicle passengers during motor vehicle accidents. He has substantial credentials in those areas. He was qualified by the defendants as an expert in the field of biomechanics.

**341**  According to Mr. Richards, biomechanics is the application of mechanical engineering principles to the human body. It studies the loading that results when a human body is subjected to acceleration forces. The threshold force on a human body above which injury occurs is drawn from scientific studies published in peer-reviewed literature.

**342**  Mr. Richards opined on the acceleration that the head of a vehicle passenger is subjected to during a rear-end collision. His opinion is based upon a study he contributed to but did not author (T. Welch et al, "An Evaluation of the BioRID II and Hybrid III During Low-and Moderate- Speed Rear Impact", Society of Automotive Engineers 2010 International World Congress, 12 April 2010, SAE 2010-0101031 ("Welch Study") together with the results of studies conducted by others.

**343**  The Welch Study involved a series of rear-end collisions using crash test dummies ("ATDs"). One of its goals was to compare and contrast the differences between an ATD model developed in the 1970s to evaluate both frontal and rear impacts ("Hybrid III") and a new ATD developed specifically for low-speed impacts ("BioRID"). It also aimed to quantify motions of and loads on the head of a human body during rear-end collisions. The study did not draw any conclusions regarding brain injury or concussion potential.

**344**  The other studies Mr. Richards relied upon are as follows:

1. L. Zhang, K.H. Yan & A.I. King, "A Proposed Injury Threshold for Mild Traumatic Brain Injury" (April 2004) 126 J. Biomech. Eng. 226:

The authors calculated from game videos the dynamics created during high-impact collisions involving 24 NFL football players. The authors recreated those dynamics using ATDs and measured the acceleration forces on the ATDs' heads. Mr. Richards agreed that this study was merely a "small piece of the puzzle" regarding the forces necessary to cause a concussion and agreed that it must be used with caution. Mr. Richards did not accept that professional football players were not representative of the general population. In his words, "there is no evidence that the brains of football players are any different than normal people". He did accept that the necks of football players are generally stronger than those of the general population.

1. W.E. McConnell et al, "Analysis of Human Test Subject Kinematic Responses to Low Velocity Rear End Impacts" (Warrendale, PA: Society of Automotive Engineers, Vehicle and Occupant Kinematics: Simulation and Modeling, 1994), SAE 930889:

The authors examined rear-end impacts using 4 volunteers. The study was focused on neck injuries, not concussions. There is no evidence that the volunteers were examined by a physician after the impacts. Mr. Richard acknowledged that the volunteers in this study were all "robustly healthy males" who knew they were about to be involved in a rear-end collision. The study found that injuries can occur from low speed impacts.

1. V. Goodwin et al, "Vehicle and Occupant Response in Low Speed Car to Barrier Override Impacts" (Warrendale PA: Society of Automotive Engineers, 1999), SAE 1999-01-0442:

Four volunteers were subjected to 24 impacts while they were aware that the impacts were about to occur. Three of the four volunteers declined to submit to tests when the impacts were increased to 8 km/h. The study examined the impact on both the vehicle occupants and its bumpers. The study focused on neck injuries and did not consider concussions or brain injury potential. However, the study indicated acceleration levels of the same order of magnitude as those found in the Welch Study.

1. S. Kuppa, *Injury Criteria for Side Impact Dummies* (Washington: National Highway Traffic Safety Administration, National Transportation Biomechanics Research Centre, January 2006):

The authors studied side-swipe collisions using cadavers and ATDs and developed risk curves of for the possibility of injuries.

1. E. Pellman et al, "Concussion in Professional Football: Reconstruction of Game Impacts and Injuries" (2003) 53:4 Neurosurgery 799 ("Pellman 2003"):

The authors studied professional football players who had sustained concussions and high-speed impacts on the field. No low-speed impacts were studied, although concussion were suffered by two players at head accelerations of 48 g and 52 g, respectively. The study found a high correlation between head acceleration and concussive injury but did not study the underlying cause of concussion.

1. J. Funk et al, "Biomechanical Risk Estimates for Mild Traumatic Brain Injury" [2007] Association for the Advancement of Automotive Medicine 51st Annual Proceedings 343:

Sensors were installed in the helmets of 64 young, healthy football players. Head acceleration of less than 10 g did not trigger the sensors.

1. S.S. Margulies & L.E. Thibault , "A Proposed Tolerance Criterion for Diffuse Axonal Injury" (1992) 25:8 Man. J. Biomech. 917:

The authors studied the kinematics of diffuse axonal injury in primates and scaled the results to humans.

1. S. Rowson et al, "Linear and Angular Head Acceleration Measurements in Collegiate Football" (2009) 131 J. Biomech. Eng. 1:

Sensors were installed in the helmets of 10 offensive and defensive football linemen with an average weight of 292 lbs. Mr. Richards agreed that, generally, these players would have been expecting the impacts to occur.

1. M.E. Allen et al, "Acceleration Pertubations of Daily Living -- A Comparison to 'Whiplash'" (1994) 19 Spine 1285:

The authors measured repeated, non-injurious human head accelerations during daily activities.

1. W. Bussone et al, "Everyday Head Accelerations of a Pediatric Population" (2009) 2:1 SAE Int. J. Passeng. Cars - Mech. Syst. 565:

The authors documented the non-injurious head accelerations of 12 children performing a series of playground activities. Mr. Richards contributed to this study.

1. V. Vijayakumar et al, "Head Kinematics and Upper Neck Loading During Simulated low-Speed Rear-End Collisions: A Comparison with Vigorous Activities of Daily Living" (Society of Automotive Engineers 2006 International World Congress, Warrendale PA), SAE 2006-01-0247:

The authors compared low-speed rear-end collisions in bumper cars with vigorous daily activities in which concussive injuries were not expected. Participants were healthy and were screened to ensure they had no physical issues.

1. D.F. Meaney & D.H. Smith, "Biomechanics of Concussion" (2011) 30 Clin. Sports Med. 19:

The authors reviewed and summarized the existing literature.

1. R.S. Naunheim et al, "Comparison of Impact Data in Hockey, Football and Soccer" (2000) 48:5 J. Trauma 938:

The authors studied accelerational forces to the head in high school level football (2 participants), hockey (1 participant) and elite soccer players. No concussions were reported.

**345**  Mr. Richards acknowledged that the football players who participated in the above studies may well have had a tendency to underreport concussion symptoms for fear of being sidelined.

**346**  Mr. Richards also acknowledged that no scientific study has yet been performed of rear-end collisions where human beings sustained concussions.

**347**  Mr. Richards is unaware of any instance during these studies of a 5 km/h rear-end impact causing a concussion. The lowest head acceleration that resulted in a concussion was 48 g (Pellman, 2003).

**348**  Mr. Richards agreed on cross-examination that it is difficult to determine the severity of a rear-end collision injury from vehicle damage alone. He also agreed that a full understanding of the biomechanical causes of concussion has yet to be achieved and that there is more to learn and more work to be done.

**349**  Mr. Richards recognizes that there are no absolutes or certainties when it comes to the human body. The studies he relies upon merely analyze the risk of a concussion occurring at various head accelerations. He agreed that, for genetic or other reasons, some people are more prone to concussions than others and that there is a "spectrum of tolerances" in the human body. The level of injury can vary greatly from person to person. Injury thresholds in humans are not a black and white science.

**350**  In summary, Mr. Richard's opinion is that the magnitude of the acceleration forces during the Accident, as calculated by Mr. Brown, were less than those that scientific studies to date have shown are likely to result in a concussive injury. However, his opinion is that, although these studies have shown that there is a low risk of concussion injury with an impact speed of less than 5 km/h, he cannot rule out or exclude the possibility that a concussion injury will occur.

**351**  Mr. Richards was an impressive expert witness whose opinions I accept.

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|  | **(11)** | **Dr. Hedi Oetter** |  |

**352**  Dr. Oetter is the Registrar and Chief Executive Officer of the College of Physicians and Surgeons of British Columbia.

**353**  She testified there is a mandatory requirement for medical doctors who are disabled due to injury to report to the College only if their continued practice is a danger to the public. Physicians may designate themselves temporarily inactive

**354**  To be reinstated, the treating physician must confirm that it is safe for the registrant to return to practice.

**355**  She testified the plaintiff has neither reported to the College that he is disabled nor designated himself to be temporarily inactive.

**356**  Physicians in British Columbia are expected to engage in meaningful continued professional development on an annual basis.

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|  | **(12)** | **Dr. John Corey** |  |

**357**  Dr. Corey is the owner and managing director of the Park Royal Medical Clinic, the walk-in clinic at which the plaintiff worked several shifts in 2008 and 2009.

**358**  Dr. Corey testified that he received no complaints from either patients or staff regarding the plaintiff. The plaintiff did not sound confused during the telephone conversations Dr. Corey had with him regarding the scheduling of his shifts.

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|  | **(13)** | **Dr. Derryck Smith** |  |

**359**  Dr. Smith is a psychiatrist who was qualified to give opinion evidence in that capacity. He conducted an assessment of the plaintiff on December 1, 2010. His medical/legal report is dated March 1, 2011.

**360**  It is Dr. Smith's opinion that:

1. the plaintiff's reported symptoms are "well out of keeping with the description of the accident";
2. the plaintiff did not suffer a traumatic brain injury;
3. the plaintiff has recovered from his symptoms of anxiety and depression;
4. the plaintiff continues to have a sleep disturbance for unknown reasons; and
5. if the plaintiff continues to suffer from a cognitive disorder, it is likely related to pain and/or a sleep disorder, not a traumatic brain injury.

**361**  Dr. Smith's further opinion is that the plaintiff's failure to return to work as an emergency room physician is not related to psychiatric illness or the sequelae of traumatic brain injury. He recommended that the plaintiff undergo neuropsychological testing because such testing uses validity measures to determine whether the subject is being forthright.

**362**  In Dr. Smith's opinion, any diagnosis of post-concussion syndrome is invalid because the syndrome "does not exist".

**363**  Dr. Smith was cross-examined at length. He was argumentative throughout.

**364**  Dr. Smith testified that he is very reluctant to accept a diagnosis of concussion at the lower end of the diagnostic criteria spectrum because the symptoms are usually too vague and non-specific. However, it was pointed out to him that he had been quick to opine in his report that the plaintiff "may have sustained a concussion" during his earlier January 2004 accident solely on the basis of his having read that the plaintiff had hit his head during the accident despite the plaintiff having advised him to the contrary.

**365**  Dr. Smith agreed that emergency room records are important to the formation of his opinions yet he gave no weight to the diagnoses of concussion by the WHCC emergency room physicians and Dr. Teal. He justified the lack of weight based on, first, his uncertainty whether WHCC was "an emergency room" and, second, his view that the diagnosis of concussion "is thrown around pretty casually". Instead, he looked for objective evidence of impairment consistent with concussion and concluded there was none.

**366**  Dr. Smith also agreed it is important to consider the plaintiff's before-and-after-Accident histories as described by his family and friends, yet he did not obtain any such information.

**367**  Dr. Smith stated there was no evidence the plaintiff had suffered immediate cognitive impairment after the Accident. It was suggested to him that there was ample evidence of cognitive impairment. Dr. Smith agreed that memory gaps (the plaintiff could not remember preparing the Statement or driving to WHCC), confusion, decreased concentration, problems with multi-tasking, fogginess, irritability and nausea following the Accident were reported to him and are consistent with a concussive injury, yet he ignored all of those reported symptoms when formulating his opinion.

**368**  Dr. Smith agreed that if the plaintiff slept well before the Accident, his current sleep disorder is likely due to the Accident. He also accepted that it is possible any cognitive impairment is the result of the Accident.

**369**  Dr. Smith ultimately agreed that if the plaintiff functioned at a high level and had his symptoms after but not before the Accident, then it is likely that the symptoms were caused by the Accident. He agreed that evidence the plaintiff has shown signs of improvement in his cognitive functioning since the Accident is consistent with him having sustained a concussion.

**370**  Dr. Smith also agreed that 10 - 15% of people who suffer a MTBI have permanent problems, including an inability to work and function in daily activities.

**371**  Eventually, after extensive cross-examination, Dr. Smith agreed that the plaintiff may have sustained a concussion in the Accident.

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|  | **(14)** | **Dr. Alister Prout** |  |

**372**  Dr. Prout is a neurologist who was qualified without objection to give opinion evidence in that specialty.

**373**  Dr. Prout met with and conducted a neurological examination of the plaintiff on February 3, 2010. His medical legal report is dated February 7, 2011.

**374**  His neurological testing of the plaintiff revealed him to be within normal ranges. He agreed on cross-examination that the neurological examinations of most concussion victims are normal.

**375**  In Dr. Prout's opinion, the plaintiff's ongoing reported concerns are out of keeping with the nature of the injuries he sustained during the Accident.

**376**  Dr. Prout was of the opinion that it is unlikely the plaintiff suffered a concussion injury during the Accident. He based this opinion on the Accident having been a relatively low-velocity impact. He also relied on his understanding that the plaintiff had only a very brief loss of awareness and was able to interact with Gill in a very short period of time after the impact without appearing to be confused. Given this understanding of the Accident, Dr. Prout testified that he has difficulty explaining the plaintiff's ongoing difficulties.

**377**  In Dr. Prout's opinion, the majority of symptoms reported by the plaintiff following the Accident can be explained as a combination of an emotional reaction to the Accident, pain, sleep disturbance and the development of some psychological difficulties. Dr. Prout opined that the plaintiff should undergo neuropsychological testing to separate and identify any neurological issues from any psychological issues.

**378**  He opined that the plaintiff does not have neurologic deficits or residual effects of a neurological injury caused by the Accident that would result in an inability to return to at least part-time work in emergency or clinical medicine.

**379**  On cross-examination, Dr. Prout conceded that he does not diagnose a concussion injury if it is merely probable. Rather he will only diagnose a concussion if he is almost certain that a patient has sustained a concussion.

**380**  Dr. Prout agreed on cross-examination that if the plaintiff had more than a brief period of loss of awareness and memory and was disoriented more than the amount that Dr. Prout identified, then the probability that the plaintiff suffered a concussion increases.

**381**  He also agreed that he would defer to the opinion of a psychiatrist with neuropsychology training who found no psychiatric or psychological pathology. He agreed that if no psychiatric or psychological pathologies were found, it is likely that the plaintiff's symptoms are due to a concussion.

**382**  Dr. Prout knows and respects Dr. Teal.

**383**  Dr. Prout agreed that, when diagnosing a concussion, it is helpful to obtain histories from others comparing the patient prior to and after the accident. Dr. Prout was not provided with any such information. He agreed that a patient being observed as disoriented and confused after an accident would be weighty evidence of a concussion. Dr. Prout conceded his understanding that the plaintiff appeared to Gill to be functioning and behaving normally after the Accident was of critical importance to his opinion.

**384**  Dr. Prout agreed on cross-examination that little is known about why some people are more susceptible to a concussion injury than are others, but opined, based on the usual clinical parameters that if the plaintiff suffered a concussion his prognosis for a full recovery from it would have been very good. However, he also agreed that ten percent of concussion victims do not fully recover and have permanent problems.

**385**  Dr. Prout agreed that the plaintiff could have had mild disorientation and a mild gap in his memory and therefore could have sustained a concussion and could fall into the 10% of people who do not recover from a concussion injury.

**386**  Dr. Prout agreed that many of the plaintiff's symptoms are consistent with a concussion injury having been sustained, specifically vomiting early on, ongoing headaches, dizziness, nausea, vision problems, physical and mental fatigue, excessive sleep, confusion, sensitivity to noise and light, irritability, depression and anxiety symptoms and problems with memory, concentration, multi-tasking, speech and communication. He also agreed that any one or more of them would meet widely accepted diagnostic criterion for concussion. He further agreed that, with a concussion, he would expect at least some of the symptoms to improve or resolve, while they would be expected to increase rather than improve if they were psychological.

**387**  Dr. Prout agreed on cross-examination that if the plaintiff had some disorientation and confusion and some gap in his memory and the above symptoms without any other explanation for them, the best explanation is that the plaintiff probably had a concussion.

**388**  Dr. Prout agreed that post-concussion syndrome is a valid and generally recognized medical diagnosis and that the plaintiff's reported symptoms are consistent with that syndrome.

**389**  He agreed that the vast majority of those suffering from carpal tunnel syndrome fully recover with the use of a brace. Of those that do not, approximately 95% fully recover with surgery.

**390**  Dr. Prout was an impressive witness who gave his evidence in an objective, candid and helpful fashion.

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|  | **(15)** | **Lisa Marginson** |  |

**391**  Ms. Marginson is a rehabilitation consultant. She was retained by the plaintiff's disability insurer, Sun Life, in early 2009 to obtain information from the plaintiff regarding his functioning, treatment and return to work potential and plan at that time.

**392**  Ms. Marginson interviewed the plaintiff in West Vancouver on March 12, 2009. She found that the plaintiff answered her questions and shared information openly. She did not observe any "major" issues with his memory or concentration.

**393**  Ms. Marginson noted that the plaintiff did not have a clear recollection of the Accident, but reported headaches, nausea and difficulty following what was being taught at the intubation course shortly thereafter.

**394**  Afterwards, the plaintiff became angry he was not being permitted to return to work.

**395**  Ms. Marginson concluded that that plaintiff was very dedicated to being an emergency room physician where he believed he had thrived. The plaintiff was not prepared to consider any plan other than one that involved returning to that profession. He was defensive about any suggestion that his cognitive abilities may limit his ability to do so.

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|  | **(16)** | **Mark Gosling** |  |

**396**  Mr. Gosling is an economist. He was qualified without objection to give economic opinion evidence.

**397**  Mr. Gosling provided a report in which he commented on Mr. Benning's future income loss multipliers and provided alternative multipliers for use by the Court.

**398**  Mr. Gosling's actuarial multipliers were virtually identical to those of Mr. Benning (12.637 to age 70 on January 8, 2030 vs. 12.637 to December 31, 2029).

**399**  Mr. Gosling's economic multipliers (assuming non-participation in the Labour Force due to both voluntary withdrawal and disability) were slightly different than those provided by Mr. Benning (10.292 to age 70 on January 8, 2030 vs. 11.770 to December 31, 2029).

**D.** **THE CASE FOR ICBC**

**400**  ICBC did not call any witnesses. It adopts the evidence led by the Transit Defendants.

**E.** **THE PLAINTIFF'S REBUTTAL EVIDENCE**

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|  | **(1)** | **Donald Rempel** |  |

**401**  Mr. Rempel is a mechanical engineer with expertise in forensic engineering and motor vehicle accident reconstruction. He was qualified without objection as an expert to give opinion evidence in that field.

**402**  Mr. Rempel reviewed and opined on the opinion evidence of the defendants' engineering experts, Mssrs. Sawa, Brown and Pohl.

**403**  Mr. Rempel dismissed Mr. Sawa's Monte Carlo simulation because it assumes that Gill would have had no regard for his speed or the distance between the Bus and the Honda and would not have perceived the Honda to be a hazard until the Honda had come to a complete stop as a result of the Snow Plow entering the intersection. In Mr. Rempel's opinion, such modeling has no connection to the reality of normal driving where drivers consider the "closing circumstances" as they approach other vehicles.

**404**  Mr. Rempel disagreed with Mr. Pohl's opinion that the "feathered" markings on the Honda bumper are unrelated to the Accident. Mr. Rempel pointed out that Mr. Pohl's crash tests had been conducted on a dry surface with a perfectly stable Honda reversing into a fixed and perfectly stable bike rack. There was no consideration of the real-world circumstances of a likely rough roadway or the braking action of the Bus. In Mr. Rempel's opinion, the markings on the Honda bumper are precisely those that would be expected to result from a collision between the Bus' bike rack and the Honda on an icy, winter road surface with a braking Bus.

**405**  Mr. Rempel opined that a low-speed collision between the Bus and the Honda could be expected to result in more than one impact in rapid succession.

**F.** **ANALYSIS**

**406**  Over the course of this 29 day trial, I had the benefit of hearing 27 lay witnesses and 16 expert witnesses. My analysis is based upon a considered assessment of their credibility and reliability as witnesses and the evidence they proffered.

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|  | **(1)** | **Liability** |  |

**407**  The Transit Defendants admit that Gill was operating the Bus at the time of the Accident, that the Bus was owned by BCT and leased to WTL, that both BCT and WTL were "owners" of the Bus pursuant to the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* and that Gill was operating the Bus with the express or implied consent of both BCT and WTL. Each is an "owner" of the Bus pursuant to the provisions of the *Motor Vehicle Act*.

**408**  ICBC admits that:

1. on December 4, 2006, the Transit Defendants notified ICBC of the existence of the Snow Plow sliding into the intersection;
2. on December 19, 2006, the plaintiff advised ICBC that a snow plow had been involved in the Accident; and
3. on February 8, 2007, the plaintiff published an advertisement in the Whistler Question newspaper seeking witnesses to the Accident.

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|  | **(a)** | **Was Gill Negligent?** |  |

**409**  When one vehicle rear ends another, the onus is on the rear-ending vehicle to demonstrate the absence of ***negligence***: *Robbie v. King*, [*2003 BCSC 1553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B081-00000-00&context=), at para. 13; *Cannon v. Clouda*, [*2002 BCPC 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61MV-00000-00&context=) at para. 9; *Cue v. Breitkreuz*, [*2010 BCSC 617*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6307-00000-00&context=) at para. 15; *Stanikzai v. Bola*, [*2012 BCSC 846*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BG-00000-00&context=) at para. 7.

**410**  This is because the following driver owes a duty to drive at a distance from the leading vehicle that allows reasonably for the speed, the traffic and the road conditions: *Barrie v. Marshall*, [*2010 BCSC 981*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20S7-00000-00&context=), at paras. 23-24; *Rai v. Fowler*, [*2007 BCSC 1678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21NY-00000-00&context=), at para. 29. This duty is codified in ss. 144 and 162 of the *Motor Vehicle Act.*

**411**  Driving with due care and attention assumes being on the lookout for the unexpected: *Power v. White*, [*2010 BCSC 1084*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2101-00000-00&context=) at para. 28, aff'd [*2012 BCCA 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3KS-00000-00&context=).

**412**  The Transit Defendants argue that Gill was not negligent because the Accident was unavoidable. They rely upon the opinion evidence of Mr. Sawa.

**413**  I have several concerns with Mr. Sawa's opinion. First, it relies upon accelerations, speeds, distances, proximities, perception speeds and a host of other scenarios and variables that are either not in evidence or are based upon the evidence of Gill, which I have found to be unreliable. Second, it does not consider the scenario of a collision if the initial gap between the Bus and the Honda was other than 30, 40 or 100 feet. Instead, Mr. Sawa invited the Court to use averages and linear relationships that would "appear" to provide an accurate result for those other distances. Third, it is based upon variables that the Court is required to speculate about. For example, if the plaintiff's perception response time was 1.2 seconds and the plaintiff's vehicle moved forward five feet at 5 km/h, then there is nothing in Mr. Sawa's analysis that can be consulted to determine the likelihood of the collision. Fourth, and most glaringly, it completely disregards the approach circumstances that a normal driver would realistically react to.

**414**  I agree with Mr. Rempel's criticisms of the Sawa report.

**415**  I also agree with the sentiments of Mr. Justice Wilson of the Alberta Court of Queen's Bench in *Mulchandani v. Kooistra Trucking Ltd.* [*2006 ABQB 391*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-2235-00000-00&context=) who stated the following regarding a similar report from Mr. Sawa, at para. 30:

This is one of the reasons that I give no credit to the report of Sawa or his opinions. As will be seen from his report, he puts a position that if a number of conditions had been fulfilled, the accident would not have happened, or the damage would have been less severe. That is not how a case like this must be decided. Unstated in his opinion, but equally in the realm of "what ifs" is the case that if the Defendant had parked his truck that day and not proceeded, the accident would not have happened. This sort of expertise [is] unhelpful.

**416**  The defendants' use of the Sawa report to argue that the collision was inevitable is, effectively, an attempt to support a conclusion that Gill met the required standard of care. The Court is capable of forming its own conclusions regarding whether or not Gill met the standard of care expected of him in the circumstances while he was driving the Bus toward the plaintiff's stopped vehicle. In such circumstances, the opinion of an expert is unnecessary: *R. v. Mohan*, [*[1994] 2 S.C.R. 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3D0-00000-00&context=) at 27.

**417**  This was a rear-end collision. The road surface was icy. When the light turned green, the plaintiff started to proceed into the Intersection. He stopped because of the presence of the Snow Plow. He was able to do so safely despite the slippery conditions. Gill testified he did not even see the Snow Plow until it was in the Intersection. The photographic evidence satisfies me that it is inconceivable the Snow Plow would not have been seen by an attentive driver well before it entered the Intersection. Gill had a clear line of sight. He had a duty to be on the lookout for unexpected maneuvers by other vehicles on the road, for example, the Snow Plow sliding into the intersection, or the Honda coming to an abrupt stop.

**418**  The Accident did not take place because it was inevitable. It took place because Gill was not properly attentive or because the Bus was travelling too fast for the road conditions, or because Gill was not sufficiently competent to drive the Bus in the road conditions he faced. There is no evidence that the road conditions were any more slippery than would normally be expected on a snowy winter day in Whistler. Gill's conduct did not meet the standard of care expected of him in the circumstances.

**419**  The Accident was caused by the ***negligence*** of Gill. BCT and WTL are vicariously liable for his ***negligence***.

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|  | **(b)** |  | **Was the Snow Plow Driver negligent?** |  |

**420**  The plaintiff and the Transit Defendants argue that the Accident was contributed to by the driver of the Snow Plow.

**421**  Section 144 of the *Motor Vehicle Act* provides that a person must not drive a motor vehicle on a highway without due care and attention or at a speed that is excessive relative to road or weather conditions.

**422**  A *prima facie* case of ***negligence*** is established where it is shown that the defendant had control of the vehicle and the event would not have occurred with the exercise of proper care: *Michel v. John Doe*, [*2009 BCCA 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2FB-00000-00&context=) at para. 22.

**423**  Although December 4, 2006, was a snowy and icy winter day in Whistler, there is no evidence that the plaintiff had any difficulty controlling the Honda prior to the Accident. The road conditions should not have taken any driver by surprise.

**424**  The evidence is that the Snow Plow slid into the Intersection after the traffic light had turned yellow or red in its direction.

**425**  The applicable section of the *Motor Vehicle Act* is as follows:

**Yellow light**

128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,

1. the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety.

**426**  Drivers approaching an intersection exhibiting a yellow traffic light must cause the vehicle to stop unless the stop cannot be made in safety. No evidence was led to suggest that the Snow Plow could not have stopped in safety had its driver been operating it at a standard of care commensurate with the road conditions. An inference of negligent driving will be made in the absence of such evidence.

**427**  Accordingly, I find that the driver of the Snow Plow, John Doe, was also negligent in causing the Snow Plow to slide into the Intersection. The defendant Jack Doe Company Ltd. is vicariously liable for the ***negligence*** of John Doe.

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|  | **(c)** |  | ***Insurance (Vehicle) Act*, Section 24(5)** |  |

**428**  ICBC's liability is subject to the provisions of sections 24(5) and 105 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*.

**429**  Section 24(5) of the *Insurance (Vehicle) Act* provides as follows:

1. In an action against the corporation as nominal defendant, a judgment against the corporation must not be given unless the Court is satisfied that
2. all reasonable efforts have been made by the parties to ascertain the identity of the unknown owner and driver or unknown driver, as the case may be, and
3. the identity of those persons or that person, as the case may be, is not ascertainable.

**430**  The plaintiff did nothing other than arrange for the placement of a small advertisement in the Whistler newspaper that requested witnesses to the Accident to come forward. The words "snow plow" did not appear in the advertisement.

**431**  Counsel for the plaintiff submitted that, because s. 24(5) reads "... all reasonable efforts have been made by the parties ...", ICBC was a party and was required to make all reasonable efforts to identify the unknown driver of the Snow Plow. He suggests that ICBC was in a vastly superior position over the plaintiff to do so.

**432**  I disagree. The plaintiff is the party seeking judgment against ICBC and has the burden of satisfying the Court that the requirements of s. 24(5) have been met.

**433**  The test of reasonableness is subjective in the sense that the plaintiff must have been in a position and condition to obtain the appropriate information: *Leggett v. Insurance Corp. of British Columbia*, [*(1992) 72 B.C.L.R. (2d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62R6-00000-00&context=) (C.A.) at 206. The standard required of the plaintiff is not perfection: *Pearce v. Insurance Corp. of British Columbia* [*(1999), 6 C.C.L.I. (3d) 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22FX-00000-00&context=), 1998 CarswellBC 1039 (B.C.S.C.) at para. 26; *Nicholls v. Emil Anderson Maintenance Co.*, [*2010 BCSC 1640*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4B5-00000-00&context=) at para 6,, aff'd [*2011 BCCA 422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62J6-00000-00&context=). Reasonableness is to be decided on the basis of all the circumstances of the case: *Holloway v. I.C.B.C. and Richmond Cabs and John Doe,* [*2007 BCCA 175*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4BV-00000-00&context=) at para. 12.

**434**  The evidence is that the Snow Plow was a large "highway" snow plow. In my view, "all reasonable efforts" would have included contacting the known or easily identifiable highway snow plow operators and contractors in an attempt to determine which drivers were operating snow plows on the morning of the Accident and in what location. Those enquiries were well within the resources of the plaintiff and/or his counsel. No such steps were taken. Indeed, no effort whatsoever was made to ascertain the identity of the driver of the Snow Plow. The plaintiff did not provide an explanation for his failure to do so.

**435**  In my view, to the extent that the plaintiff's injuries were caused or contributed to by the ***negligence*** of the driver of the Snow Plow, judgment in respect of those injuries against ICBC is precluded by section 24(5) of the *Insurance (Vehicle) Act.*

**436**  Given this ruling, there is no need to deal with the limit of liability found in section 105 of the *Insurance (Vehicle) Act.*

**437**  The defendants, excluding ICBC, are jointly and severally liable for the plaintiff's injuries.

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|  | **(2)** | **Causation** |  |

**438**  The plaintiff must show on the balance of probabilities that he was injured by and his injury would not have occurred but for the defendants' ***negligence***. The "but for" test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendants' ***negligence*** made to the injury: *Clements v. Clements* [*[2012] 2 SCR 181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=) at paras 8-9.

**439**  Causation is to be decided on the whole of the evidence: *Hoy v. Harvey*, [*2012 BCSC 1076*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24W1-00000-00&context=). Here, as in many personal injury cases, the evidence of injury consists of the subjective history of the plaintiff, the collateral evidence of his wife, friends and former co-workers, as well as the findings and opinions of several medical and engineering experts.

**440**  The defendants contend that the plaintiff is a malingerer and that his failure to return to work after the Accident was part of a conscientious plot, contrived at the time of the Accident, to transform his life from that of a workaholic to that of a malingerer. Their theory is that the plaintiff had become burnt out, was exhausted by his new parenting role, was angry at ICBC for denying his earlier claim and the Accident was an opportunity to not only change his life but also to obtain retribution against ICBC.

**441**  The defendants say the damage to the Bus and to the plaintiff's vehicle was so minor that the plaintiff could not possibly have suffered the injuries he complains of. They sought to bolster their position with engineering evidence they submit demonstrates that the forces created by the collision and transmitted to the plaintiff's body were minimal at best. Alternatively, they argue that any injury the plaintiff suffered has either been exaggerated or is not attributable to the Accident.

**442**  Gill gave evidence that the Bus hit the Honda with sufficient force to push it 5 to 7 feet forward into the Intersection, albeit on a slippery roadway. He gave no evidence regarding whether the contact between the Bus and the Honda was straight on or at an angle. He gave no evidence regarding the force of the impact. If the Bus merely "tapped" the Honda, I am confident I would have heard evidence from Gill to that effect.

**443**  The only evidence regarding the magnitude of the impact between the Honda and the Bus was opinion evidence of Mssrs. Brown, Pohl and Rempel.

**444**  Mr. Brown assumed the impact had been straight on point impact between the bike rack's protruding bolt and the Honda's bumper. However, he found no evidence of such an impact. He agreed that if the impact had not been focused but rather distributed, the forces would have been higher than those he had calculated.

**445**  Mr. Pohl was able to produce damage to an exemplar vehicle that he concluded was similar to some of the damage depicted in photographs of the Honda at an impact speed of 3.1 km/h. He therefore opined that the speed of the impact during the Accident was approximately 3.1 km/h. He was unable to reproduce other obvious damage so he concluded it was unrelated to the Accident.

**446**  The difficulties I have with Mr. Pohl's crash tests are that:

1. all were single direct impacts between the bike rack and the vehicle whereas some of the damage to the Honda is consistent with a double angular impact;
2. they did not take into consideration that the foam impact absorber in the bumper likely reacts differently in colder weather; and
3. they did not replicate the actual damage to the Honda.

**447**  According to Dr. Anton, who I found to be an impressive and credible expert witness, there is no authoritative medical literature setting out the threshold of force required to produce a brain injury in a vehicle passenger. However, there is a relationship between the forces occurring in a motor vehicle accident and the likelihood of injury, albeit far from a one-to-one relationship. He opined that, although it is useful to know something about the mechanics of a collision, those mechanics do little to assist the medical diagnosis. Accident reconstruction discloses nothing about an individual's vulnerability to the forces. The forces that can cause a brain injury are either (a) direct (a linear force causing a blow to the head with injury at the site of the blow or, if the brain moves, at the other side of the skull) or (b) diffuse (rotational causing traction and stretching of the long nerve fibres resulting in brain injury at locations other than where the direct trauma occurred).

**448**  Mr. Richards agreed. Although he was of the opinion that the risk of a concussion injury during a low-impact collision is small, much more scientific study is required regarding whether a particular person will be vulnerable to concussion.

**449**  Dr. Smith's view was that the Accident was a minor impact, there was no objective evidence of a concussion and it was therefore "preposterous" to suggest that the plaintiff sustained a concussive injury. However, Dr. Smith did not attribute the plaintiff's subjectively reported symptoms to any other cause. He ignored and made no attempt to reconcile the contrary opinions of other respected physicians and the diagnostic criteria for concussions set out in authoritative text books he had previously endorsed because they "set the bar way too low". He relied only upon information that was supportive of his opinions and disregarded the information that was not. He sought to justify his approach by stating: "These are the facts and assumptions that I relied upon in forming my opinion. Obviously I did not rely upon [the other information I was given] because it's not reflected in my facts and assumptions". This kind of "cherry-picking" by experts is unhelpful. Dr. Smith was not an objective expert witness. I do not accept his opinion that the plaintiff did not suffer a concussion in the Accident.

**450**  According to the authoritative definitions commonly used by physicians to diagnose concussions, the plaintiff sustained a MTBI. The defendants do not suggest otherwise. Instead, they merely submit that because the plaintiff's complaints are subjective and that he complains he suffers from virtually all of the symptomatic criteria when only two or three would suffice, he "doth protest too much" and must have fabricated his evidence.

**451**  Although the medical opinions at trial were based largely upon the plaintiff's subjective descriptions of his symptoms, the fact that the plaintiff's symptoms are subjective does not mean they are not real.

**452**  To accept the defendants' submissions that the plaintiff is a malingerer and that the forces imparted on the plaintiff by the Accident could not have injured him, I would have to completely disregard the evidence of the plaintiff, Ms. Roth and all other lay witnesses called by the plaintiff (several of whom are physicians) who testified about the plaintiff's sudden and dramatic change in character and personality in the hours, days, months and years following the Accident. I found each to be candid, credible, forthright and, above all, honest. The defendants' theory of the case is devoid of credulity and appears to have been inspired by nothing more than a conviction that the Accident impact was minor and could not possibly have injured anyone.

**453**  I accept that the Accident was relatively minor in terms of the physical damage sustained by the Honda and the Bus. However, even a low-impact collision can cause injury: *Lubick v. Mei*, [*2008 BCSC 555*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2FW-00000-00&context=) at para. 5.

**454**  The evidence in this case establishes that the low-velocity impact was sufficient to move the plaintiff's vehicle forward from a complete stop to the middle of the intersection, albeit in slippery road conditions. The plaintiff saw a "white light" immediately after impact.

**455**  The evidence is overwhelming and uncontradicted that, prior to the Accident, the plaintiff had a long history of functioning at a high level. He had extraordinary energy, was exceptionally hard working and successful. He loved people, was well liked and had a very good reputation in the community.

**456**  The evidence is equally overwhelming and uncontradicted that, immediately after the Accident, the plaintiff was confused, disoriented, had gaps in his memory and was lethargic. In the days and weeks that followed it was plain to those who knew him that he no longer had many of his pre-Accident qualities. He has cognitive and communication difficulties, low energy, is unable to work effectively or efficiently, and is forgetful, withdrawn and irritable. He has had episodes of anxiety and depression.

**457**  A small yet cogent example of the plaintiff's cognitive issues was seen during his cross-examination when he was asked about his and Ms. Roth's ages at the time his children were born. It was obvious that he was stumbling and was confused. He appeared lost. He was wrong in their ages by five years. There were many other instances where the plaintiff became easily confused over relatively simple matters. Examples include the cross-examinations of him regarding Dr. Lisa Marginson's report dated March 12, 2009, his personal training program, his income tax returns and his receipt of Canada Pension Plan Disability Benefits. It was obvious that he had difficulty distinguishing between actual and planned achievements.

**458**  While there are some inconsistencies in the various descriptions given by the plaintiff to medical practitioners regarding his recollection of the Accident, I find that those inconsistencies reflect the day-to-day variability of plaintiff's symptoms, his genuine struggles to remember and his legitimate attempts to piece together as best he could what actually had happened and to come up with an explanation for his injuries. I accept that he has a difficult time distinguishing between what he thinks must have happened and what he can actually remember happening.

**459**  It is obvious to me that the plaintiff continues to be confused about the details of the Accident. It is equally obvious to me that this confusion is the result of the plaintiff's Accident-related injuries, not an attempt to fabricate a condition that does not exist.

**460**  I find that the plaintiff's symptoms, as he described them, are genuine.

**461**  It is the opinion of each of Drs. Kausky, Teal, Anton and Remick, all impressive experts whose respective opinions I accept, that the plaintiff suffered a MTBI and, thereafter, post-concussion syndrome as a result of the Accident.

**462**  Dr. Prout, who I found to be a candid and objective expert, did not diagnose a concussion at the time of his Report because he understood the plaintiff had been able to remember details of the Accident, he appeared to Gill to be behaving normally shortly after the Accident and because other possible explanations for the plaintiff's symptoms had not been ruled out.

**463**  However, Dr. Prout, agreed that, if the plaintiff was functioning at a high level prior to the Accident, had some confusion, some disorientation, some gaps in his memory and other symptoms associated with a concussion after the Accident without any other explanation for those symptoms, the best explanation is that the plaintiff probably suffered a concussion.

**464**  I have placed no reliance on Gill's evidence that the plaintiff did not appear to be confused. Gill's interaction with the plaintiff was fleeting, he had never met the plaintiff previously and he was not shown to be qualified of providing trustworthy substantiation of normal human behaviour. Further, I have found Gill's evidence generally to be confused and unreliable.

**465**  Dr. Smith opined that post-concussion syndrome is not a valid medical diagnosis. Drs. Teal and Prout opined that it is not only a valid, but also a generally recognized diagnosis. I accept the opinions of Drs. Teal and Prout and reject those of Dr. Smith.

**466**  In my view the plaintiff has established beyond the balance of probabilities that the dramatic and sudden onset of symptoms of headaches, dizziness, nausea, vomiting, physical and mental fatigue, confusion, sensitivity to noise and light, irritability, depression and anxiety and problems with vision, concentration, multi-tasking and speech and communication, are the result of him having suffered a MTBI (concussion) caused by the Accident.

**467**  Moreover, I find that the plaintiff continues to suffer from post-concussion syndrome as a direct result of his Accident-related concussion.

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|  | **(3)** | **Damages** |  |

**468**  The plaintiff is entitled to an award of damages that will put him, so far it is possible for money to do so, in the same position he would have been in had the Accident not occurred: *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 74, *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..

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|  | ***(i)*** | ***Non-Pecuniary*** |  |
|  |  | ***Damages*** |  |

**469**  The considerations to be taken into account by a court in assessing non-pecuniary damages were 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:

[46] The inexhaustive list of common factors cited in *Boyd*, [*[2004] B.C.J. No. 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=), that influence an award of non-pecuniary damages includes:

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

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

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**470**  Prior to the Accident, the plaintiff was a confident, decisive, energetic individual with an excellent memory and a penchant for detail. He was able to identify a problem facing him, define the options available for resolving the problem and choose from among them. He loved challenge and loathed routine. He felt he could accomplish anything he wanted to. He was the hardest-working emergency room physician at WHCC. He loved and was passionate about his work. He thrived on the stimulation and the trauma of the emergency room. He was happy with his life and enjoyed helping others.

**471**  At the time of the Accident, the plaintiff was at the height of his medical career. He had a very good reputation as an emergency room physician and was well respected in the Whistler community. His reputation was important to him and he was proud of his accomplishments. He had no plans to retire.

**472**  There is no question that the plaintiff's life has changed profoundly as a result of the Accident. His ability to function in everyday life has been significantly impaired. He has considerable cognitive challenges that will likely affect him for the rest of his life. He has lost his overall confidence. He struggles to make decisions and initiate activities. He is inattentive and displays poor judgment. He has withdrawn socially. His thresholds for mental and physical activities are limited to approximately 2 hours and 30 minutes, respectively, beyond which he becomes symptomatic. He is no longer able to practice as an emergency room physician, a job he was passionate about and proud of. His ability to interact with and enjoy his children has been impaired. The medical experts are of the opinion that his recovery has likely plateaued.

**473**  As a result of the Accident, the plaintiff's ability to work in the job he loved has been taken from him. He has lost his sense of purpose in life. He no longer feels that he is a contributing and productive member of society. The realization that he will be unable to return to his profession and that his life as it was prior to the Accident is gone has been devastating to him.

**474**  He wanted to engrain in his children the values of hard work and reputation in the community. It is devastating to him that he cannot show his children that he works hard.

**475**  He has difficulty identifying problems facing him and defining his options. He cannot seem to understand the problem and make a decision. He does not trust his own judgment either medically or as it relates to his real estate investments. He has trouble making day-to-day life decisions. Although the plaintiff realizes that he must learn to allow others to help him, he has a great deal of difficulty accepting that fate.

**476**  The plaintiff submits that an award in the range of $200,000 to $225,000 for non-pecuniary damages is appropriate in this case, He relies on the following decisions:

1. *Roussin v. Bouzenad*, [*2005 BCSC 1719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2SW-00000-00&context=) ($200,000);
2. *Lines v. Gordon et al. and ICBC*, [*2006 BCSC 1929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61K6-00000-00&context=) ($225,000);
3. *Sirna v. Smolinski*, [*2007 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V5-00000-00&context=) ($200,000);
4. *Dikey v. Samieian*, [*2008 BCSC 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=) ($215,000);
5. *Young v. Anderson*, [*2008 BCSC 1306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3JG-00000-00&context=) ($200,000) and
6. *Burdett v. Eidse*, [*2011 BCCA 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1W5-00000-00&context=) ($200,000).

**477**  In *Roussin*, the plaintiff was a full-time associate producer for a local television station, who was characterised as being "hard-working, focussed, informed and a good researcher who wanted to excel", but was considering a change in employment (at paras. 28-29). As the plaintiff was proceeding through an intersection, she was struck by the defendant's vehicle in a "T-bone" fashion (at para. 5). The plaintiff sustained a number of injuries in the accident including a MTBI with significant effects including loss of executive function, dizziness and vertigo, tinnitus and headaches. She was unable to pursue her chosen career path, and had severely limited employability (at paras. 95-96). Mr. Justice Kelleher awarded non-pecuniary damages of $200,000 (para. 97).

**478**  In *Lines*, the defendant, was travelling behind the plaintiff and attempted to overtake the plaintiff on the left side when the plaintiff was attempting to make a left-hand turn, resulting in a T-bone impact (at para. 1). The plaintiff sustained MTBI and post-concussive syndrome that caused "profound" ongoing effects including severe headaches with vestibular dysfunction, fatigue, visual difficulties, sexual dysfunction, depression and problems higher cognitive function and capacity such as memory, concentration, decision making and organization (at para. 219). He also lost his future standing in the community as a skilled journeyman mechanic or marine engineer, and his enjoyment of his pre-accident hobbies and activities (at para. 219). Mr. Justice Lander awarded non-pecuniary damages of $225,000.

**479**  In *Sirna,* the plaintiff was rollerblading across a marked cross-walk when she was hit by the defendant's vehicle (at para14). The plaintiff was an accomplished athlete who anticipated enrolling in a dental hygienic course (at paras. 41 and 44). As a result of the accident, the plaintiff sustained a traumatic brain injury resulting in permanent functional deficits including deficits related to attention and memory, and impaired sense of smell and additional fatigue, reactive depression, and a sense of the loss of the person that she was and could have been before the accident (at para. 111). Mr. Justice Macaulay assessed non-pecuniary damages at $200,000 (at para. 117).

**480**  In *Dikey*, the plaintiff was standing in a roadway when he was struck by a sports utility vehicle driven by the defendant. As a result, the plaintiff suffered a number of injuries, the most significant being a traumatic brain injury (at para. 2). After the accident, he had continuing cognitive problems including limitations with memory, planning, attention, organizing, awareness, concentration, decision making, judgment, reasoning, language, mental flexibility, abstract thinking and calculations. He had a tendency to forget to eat and take medications regularly, and to forget appointments (at para. 110). It was unlikely that those problems would improve materially (at para. 120). Prior to the accident, the plaintiff was social and athletic with the ambition to work in the hotel industry and the courage to come to Canada from Turkey to pursue that education (at para. 114). Because of the accident, the plaintiff was unlikely to work, and lost the self-esteem, enjoyment and income that would have been available to him from work (at para. 142). Madam Justice Gray assessed non-pecuniary damages of $215,000 (at para. 146)

**481**  In *Young*, the plaintiff's vehicle was rear-ended in a truck driven by the defendant (at para. 1). At the time, the plaintiff was almost 51 years old and had been employed for many years as a cameraman and director of photography in the film industry (at para. 3). As a result of the accident, the plaintiff was found to have sustained a MTBI with tinnitus, personality changes and cognitive deficits, as well as chronic pain, headaches and depression. It was anticipated that the plaintiff would be chronically unemployable in his chosen profession for the rest of his life. Madam Justice Boyd assessed non-pecuniary damages of $200,000 (at para. 126).

**482**  In *Burdett*, the plaintiff was involved in two accidents (at para. 1). He claimed that as a result of the first accident, he suffered a MTBI and was no longer able to work at his construction and renovation business (at para. 37). At trial, Madam Justice Loo concluded that the plaintiff suffered soft tissue injuries and an MTBI from the first accident, was unlikely to recover and was no longer capable of working as a contractor and was competitively unemployable (at para. 41). She also found that the MTBI caused severe cognitive impairments including an inability to focus, sleep, concentrate or multi-task, and that the plaintiff experienced frustration, emotional liability and a lack of interest in the activities that used to give him pleasure (at para. 42). The Court of Appeal for British Columbia upheld those conclusions on appeal, and thus did interfere with the trial judge's assessment of non-pecuniary damages at $210,000 (at para. 51).

**483**  The defendants submit that the plaintiff is not entitled to any award for non-pecuniary damages other than a "modest" award for soft tissue injury. Moreover, they argue that the plaintiff had a history after the Accident of not complying with the treatment and medication regimes of his treating physicians and that his failure to do so is indicative of the minor severity of his post-Accident symptoms.

**484**  Having considered the principles set out in *Stapley*, the ordeal that the plaintiff has gone through, the impact the Accident has had on the plaintiff's life including the loss of a vibrant medical career that was very important to him, as well as the cases relied upon by counsel, I find that an award of $200,000 for non-pecuniary damages is appropriate.

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|  | ***(ii)*** |  | ***Past Income Loss from Medical Practice*** |  |

**485**  Loss of past income is a hypothetical assessment guided by the plaintiff's earnings prior to the Accident. It is not an exact calculation: S*mith 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 34. The Court must consider both positive and negative contingencies that, but for the Accident, the plaintiff's income between the Accident and trial would have been more or less than it was prior to the Accident.

**486**  The defendants submit that, by the fall of 2010, the plaintiff had received from a psychiatrist, Dr. Riar, a prognosis that he would improve within six months. The Court was not provided with any evidence from Dr. Riar despite both the plaintiff and the defendants having listed him as a witness in their respective trial briefs.

**487**  The defendants further submit that the plaintiff was not compliant with the treatment recommended by Dr. Remick, who began treating him in April 2008. They say that, had he done so, he likely would have been able to return to work within six months (based upon Dr. Riar's prognosis, which is not in evidence) and that the plaintiff should be precluded from recovering any past wage loss after October 2008.

**488**  I reject the defendants' submissions in this regard. I cannot accept opinion that was not tendered in evidence. Dr. Riar did not give any evidence let alone evidence with respect to how the plaintiff's failure to adhere to a treatment plan might or might not have affected that prognosis.

**489**  To the extent that the defendants suggest the plaintiff did not mitigate his losses, I note that the plaintiff wanted and continues to want nothing more than to return to his life as it was prior to the Accident. He did not return to work as an emergency room physician because he was physically and mentally incapable of doing so. He attempted to work in surgical assists and in a walk-in clinic but was unable to continue for the reasons I have set out above. He earned a total of $14,553.90 during those attempts. I have no doubt that if the plaintiff could have productively worked more as a physician he would have done so.

**490**  It is telling that Dr. Kausky, whose evidence I accept unreservedly, testified that the plaintiff tended to minimize his symptoms, resisted her attempts to put limitations on his activities, wanted to return to work as soon as possible and did not react well to her recommendation that he rest both mentally and physically.

**491**  I find that prior to the Accident, the plaintiff had no medical impairment preventing him from continuing his work as an emergency room doctor. Although the defendants attempted to make much of the plaintiff's telephone call to ICBC less than two weeks before the Accident in respect of which ICBC noted that the plaintiff "continues to have problems with his hands", I accept the plaintiff's evidence that the carpal tunnel syndrome in his hands and arms had resolved by the summer of 2006 and that he must have been misunderstood by ICBC. I find that his inability to concentrate and the poor short-term memory he demonstrated while performing surgical assists are attributable to the injuries he suffered during the Accident.

**492**  Mr. Benning's past wage loss calculations were based upon an average of the plaintiff's income during the five years immediately preceding the Accident. The defendants submit that the baseline should be the plaintiff's income for the three years immediately preceding the Accident, thereby excluding the plaintiff's peak income in 2002.

**493**  Mr. Benning's calculations assume personal income tax rates and not the rates that would had applied had the plaintiff followed the tax planning which was in place prior to the Accident, including the use of a professional corporation. The result is the least favourable to the plaintiff.

**494**  Mr. Benning's income analysis reveals that the plaintiff's income was trending upwards. In my view, it is more probable than not that the plaintiff's annual income between the date of the Accident and the date of trial would have been at least $346,000. That is the figure that should be used to calculate his past income loss.

**495**  I accept Mr. Benning's calculations that based upon an annual income of $346,000 the plaintiff's net income loss is $1,453,595. The plaintiff's earnings from surgical assists and the walk-in clinic must be deducted from this amount. His gross earnings of $14,553.90 reduced by 41.1% for income tax results in a deduction from his net past income loss of $8,572.

**496**  The plaintiff is entitled to an award of $1,445,023 for past income loss.

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|  | ***(iii)*** |  | ***Future Loss of Earning Capacity from Medical Practice*** |  |

**497**  The plaintiff is entitled to compensation for future losses he has shown are a real and substantial possibility, quantified by estimating the chance of the loss occurring: *Athey* at para. 27; *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. The valuation of the loss 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.

**498**  The plaintiff had no interest in altering his level of work activity before the Accident. He loved his job and had no plans to retire from it. As a result of the Accident, the plaintiff is significantly limited by fatigue, poor memory, inability to concentrate and poor decision making.

**499**  I accept the opinions of Dr. Kausky, Dr. Anton, Dr. Teal and Mr. Hohmann that the plaintiff is not capable of returning to work as a physician or to any other occupation requiring higher cognitive function and multi-tasking due to his cognitive deficits. Any future employment will be limited to non-complex routine work.

**500**  Each of Drs. Sexton and Teal opined that the plaintiff was and will continue to be disabled from working as an emergency room physician. Drs. Remick and Anton went further. They opined that the plaintiff is totally disabled from any form of competitive employment.

**501**  The defendants did not offer any evidence to suggest otherwise if the Court found, as it has, that the plaintiff suffered a debilitating concussion as a result of the Accident.

**502**  Taking into account labour market contingencies related to the plaintiff having become disabled or deciding to work part-time, Mr. Benning calculated the plaintiff's future loss of income from his inability to work as an emergency room physician, assuming an annual loss of $346,000 to age 70, to be $4,072,410.

**503**  Assuming lost annual future income of $346,000, an application of Mr. Gosling's multipliers (which assume average participation rates for health care professionals) results in a future loss of income of $3,561,032 (using economic multipliers) and $4,372,402 (using actuarial multipliers).

**504**  In my view, Mr. Benning's economic multipliers are appropriate in this case. The evidence is overwhelming that there was a real and substantial possibility the plaintiff would have continued working as an emergency room physician at the WHCC, likely until age 70. He was not just an "average" physician. He worked longer hours than any other physician at WHCC. He loved his work there.

**505**  As a result of the Accident, the plaintiff is not competitively employable as a physician. Allowance must be made for the contingency that the assumptions upon which the foregoing analysis is based may prove to be wrong: *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 paras. 101. The plaintiff's symptoms may improve, with treatment or otherwise. He may secure some form of employment capacity. My best estimate is that there is a 10% chance of one or more of these contingencies transpiring.

**506**  The plaintiff is entitled to an award for future loss of earning capacity from his medical practice of $4,072,410 x 90% = $3,665,169.

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|  | ***(iv)*** |  | ***Future Loss of Earning Capacity - Real Estate Investments*** |  |

**507**  The plaintiff claims significant damages in respect of the lost opportunity to purchase and develop further rental properties. He says that the evidence establishes he had a proven track record of successful real estate development. He says the opportunity is not mere speculation but that there was a real and substantial possibility he would have accumulated at least a further $7 million in real estate equity had the Accident not occurred.

**508**  I note, however, that of the eleven properties currently owned by the plaintiff, Ms. Roth and/or the Professional Corporation, only four - the Queen's Avenue, Connaught Drive, Toronto and Dunbar properties - were purchased with the intention of renovating and renting them. The West 14th Avenue, St. Moritz and Crabapple Drive properties were initially purchased or built as the plaintiff and Ms. Roth's primary residences. The Kelowna property was purchased as a potential retirement home. The Wasaga Beach property was the plaintiff's family's vacation cottage. The Snowbridge property was built by the plaintiff on a vacant lot for the purpose, at least in part, of a winter ski vacation home. The West 7th Avenue property was acquired by Ms. Roth with inheritance money she received from her father.

**509**  There is no doubt that the plaintiff is now less capable of developing real estate property. However, it is pure speculation that any such property would have been identified much less purchased, renovated and rented for reasonable amounts. It is equally speculative whether they would have increased in value. The mere fact that four real estate investments had been successful in the past does not mean that they will continue to be successful or that any future investments will prove to be prudent. The real estate market ebbs and flows based on world factors that cannot be predicted. At a minimum, expert evidence from economists and real estate professionals regarding market trends and opportunities was required. No such evidence was led by the plaintiff.

**510**  Moreover, the plaintiff failed to tender any cogent evidence regarding the fair market value of his various rental properties or the expenses associated with them, including property taxes, insurance costs, strata fees and building, renovation, maintenance and improvement costs. The Court is unable to determine the actual increase in equity of these properties because there was insufficient evidence lead concerning the capital cost of the properties.

**511**  I accept that, prior to the Accident, the plaintiff and Ms. Roth had planned to continue look for real estate investment opportunities. I find the plaintiff had a track record of acumen and success and has established a real and substantial possibility that, if suitable properties could have been found, they would have purchased, renovated and rented them. The plaintiff has lost genuine potential in this regard.

**512**  The evidence is far too speculative to attempt any form of accurate calculation of an award based upon losses from possible future real estate investments. In such cases, the Court must do its best to assess the loss: *Adamson v. Charity*, [*2007 BCSC 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HS-00000-00&context=) at para. 278. The overall fairness and reasonableness of the award must be considered taking into account all the evidence. It requires an assessment of damages, not a calculation according to some mathematical formula: *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.

**513**  Considering the recent investments that plaintiff made prior to the Accident, that he was "on a roll" with that aspect of his investment strategy and that it is impossible to forecast the future with any accuracy, particularly given the speculative real estate market, I find that a fair and reasonable award for the plaintiff's loss of future earning capacity in respect of real estate investments is $500,000.

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|  | ***(v)*** | ***Special Damages*** |  |

**514**  The plaintiff spent $45,507 for OT treatments with Laurie Nelson ($39,831), counselling sessions with a psychologist, Dr. Jung ($2,520) and a concussion clinic with Dr. Iverson ($500). The defendants contest their obligation to pay these amounts, arguing first that Ms. Nelson's charges greatly exceed those that Tracy Berry recommended as necessary, and second that there is no evidence to demonstrate that Dr. Jung's and Dr. Inverson's expenses were necessary.

**515**  The plaintiff benefitted significantly from the sessions with Ms. Nelson. They resulted in him understanding his condition and becoming better able to manage it. Although the number of sessions exceeded those initially recommended by Ms. Berry, I find that they were necessary. The expenses associated with Ms. Nelson's treatments are allowed.

**516**  No evidence was proffered regarding the reason for or necessity for the sessions with Drs. Jung and Iverson. Those expenses are not allowed.

**517**  The plaintiff also claims $63,000 for the cost of a nanny for his children commencing September 2010 to the date of trial (3 years at $21,000 per year). The defendants say these expenses would have been incurred regardless of the Accident.

**518**  The uncontroverted evidence is that the plaintiff and Ms. Roth hired a nanny to help them function because the plaintiff was unable to mind the children and function in the household because of his Accident-related injuries. Ms. Roth expects that a nanny will be required until her youngest children are in school. The nanny is paid $16,800 per year net of her room and board.

**519**  I accept Ms. Roth's evidence in this regard. The plaintiff is entitled to compensation for the cost of a full-time nanny for the three year period preceding the trial at $16,800 per year.

**520**  The plaintiff is entitled to special damages in the amount of $90,231.

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|  | ***(vi)*** | ***Cost of Future*** |  |
|  |  | ***Care*** |  |

**521**  The amounts claimed for future care costs must have some evidentiary link to a physician's assessment of pain, disability and recommended treatment, and the care recommended by a qualified health care professional: *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. In that regard, the Court must perform an analysis of each item of future care cost being sought by the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 32.

**522**  In Dr. Kausky's opinion the plaintiff will likely require ongoing manual therapy (physiotherapy, massage therapy, chiropractic therapy) and a personal trainer. He may also require occupational therapy, counseling and a neuropsychologist.

**523**  Ms. Berry's assessment of the plaintiff's future care costs is flawed to the extent that it relies in part upon assessments and consultations that were not put in evidence (Drs. Wilkinson, Riar and Jung). Moreover, many of Ms. Berry's recommended treatments have already been undertaken or abandoned.

**524**  The plaintiff claims the following future care costs (present valued):

1. *Trazadone* ($6,229): This amount assumes the plaintiff will take this drug daily. The evidence shows that he only takes it intermittently. I agree with the defendants that the claim should be reduced by half to $3,130.
2. *Physiotherapy* ($900): This claim is based upon Ms. Berry's 2011 opinion. The evidence is that the plaintiff is not taking either physiotherapy or massage therapy. In my view, it is unlikely that the plaintiff will avail himself of this treatment modality in the future and hence nothing should be award under this head. This claim is disallowed.
3. *Occupational Therapy - past* ($8,391): This part of the claim has been accounted for under the heading "Special damages".
4. *Occupational Therapy - ongoing* ($2,976): The plaintiff has benefited significantly from this therapy. This claim is allowed in full.
5. *Psychology* ($38,435): The plaintiff began psychological counseling at the recommendation of Dr. Anton but discontinued it for approximately 15 months and has only recently resumed it. In my view, it is likely he will continue to avail himself of this recommended treatment but not to the degree claimed. I find that an allowance of $1000 per year is reasonable. Using a multiplier of 16.814, the plaintiff is entitled to an award of $16,814 under this head.
6. *Homemaking, Yard and Home Maintenance* ($150,130): This claim is based upon the plaintiff having difficulty performing tasks around the home. I accept that the plaintiff has limitations in this regard. However the evidence is not that the plaintiff is physically unable to perform them but rather that he becomes symptomatic and it takes him longer to perform them. Moreover, to the extent that the claim for childcare is allowed, Ms. Roth will be freed up to perform these tasks, which the evidence shows she is doing. I am not satisfied that the plaintiff has demonstrated the required link between these claims and his disability. This claim is not allowed.
7. *Childcare* ($11,369): Ms. Berry recommends that the plaintiff and Ms. Roth have childcare for 4 hours per day Monday to Friday and 12 hours over the weekends, for a total of 32 hours per week. This is best provided by a full-time live-in nanny. I accept Ms. Berry's opinion that childcare will be required until Nicholas and Isabella are 11 years of age, that is until July 2019. The plaintiff is entitled to a present value award of $11,369 under this head.
8. *Rehabilitation* *Assistance* ($6,942): The plaintiff used a rehabilitation assistant in 2011 for approximately 1-1/2 years but discontinued that service. I am not satisfied that the plaintiff will avail himself of this service in the future. This claim is disallowed.

**525**  In summary, the plaintiff is entitled to an award of $34,289 for the cost of his future care.

**G.** **CONCLUSION**

**526**  The plaintiff is entitled to judgment against each of Rajinder S. Gill, British Columbia Transit and Whistler Transit Ltd., John Doe and Jack Doe Company Ltd., jointly and severally, for the following amounts:

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|  | (a) | Non-pecuniary damages: | $ 210,000; |  |

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|  | (b) | Past income loss: | $ 1,445,023; |  |

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| --- | --- | --- | --- | --- |
|  | (c) | Future Loss of Earning |  |  |
|  |  | Capacity-Medical Practice: | $ 3,665,169; |  |

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|  | (d) | Future Loss of Earning |  |  |
|  |  | Capacity-Real Estate: | $ 500,000; |  |

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|  | (e) | Special Damages: | $ 90,231 |  |

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|  | (f) | Cost of Future Care: | $ 34,289 |  |

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|  | **Total** | **$ 5,944,712** |  |

**527**  The action against the Insurance Corporation of British Columbia is dismissed.

**528**  The parties are at liberty to speak to costs.

G. WEATHERILL J.

**End of Document**

[***Rycroft v. Rego, [2017] B.C.J. No. 447***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N35-9B81-F57G-S29K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.W. Williams J.

Heard: July 11-15, 2016.

Judgment: March 7, 2017.

Docket: S135904

Registry: New Westminster

**[2017] B.C.J. No. 447** | 2017 BCSC 373

Between William Joseph Rycroft, Plaintiff, and Nelson Rego, Defendant

(174 paras.)

**Case Summary**

**Damages — For torts — Affecting the person — Assault — Action for damages for battery allowed in part — 63-year-old plaintiff sustained bruised temple, sore arm, elbow, jaw and hands, and disturbance to left eye, which resolved — It was accepted that falling to knees in altercation caused injury to plaintiff's right knee, which would require replacement — Plaintiff awarded $70,000 non-pecuniary loss — Plaintiff worked 2.5 weeks after incident and sporadically thereafter, but had sporadic work history and pre-existing left knee injury — Plaintiff awarded $100,000 past wage loss — No accepted plaintiff would have worked until age 70 — Plaintiff awarded $45,000 future income loss and $2,500 aggravated damages.**

**Damages — Physical and psychological damages — Physical injuries — Body injuries — Soft tissue — Head injuries — Eyes — Impaired vision — Jaw — Leg injuries — Knee — Considerations impacting on award — Pre-existing injuries — Action for damages for battery allowed in part — 63-year-old plaintiff sustained bruised temple, sore arm, elbow, jaw and hands, and disturbance to left eye, which resolved — It was accepted that falling to knees in altercation caused injury to plaintiff's right knee, which would require replacement — Plaintiff awarded $70,000 non-pecuniary loss — Plaintiff worked 2.5 weeks after incident and sporadically thereafter, but had sporadic work history and pre-existing left knee injury — Plaintiff awarded $100,000 past wage loss — No accepted plaintiff would have worked until age 70 — Plaintiff awarded $45,000 future income loss and $2,500 aggravated damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Employment status — Loss of earning capacity — Special damages — Past loss of income — Employment income — Non-pecuniary loss — Pain and suffering — Aggravated damages — Nature or character of wrongful act — Action for damages for battery allowed in part — 63-year-old plaintiff sustained bruised temple, sore arm, elbow, jaw and hands, and disturbance to left eye, which resolved — It was accepted that falling to knees in altercation caused injury to plaintiff's right knee, which would require replacement — Plaintiff awarded $70,000 non-pecuniary loss — Plaintiff worked 2.5 weeks after incident and sporadically thereafter, but had sporadic work history and pre-existing left knee injury — Plaintiff awarded $100,000 past wage loss — No accepted plaintiff would have worked until age 70 — Plaintiff awarded $45,000 future income loss and $2,500 aggravated damages.**

**Tort law — Trespass — To person — Battery — Defences — Self-defence — Provocation — Action for damages for battery allowed in part — Plaintiff's version of events that defendant confronted, struck him and put him in headlock after plaintiff fell to ground was accepted, but not that defendant delivered multiple blows while plaintiff was on ground — Defendant's claim he approached plaintiff calmly and was attacked was at odds with his claim plaintiff threatened his son and with evidence of three eye witnesses — Tort of battery established — Defendant did not act in self-defence or defence of anyone and plaintiff did nothing to constitute provocation.**

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| --- |
| Action for damages for battery. A neighbour observed the defendant's son and a friend playing near the plaintiff's bike park and was concerned they were damaging it, so told the boys to leave and called the plaintiff. When the plaintiff came home, he went to investigate and saw the boys on the corner of his property again. The plaintiff testified he told the boys to leave, and then heard "don't" and saw the defendant approaching. The plaintiff testified he said "you must be the dad" and started to explain why he did not want the boys playing there, but the defendant punched him in the side of the head so he was knocked to his knees, and then placed him in a stranglehold and continued punching him and hitting him in the legs until the defendant's wife told the defendant to stop. The defendant testified his son and the friend said a man had threatened to kick their heads in, so he approached the plaintiff and asked if there was a problem with the kids. The defendant testified the plaintiff started yelling at him, pushed him and was about to throw a punch, so the defendant placed the plaintiff in a headlock. The defendant testified the plaintiff slammed him to the ground, but he held on and his wife yelled at him to stop. The defendant testified the plaintiff reached into his pocket so he and his wife ran. The plaintiff claimed he sustained bruising to his left temple, minor injuries to his arm, elbow, and hands, a cataract in his left eye, and injuries to his knees that required a knee replacement of his left knee and would require one for the right.  HELD: Action allowed in part.  The plaintiff's version of events was accepted to the extent the defendant approached him angrily, struck him so he fell to his knees and then placed him into a headlock where they had a brief struggle. It was not accepted that the defendant continued to throw punches. The defendant's evidence he approached the plaintiff calmly despite his allegation his son was threatened, and that the plaintiff attacked him was both inconsistent with common sense and the evidence of three witnesses. The defendant also gave conflicting answers about whether he was injured and why he thought the plaintiff reached in his pocket. The defendant's wife claimed she missed the beginning of the fight, which was contrary to witness evidence she was running after the defendant trying to stop him. It was telling that only the plaintiff called the police after the incident. The defendant did not act in defence of himself or anyone else and the plaintiff did nothing to constitute provocation. The 63-year-old plaintiff was a long-haul trucker who worked for 2.5 weeks after the accident, then was off work and then worked sporadically. The plaintiff sustained a meniscus tear to his right knee and also had degenerative arthritis, but the latter was asymptomatic prior to the assault. The plaintiff sustained minor soft tissue injuries and bruising that quickly resolved and an injury to his left eye that was substantially resolved. The plaintiff's left knee injury was pre-existing and he tried to obtain workers' compensation for it just days before the assault. The plaintiff did not establish the assault aggravated his left knee. The plaintiff suffered real injuries and would have continued discomfort, particularly from the future right knee replacement. The plaintiff was awarded $70,000 non-pecuniary damages. Considering the plaintiff was actively pursuing workers' compensation at the time of the incident, had other medical issues and a sporadic work history, he was awarded $100,000 past wage loss. It was quite unlikely the plaintiff would have worked to age 70 so he was awarded $45,000 future loss of earnings. The plaintiff was awarded $2,500 aggravated damages but there was no basis for punitive damages, and this was not a calculated assault and the award was already substantial. Submissions were needed on the claims under the Crime Victim Assistance Act and Heath Care Costs Recovery Act. |

**Statutes, Regulations and Rules Cited:**

Crime Victim Assistance Act, *S.B.C. 2001, c. 38*,

Health Care Costs Recovery Act, *S.B.C. 2008, c. 27*,

**Counsel**

Counsel for the Plaintiff: D. Grunder.

Counsel for the Defendant: C. Morcom.

**Reasons for Judgment**

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| **J.W. WILLIAMS J.** |

**Introduction**

**1**  The plaintiff, William Joseph Rycroft, brings an action alleging the tort of battery. He says that the defendant Nelson Rego wrongfully inflicted physical violence upon him.

**2**  For the reasons that follow, I rule in Mr. Rycroft's favour.

**Background**

**3**  In July 2009, the plaintiff was residing in a rented home located on 227th Street in Maple Ridge, BC. The house is situated on the eastern end of a large parcel of property, with the western portion of that property being, for the most part, an undeveloped acreage. In all, the property is somewhere between 3 and 5 acres in size. The land is owned by a man named Isaaks, who lives in a house located on the western edge of the property. Although he was not a witness to the subject events or a participant in the trial, he was referenced during the course of testimony.

**4**  There is a 'bike park', as the parties have referred to it, situated on a portion of the property northwest of the plaintiff's home. As I understand it, this is an area where the plaintiff's son and another young man had, some time ago, set up a course for BMX bikes. The park consists of ramps and bridges.

**5**  The defendant lives with his wife and son in a home located along the southern border of the property. His backyard abuts the property and is separated from it by a small creek. The backyard itself is fairly small, measuring approximately 40 feet by 40 feet.

**6**  On July 10, 2009, the plaintiff, who was then working as a long-haul trucker, was out of town. That afternoon, he was returning to the Lower Mainland from the interior of the province. He delivered his truck to his employer's depot in Abbottsford, and then drove to his home in his own vehicle, arriving there at approximately 7:30 p.m.

**7**  Earlier that same day, during the afternoon, the defendant's 12-year-old son, Jordan, was entertaining a friend, Jesse, a young man of the same age who was visiting the Rego residence.

**8**  At some point, the two boys were apparently playing in the area of the bike park. They were noticed by a neighbour who lived on the south side of the property, approximately halfway between the residences of the plaintiff and the defendant. The neighbour, Peter Henkels, was concerned that the boys were causing damage to the park. As a consequence, he did two things. First, he went on to the property to tell the children to get away from that area. Second, he called the plaintiff on the telephone, advising him that the boys were on the property. The plaintiff explained that he was out of town but that he would be returning later that day.

**9**  Evidently the boys went home after Mr. Henkels spoke to them.

**10**  The evidence is that the boys went back to the Rego residence and told Ms. Rego (the defendant's wife) that a man had yelled at them and told them to get off the property. She told the boys to stay home and, initially, they remained inside of the Rego house. Later, they asked to go out and she said that they could, but they had to remain in the yard.

**11**  A short time later, the plaintiff arrived home. He testified that, shortly before returning home, he had purchased a slurpee beverage. When he arrived home, his first order of business was to walk into the backyard to see if there had been damage to the bike park. He testified that, as he did so, he had the slurpee drink in one hand and a cigarette in the other.

**12**  What occurred next is a matter of considerable contention. Both parties agree that there was an altercation between the plaintiff and the defendant. However, the specifics of that -- how it came about and what actually took place -- are disputed.

**13**  A number of witnesses testified about the events leading up to the physical contact between the two men, as well as the altercation itself. In addition to testifying himself, the plaintiff called three of his neighbours as witnesses. Additionally, the plaintiff called evidence relating to the injuries he claims to have sustained and the effects of those injuries upon him, including testimony from his mother.

**14**  The defendant also testified, and called his wife, his son Jordan, and Jesse, his son's friend, as witnesses.

**Issues**

**15**  The issues to be determined in this trial fall into two categories:

1. Has the plaintiff proven that the defendant committed battery against him?
2. If the Court is satisfied that the tort of battery has been made out, what injuries and consequences have been proven, and what monetary damages are appropriate?

**Positions of the Parties**

**16**  The plaintiff says that the evidence adduced at trial constitutes proof of an unlawful battery. In addition, he submits that no defence, such as self-defence, consent, or provocation, has been made out.

**17**  The defendant disputes liability. He says that a fair assessment of the evidence should satisfy this Court that he acted in self-defence, and that he used no more force than was proper in the circumstances. The defendant also says that the Court should find that there was consent to the physical encounter between the men, such that the plaintiff is not able to maintain this action. Finally, the defendant submits that this Court should consider whether provocation is a factor in the assessment of liability, although he provided no submissions on that issue.

**Analysis and Discussion**

**Liability for Battery**

**18**  As outlined in *Saether v. Irvine*, [*2011 BCSC 1497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22C8-00000-00&context=) at paras. 49 and 51-53, the principles that apply to the tort of battery are as follows:

[49] ...Battery is the intentional application of force constituting a harmful or offensive contact with another, without the other's consent.

...

[51] Once the plaintiff has established that there was a battery, and that injuries were caused by it, the defendant has the onus of establishing any defence he may have and, in addition, that the force used was reasonable in the circumstances.

[52] The law does not provide an absolute bar to the use of force. In fact, a party will be permitted to use force where it is taken for the purpose of defending himself or another or in defence of that person's property. However, the force used to effect that defence must not be more than necessary for the purpose at hand: it cannot be unreasonably disproportionate to the nature of the evil sought to be avoided. Where the force used by the defendant falls within that scope, that is, acting in such defence and not of an excessive degree, the defendant will not be liable.

[53] The degree of force used will not be subjected to an especially critical examination: it has been said that the law will not concern itself with niceties in such matters.

**The Evidence of Battery**

**19**  In determining liability, my assessments regarding the credibility of the witnesses have substantially informed my analysis.

**20**  There is significant disparity between the evidence presented on behalf of the plaintiff as compared to that adduced in favour of the defendant. Not surprisingly, each side urges the Court to find that their evidence is straightforward and reliable, and to conclude that the other's case is fraught with flaws and inconsistencies.

**21**  The factors to be considered when assessing credibility were succinctly summarized 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:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), [*1919 CanLII 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (SCC), [*59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&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*, [*1951 CanLII 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (BC CA), [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [*1997 CanLII 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) (SCC), [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

**22**  I will commence my analysis by summarizing the testimony of both the plaintiff and the defendant regarding the relevant events.

**23**  The plaintiff testified that, after he got home and went into the yard, he saw some children in the corner of the property. He said that he told them to leave. He claims that he then started to walk over to investigate whether there was any damage to the bike park. As he was making his way there, he claims he heard a voice say "don't," and then turned to see Mr. and Ms. Rego walking towards him. The plaintiff testified that, after Mr. Rego walked to within 3 to 5 feet of him, he said "you must be the dad; I do not want kids playing there anymore because...," being interrupted mid-sentence by the defendant striking him on the left side of his head. Mr. Rycroft said that, at the time he was struck, his head was turned to the right.

**24**  The plaintiff testified that he was partially knocked down. Following that, he said that Mr. Rego moved behind him, jumped on his back and put him in a stranglehold. The plaintiff claims that he then went down and that Mr. Rego punched him, He also recalled getting "whacked" on the back of his leg when he tried to stand up. At that point, he said he was on his elbows and knees, and felt the back of his leg being struck again. He testified that he was "freaked out" because he was concerned that the violence was going to trigger his heart arrhythmia. He recalls the defendant's wife yelling "he [the plaintiff] cannot breathe," and that Mr. Rego responding by letting go, running about 5 feet away, and saying words to the effect "do you want round two?" Mr. Rycroft said that his reply was "you bet" but that he did not take any physical action against the defendant. Shortly after, Mr. Rego left, and the plaintiff then called the police.

**25**  The defendant's testimony was that, after dinner, his son and Jesse came into the house and said that a man had threatened to kick their heads in. He testified that he then went out of the house and into the yard, intending to identify the person. He saw a large man, Mr. Rycroft, and approached him, saying "excuse me are there problems with the kids?" He said the plaintiff replied "yeah you need to keep your fucking kids off my property." The defendant said that he responded by trying to explain that he had lived there for 14 years and pointed to his home. He said Mr. Rycroft replied "I know where you live. I need to go. You keep your kids off my property, you fucking Hindu."

**26**  The defendant said the plaintiff then pushed him, putting his hand on the defendant's left shoulder. His evidence was that, at that point, he was not angry but concerned. He said he first took a step back, and then he jumped up and put the plaintiff in a headlock. He claims that the plaintiff then started to throw a punch, and so he did as well. The defendant said the plaintiff subsequently "body-slammed" him into the ground, but that he continued to hold the plaintiff in a headlock.

**27**  The defendant testified that his wife then arrived, yelling at the men to stop. Mr. Rego testified that they both stood up and that the plaintiff said "you fucking Hindu" to him again. The defendant also described that, at that point, the plaintiff reached into his pocket, scaring Mr. Rego, who thought Mr. Rycroft had a weapon. The defendant said that he then grabbed his wife's hand and they left.

**28**  In essence, the defendant claims that, given that the plaintiff was a big man, after Mr. Rycroft pushed him, he became scared and that he lost his temper, having no choice but to fight back.

**29**  A number of witnesses testified regarding the altercation. In addition to the plaintiff and the defendant, those witnesses included the defendant's wife, as well as three persons who, at the time, were sitting on a nearby backyard deck having a barbecue and who watched the events.

**30**  Based on my examination of all of the evidence, my conclusions with respect to what occurred are as follows.

**31**  In order to investigate the reported damage caused to the bike park, shortly after returning home, the plaintiff entered the yard behind his residence. Immediately before the altercation, while Mr. Rycroft was walking at a moderate pace in the general direction of his own home, Mr. Rego, walking quite briskly, approached him.

**32**  I accept that the plaintiff said words to the effect of "you must be the dad; I do not want kids playing there anymore."

**33**  I find that, at that point, the defendant struck the side of the plaintiff's head. The version of events which most sensibly and logically explains the resulting bruise is that, when he was struck, Mr. Rycroft had his head turned to the right. The punch was of significant force and unexpected.

**34**  As a consequence of the blow, the plaintiff went down in a forward direction, ending up on his knees. He had his hands on the ground. The defendant immediately applied some type of headlock to Mr. Rycroft from behind.

**35**  The two men struggled, with Mr. Rego behind and above Mr. Rycroft. No significant blows were landed.

**36**  The physical engagement ended fairly quickly. The defendant let go of the plaintiff and moved away, and the plaintiff got to his feet.

**37**  The defendant said something to the effect of "do you want round two?" or "do you want some more?" The plaintiff responded in the affirmative, I expect probably more reflexively than seriously, but did nothing physically to further engage with the defendant. Instead, the plaintiff reached into his pocket, took out his phone, and called 911.

**38**  At that point, the defendant and his wife left and went home.

**39**  In the course of the altercation, the plaintiff sustained an injury to his left temple area, an injury which is depicted in the photo marked Exhibit 6. I find that bruise was caused by a blow from the defendant.

**40**  It is also reasonable to conclude that Mr. Rycroft sustained minor injuries to his arm, his elbow area, and his hand, likely from going to the ground.

**41**  Finally, I accept that the plaintiff incurred some injury to his knees, also resulting from going to the ground.

**42**  The plaintiff's description of the events includes the claim that he was punched multiple times and that he was struck twice on the back of his leg. I am unable to find that the defendant administered those blows.

**43**  In so finding, I do not mean to suggest that I believe the plaintiff is deliberately being untruthful when he described those blows. The fact is that, certainly from the perspective of the plaintiff, the events of the altercation occurred quite suddenly. There was a flurry of physical activity in the course of which he was struck and driven to the ground. In those circumstances, it is not reasonable to expect that he would have a clear, precise, step-by-step, recollection of everything that occurred.

**44**  The conclusions I have reached obviously do not accord with the testimony of the defendant and his wife. Specifically, I reject Mr. Rego's contention that he approached the plaintiff in a benign and inoffensive manner, that the incident began when the plaintiff stuck or pushed him, and that, in the course of the altercation, the plaintiff "body-slammed" him to the ground.

**45**  Some explanation for my findings is warranted.

**46**  A significant influence on my findings is the evidence provided by the three non-involved witnesses. As described above, these witnesses were situated on their back deck, an elevated location which provided a reasonably good vantage point from which to observe the events in question.

**47**  In examining the evidence of each of those three persons, I recognize that their descriptions of the events were not exactly the same. However, while there are some differences in terms of details, overall, their descriptions of the events are substantially and essentially similar. That, it seems to me, is what one might sensibly expect when persons are called upon to describe, fully and carefully, the details of a fairly brief encounter which they witnessed some seven years prior.

**48**  I am also cognizant of the fact that each of these witnesses knew the plaintiff previously. They had some type of acquaintanceship with him, whereas none of them had any such prior connection to the defendant.

**49**  Nevertheless, I observed each of these persons testify, in chief and under cross-examination, and I have scrutinized with care both the presentation and the content of their testimony. I find no reason to believe that any of them was tailoring his or her evidence to favour the plaintiff. I find no basis to disregard or substantially discount the evidence that these witnesses gave, other than to be cautious about it, given the passage of time and the fact that the ability of honest witnesses to observe, recall, and recount events cannot be held to a standard of perfection.

**50**  The evidence of these witnesses has informed my conclusion as to what occurred that day.

**51**  My assessment of the veracity and reliability of the plaintiff's description of the events is that he was generally trying to describe what happened in an accurate way. Certainly, I accept his evidence that he did not initiate any physical contact with the defendant.

**52**  I am not prepared to find that he has provided a description of the details of what occurred that is absolutely complete and accurate. However, I am inclined to attribute that to the fact that he was the target of an unexpected physical attack and, as well, that there is a certain element of indignation and embarrassment that flows from that, rather than any deliberate untruthfulness.

**53**  As I will explain later in these reasons, I have misgivings with respect to the extent of the damages that the plaintiff claims to have suffered as a consequence of the assault. However, I am confident that the findings I have made about the specifics of the event are solidly and reliably grounded in a fair assessment of the evidence.

**54**  As for the testimony of the defendant and his wife, I am unable to accept it in certain material particulars.

**55**  Firstly, both the defendant and Mrs. Rego say that, after being told the children had been threatened, the defendant went out of his house, through his yard, and onto the property, not angry or upset but, rather, calm and concerned.

**56**  I am unable to accept that as being true. The fact is, this was the second time that day that the boys had said (probably with a reasonable measure of truth) that they had been given a hard time by a man while they were outside and playing in an area where they (and the Regos) believed they had a right to be.

**57**  In these circumstances, I have no reservations in concluding that when Mr. Rego went outside to deal with this problem, he was angry. I believe he went out there to confront the problem directly.

**58**  The evidence of the three eyewitnesses is that the defendant was moving toward the plaintiff quickly and purposefully. One described him as "walking fast"; another described it as "high-stepping." These witnesses also reported that Ms. Rego was not far behind the defendant, seemingly urging him to stop, and that, despite this, he "sucker punched" the plaintiff.

**59**  Clearly, this testimony is starkly at odds with the defendant's claim that he approached the plaintiff in a restrained way, saying words to the effect of "excuse me, are there problems with the kids?" and that he only resorted to physical force after the plaintiff struck him and directed a racial slur at him. The defendant's description of these events is not only pronouncedly at variance with the other evidence to which I have referred, but it is also at odds with what, given the circumstances of the encounter, common sense would dictate.

**60**  With respect to the credibility of the defendant, I note that, in cross-examination, he was referred to two statements that he had made in his examination for discovery, statements which he acknowledged to be true, and which were inconsistent with his trial testimony. One of these statements concerned whether he had been injured in the altercation. At trial, he said he had been injured, although not badly. On examination for discovery, he said, in response to the same question "No, I was not."

**61**  The other statement concerns the defendant's claims regarding what the plaintiff did immediately after the physical altercation ended. At trial, the defendant said that, after the men were back on their feet, he saw the plaintiff reach into his pocket and testified that he thought the plaintiff was drawing a weapon, but that he did not see one. On his examination for discovery, when asked what he thought the plaintiff was actually doing when he reached into his pocket, the defendant replied "drawing a... I have no idea. Actually, I have no idea what he was doing."

**62**  The testimony of Ms. Rego is also problematic. She says that she did not accompany the defendant as he went out into the field. Instead, she says that she did not get to the men until they were already on the ground, and that she then yelled at them to stop, which they did.

**63**  This description of events is quite different than the evidence of two of the balcony witnesses. They described her following the defendant as he approached the plaintiff and, according to one of them, urging him to back off or stop. I note as well that the plaintiff testified that he observed both the defendant and the defendant's wife walking toward him.

**64**  Ms. Rego's evidence is also curious in that she says she told the men to stop, which they did, but then she says that she did not see them stand up. It seems logical to me, given her description of the concern she had about the rather distressing sight of these men struggling on the ground, and the fact that she told them to stop, that she would have seen how matters ended.

**65**  I accept that witnesses often see matters through their own lens and that their evidence can reasonably be understood to reflect that perspective. However, in this case, I am unable to accept that, in their testimony, the defendant and Ms. Rego accurately described the altercation.

**66**  I find that Mr. Rego quickly approached Mr. Rycroft and, despite his wife's admonitions, struck the plaintiff, who had done nothing to physically engage with the defendant.

**67**  There is another aspect of the evidence that merits mention. Both Mr. and Ms. Rego testified that, both before and after the physical altercation, Mr. Rycroft referred to Mr. Rego as a "fucking Hindu." None of the other eyewitnesses, who also appeared to have some reasonable ability to hear what occurred in the course of the incident, had any recollection of that having been said. When asked, Mr. Rycroft denied that he had said any such thing to Mr. Rego.

**68**  To my mind, that seems to be an odd remark to have been made. Having observed Mr. Rego in the courtroom, I noted nothing about him that would suggest that he has the appearance traditionally associated with people from the Indian subcontinent. I am, of course, assuming that when the defendant said that Mr, Rycroft made this remark, that was the basis of it.

**69**  I make no finding as to whether such a comment was made. In any event, even if Mr. Rycroft had said such a thing to Mr. Rego, it would not be determinative as to the legal consequences of what occurred.

**70**  Furthermore, it is, in my view, somewhat telling that it was Mr. Rycroft who called the police, not Mr. Rego. Evidently, it was the plaintiff's view that he had been assaulted and that he was the victim. On the other hand, although Mr. Rego's description of the event would amply support him feeling that he had been quite improperly set upon, physically assaulted, and verbally abused by the plaintiff, a man he had good cause to believe had threatened his son, he testified that he did not take any steps to notify the authorities. While that may have been a not entirely unreasonable choice for him to make, I find it at least somewhat curious that he thought that there would be no reason to notify the authorities or to complain to them that he had been the victim of an assault.

**71**  I should note that this last observation is not one of the fundamental bases upon which I make my findings. I do not think that the defendant's lack of action is, by any means, determinative of the issue. Instead, it is one of a number of tertiary evidentiary facets which informed my assessment.

**72**  One final observation I will make is with respect to the size and appearance of the two men. On the one hand, it is true that the plaintiff is a fairly large man. Intending him no disrespect, certainly as he appeared at trial, he seemed quite out-of-shape and lumbering. As well, the evidence is that he was, at the time, not in good health, having recently experienced problems with his heart. In short, while of large size, the plaintiff did not appear to be a man who would be in fighting shape. Mr. Rego is a smaller man, but appears lean, fit and trim. From his testimony, I conclude that he has been involved in coaching youth soccer. Presumably, he is at least somewhat physically active.

**73**  In terms of apparent capability to handle themselves physically, while my assessment is based on little other than what I have noted, my impression is that it would be wrong to see this as a match where a large and physically able man was bullying a small and vulnerable person.

**74**  Again, that observation is not the basis for the conclusions I have reached, but offered only to make clear that I have considered that aspect of the matter.

**75**  In the final analysis, I am satisfied that, on a fair assessment of the totality of the evidence, the conclusions that I have reached with respect to the altercation between these men are reasonable and properly supported by the evidence.

**76**  Given those findings, I am obliged to consider the defences put forward by Mr. Rego.

**77**  Shortly put, following from the rather lengthy discussion set out above, I do not believe there is a plausible argument to be made that the plaintiff consented to the altercation. In addition, I reject the submission that the defendant was acting in defence of himself or anyone else.

**78**  As for provocation, that is not a complete defence. Rather, it is a factor that, if found to be present, can be considered in mitigation of damages. In order for the defendant to be able to invoke the principle of provocation, the court must find that the conduct of the plaintiff caused the defendant to have lost his power of self-control, and that such conduct must have taken place in the immediate context of the assault. It is a recognition that the actions of a plaintiff can sometimes cause a defendant, in the heat of the moment, to take leave of his sense of judgment and act out violently. On this point, this Court recently cited with approval the following passage from Lewis N. Klar, Q.C., *Tort Law*, 5th ed. (Toronto: Carswell, 2012) in *Robinson v. Bud's Bar Inc.*, [*2015 BCSC 1767*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H30-VXR1-FK0M-S1DV-00000-00&context=) at para 134:

1. PROVOCATION

Provocation has been defined as "conduct which caused the defendant to lose his power of self-control, and which occurred at the time of, or shortly before, the tortious act of the defendant." It generally involves insulting or taunting words, or conduct which, although falling short of assault necessitating a defensive reaction, incite the defendant. Because the plaintiff's conduct does not require that the defendant take protective action, but merely provokes an often violent reaction, provocation is not regarded as a complete defence to an intentional tort, nor justification for tortious behaviour. Provocation operates as a type of contributory ***negligence***, mitigating, though not eliminating, the *plaintiff's* damages.

**79**  Frankly, it is my view that Mr. Rego was, unfortunately, angry when he approached Mr. Rycroft and decided, rashly, to deal with the person he thought had been acting offensively toward his son and his son's friend. Nothing the plaintiff did immediately before the altercation began can be said to have constituted a provocation of Mr. Rego. As noted above, I find that the defendant was angry when he approached Mr. Rycroft, and that that anger overwhelmed his better judgment, resulting in the assault. What he did was ill-considered and foolish - a brief but quite regrettable event that has had significant regrettable repercussions for all concerned.

**80**  It follows that I am unable to conclude that the defendant's actions resulted from any provocation on Mr. Rycroft's part.

**81**  Therefore, in light of all the matters discussed in this section of my reasons, I find that the tort of battery has been made out.

**The Claim for Damages**

**82**  The plaintiff claims damages under a number of different heads:

1. Nonpecuniary damages;
2. Past income loss;
3. Loss of earning capacity;
4. Aggravated damages; and
5. Punitive damages.

**83**  In addition, there are two claims advanced on the basis of the following statutes:

1. *Crime Victim Assistance Act,* *S.B.C. 2001, c. 38*; and
2. *Health Care Cost Recovery Act,* *S.B.C. 2008, c. 27*.

**Nonpecuniary Damages**

**84**  An assessment of the plaintiff's claim for nonpecuniary damages must begin with this Court's findings regarding the injuries visited upon him by the defendant.

**85**  The plaintiff is 53 years of age. He is divorced and was, at the time of the incident, living alone in his rented home. He was employed as a long-haul truck driver. As a result of the assault, he claims to have sustained injuries to the following parts of his body:

1. Both knees;
2. Right elbow, arm, and hand;
3. Left eye; and
4. Jaw.

**86**  In addition, he says that the events in question have had a serious psychological effect on him. Specifically, he claims that it has changed his personality, making him more withdrawn and depressed.

**87**  In regards to the plaintiff's claimed physical injuries, the matter of his purported knee injury is by no means straightforward. Supported by the medical opinion of Dr. Shiraz Mawani, who has been his family physician for many years, the plaintiff says that the worst injury he sustained in the event was a contusion to his right knee and a tear in the posterior horn of his right knee's medial meniscus. Mr. Rycroft claims that, as a result of injuries he sustained during the altercation, the knee subsequently required surgical debridement.

**88**  An x-ray taken of the knee in August 2009, a month after the assault, showed only "minor narrowing of the medial tibiofemoral compartment with minor osteophystosis of the femoral and tibia condyles, in keeping with mild-to-moderate osteoarthritic degenerative changes." However, the plaintiff says that, up to that point, his right knee had been entirely asymptomatic and fully functional. In addition, Mr. Rycroft submits that, despite the suggestion arising from the x-ray that there were only minor changes, the fact is that, as a consequence of the assault, he had severe pain and limitation in his right knee.

**89**  An MRI was taken of the knee in May 2010. This MRI disclosed a torn medial meniscus and more significant degenerative osteoarthritic changes.

**90**  The theory of the plaintiff is that the initial mild osteoarthritic changes in the right knee progressed to more severe changes. Ultimately, in March 2011, Dr. Trevor Stone (an orthopedic surgeon) performed an arthroscopy on the right knee.

**91**  In summary, it is the position of the plaintiff that the injury initially appeared to be minor, but eventually manifested as a significant problem that required surgical intervention and that will likely require further medical intervention, a total knee replacement.

**92**  In regards to his left knee, in 2006, the plaintiff was involved in a workplace accident that caused a lateral meniscal tear in that knee. That required arthroscopic debridement. An MRI and other investigations taken at the time disclosed a significant osteoarthritic change in both the left knee's medial and patella-femoral compartments.

**93**  The plaintiff accepts that all of those changes and conditions were not caused by the assault, as they were present before it.

**94**  Nevertheless, it is the position of the plaintiff that, as a result of the injury to his right knee during the assault, he was forced to place an additional load on his left knee. Consequently, this additional burden led to more wear and tear of his left knee, thereby hastening more severe arthritic changes. The plaintiff says that, while his left knee had been symptomatic prior to the assault, he had nevertheless been mobile and active, able to carry on his ordinary day-to-day activities.

**95**  It is important to note that Mr. Rycroft had a left knee replacement in October 2015. He was approximately three months in recovery, and testified that the left knee remains symptomatic in that it continues to experience some discomfort and continues to limit his activities.

**96**  Dr. Stone opines that the osteoarthritis in Mr. Rycroft's right knee is likely to progress and that it is likely that the plaintiff will ultimately require a total right knee replacement.

**97**  Consequently, the plaintiff says that both his knees are now injured, significantly impacting upon his enjoyment of life, his ability to partake of his usual activities, and to earn an income.

**98**  In terms of other physical injuries, Mr. Rycroft claims to have sustained a contusion to his right elbow. While that was initially symptomatic and painful, it has essentially resolved.

**99**  Mr. Rycroft also says that, following the assault, the vision in his left eye deteriorated as a result of the formation of a cataract.

**100**  Mr. Rycroft was referred to a specialist in ophthalmology, Dr. Gabriel Chu, who performed a left cataract extraction and intraocular lens implantation. Mr. Rycroft's vision in that eye is essentially restored.

**101**  Dr. Chu testified at trial. He described having performed the cataract surgery on Mr. Rycroft's left eye on January 29, 2013. He examined Mr. Rycroft and found no cataracts in his right eye.

**102**  The theory of the plaintiff is that the cataract injury was likely the result of the trauma that Mr. Rycroft sustained in the assault. In their opinions, both Drs. Chu and Mawani make reference to the injury being the "likely result of the trauma that Mr. Rycroft sustained in the assault, wherein he was punched repeatedly on the left side of the left eye."

**103**  Mr. Rycroft also complained of injury to his jaw. He testified that there was discomfort immediately following the altercation, and attributes that soreness to having been choked by Mr. Rego. He reports that the jaw pain went away within a few weeks of the incident in question.

**104**  In short, the position of the plaintiff is that the injuries which he sustained in the altercation with the defendant have substantially impacted upon a number of aspects of his life, including his everyday enjoyment of life and his ability to function in his employment.

**105**  I will further discuss the issue of the impact of the injuries upon his working circumstances later in these reasons. For now, I will more directly address his claim that the injuries have had a very significant effect upon him in terms of pain, suffering, and loss of enjoyment of life.

**106**  The defendant submits that there is a substantial body of evidence which should cause of this Court to have grave misgivings about Mr. Rycroft's claims concerning the extent and effect of his injuries.

**107**  In the course of a rigorous cross-examination, a number of propositions were put to Mr. Rycroft, particularly with respect to instances of prior injury and claims that he made respecting those.

**108**  His prior work history was also examined in careful detail.

**109**  As noted, the evidence establishes that, in 2006, Mr. Rycroft sustained an injury to his left knee in a workplace accident. As a consequence, he took time off and had medical treatment.

**110**  In cross-examination, it was put to the plaintiff that on July 6, 2009, four days before the incident in question, he had contacted a representative of WorkSafe BC to make inquiries about an injury to his left knee. The record to which counsel made reference in the course of cross-examination indicated as follows:

Worker advised two days after he returned to his job he was laid off work. He is having ongoing problems with his left knee, going down the stairs and he is limping on it.

He is having a hard time finding work as he is a truck driver and is inquiring if retraining is possible.

He will be following up with his doctor to have a report sent in.

**111**  When queried at trial about this contact, Mr. Rycroft downplayed its significance. He testified that he did not recall saying that it was an ongoing problem or that he had reported that he was limping.

**112**  It is to be noted that, following the event at bar, the plaintiff continued to work at his job for a further 2 1/2 weeks, at which time he stopped.

**113**  Also of significance, it seems to me, are the steps that the plaintiff took following the altercation to seek medical attention for the injuries that he says he sustained.

**114**  The attendances and notations, as reflected in the clinical notes, are contained in Dr. Mawani's report. They read as follows:

1. 23 July 2009:

Patient presented again for soreness of the left knee. He indicated that it had continued ever since the arthroscopy in September 2006. He was limping on it. Then he cracked and occasionally felt unstable. It swelled. He was unable to walk any distance or ride a bike. He was frustrated and wanted it fixed. Apparently he had been off work for one and 1-1/2 years prior and had started driving a truck 3 weeks previously.

1. 12 August 2009:

Patient was seen for the first time following an ASSAULT which had taken place on July 7, 2009. Apparently a male person a jumped on his back, had his neck in an elbow lock and he was choking. His left knee, which was usually sore, had given out and he fell onto his right knee and right elbow onto hard dirt. The knee had swollen up and had been sore since. He had also been punched on his left temple, quite out of the blue.

The knee pain was mainly in front of the knee around the patella, spreading down the front of the right leg to above the ankle and, as wel,l [sic] behind the knee in the popliteal fossa.

Examination showed no effusion or bruising. Patient was extremely sensitive to flexion and extension of the knee and very tender in the patellar tendon and lateral tibial condyle. He was tender along the lateral aspect of the right leg along the tibia. Hyperextension was very painful.

**115**  There are a number of entries which follow. They disclose that the plaintiff saw Dr. Mawani an additional four times in 2009. The principal notation in those visits is with respect to complaints of right knee pain.

**116**  Having examined the documented medical history and the trial evidence regarding it, taken in conjunction with the plaintiff's work records and in the context of his trial testimony, I find myself unable to glean a clear picture of his circumstances.

**117**  The conclusion that I take is that, prior to the events of July 10, 2009, his work history had been somewhat sporadic and uneven. At the time of the altercation, he had been working at his job as a driver with LA Transport for only a matter of two or three weeks. As best I can discern, prior to that, he had not worked between September 2008 and June 2009.

**118**  I also conclude that, as detailed above, he had been in contact with WorkSafe BC to report problems with his left knee just days prior to the altercation.

**119**  The timing and manner in which the plaintiff sought medical attention as a consequence of the altercation is, in my view, somewhat curious in light of his claim of having sustained acute physical injuries.

**120**  In the result, I have a degree of reservation about whether the substantial physical injuries and their effect which Mr. Rycroft ascribes to the altercation meet the standard of proof that must be attained.

**121**  I believe that Mr. Rycroft's prior left knee condition was symptomatic at the time of the event, and was of sufficient seriousness to constitute meaningful interference with his ability to work. I also find that that condition was a substantial factor affecting his long-term vocational fitness.

**122**  There is no doubt that he sustained some physical injury in the altercation, but it was not of the degree of seriousness that he urges this Court to find.

**123**  The defendant is responsible for the harm and injury that his unlawful act caused. However, in determining the damages he must pay, the Court is required to make proper allowance for those conditions that were pre-existing and were not caused by the conduct of the defendant. On this point, the Supreme Court of Canada stated the following in *Athey v. Leonati*, [*[1996] 3 SCR 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 32:

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]

**124**  The challenge in this case is to fairly and properly determine the damages for which the defendant is responsible.

**125**  This task is made more difficult by the fact that the plaintiff's pre-incident history is neither clear nor straightforward. As well, as noted above, it is questionable whether he is able to provide accurate and reliable testimony.

**126**  That is not to say that I am concluding that the plaintiff has been deliberately untruthful in his testimony. However, the fact remains that some of the details of his employment and medical circumstances are unclear and somewhat confusing. He has shown himself to be an unreliable historian. In addition, as witnessed by the plaintiff's employment history, there seems to be a tendency on his part to seek benefits on the basis that he is unable to maintain employment.

**127**  Given the onus that rests upon the plaintiff to prove his claim, these deficiencies must necessarily impact this Court's assessment.

**128**  I find that the defendant's assault upon Mr. Rycroft injured the left side of his head, causing a laceration and bruising. Moreover, Mr. Rycroft sustained some soft tissue injuries to his arm, elbow and hand, but I find those to be of a relatively modest severity. As a result, I find that no ongoing effect has been proven.

**129**  The assault also injured the plaintiff's left eye which subsequently required cataract surgery. This matter has caused me some concern. There was a substantial passage of time between the incident and the operation that Dr. Chu performed. As well, in attributing the cause of the condition to the assault, both Dr. Chu and Mawani make reference to "repeated punches to the left side of the left eye." As my findings indicate, I am not satisfied that there were multiple punches, although there was certainly one. However, upon reflection, I accept that the plaintiff has proven, on a balance of probabilities, that the injury to his eye resulted from the defendant's blow. That said, I also find that that injury has substantially resolved.

**130**  In regards to the plaintiff's knees, I find that the event resulted in some meaningful injury to the plaintiff's right knee. I am satisfied that there was pre-existing degenerative change present in the right knee, but that it was not symptomatic prior to the altercation. I find that the injury he sustained to the right knee during the altercation resulted in the onset of significant pain that has required medical intervention, including an arthroscopic medial meniscectomy. That procedure has not, and will not, provide full relief from the pain, stiffness and decrease of function that attends the condition. Mr. Rycroft will require a total replacement of his right knee and, in fact, at the time of trial, that replacement was scheduled to be done fairly imminently. Those consequences are attributable to the battery.

**131**  As for the left knee injury, I find that that was a pre-existing and symptomatic condition. Consequently, the defendant does not bear responsibility for it.

**132**  With respect to the contention of the plaintiff that the injury to his right knee has resulted in aggravation to his left knee, and that it has caused unusual wear and deterioration to his hip, I reject those claims as unproven. In this regard, I rely upon the evidence of Dr. Stone, whose opinion I consider to be the most authoritative on the matter.

**133**  I accept that the injuries he sustained caused him some pain, suffering, and diminishment of enjoyment of life, including feelings of despondency and a concern for being secure in his own home. Certainly, some of those effects continue to some degree and will be present going forward.

**134**  With respect to determining a monetary value of damages to compensate the plaintiff for those nonpecuniary losses, both the plaintiff and the defendant have provided submissions as to an appropriate quantum. These submissions have been supported by reference to other court decisions that each party says validates their respective positions.

**135**  The plaintiff acknowledges that, prior to the event in question, he had various health concerns, including a serious injury to his left knee resulting from the accident in 2006 for which he had undergone surgery. He concedes it was still symptomatic prior to the battery. He also acknowledges that he had suffered from a heart arrhythmia. At the time of the battery he was 57 years old and was active to some extent. He maintained his own home and assisted his mother at hers.

**136**  Mr. Rycroft says that he is been diligent in following the advice given to him by the medical professionals he has seen, and has taken the medications prescribed to him. He attended at physiotherapy. He underwent arthroscopic surgery to repair the medial meniscus of his right knee and underwent a total left knee replacement. He intends to have a total right knee replacement.

**137**  Mr. Rycroft says that, despite his best efforts, his quality of life has been markedly diminished.

**138**  In the plaintiff's submission, an appropriate award for nonpecuniary damages in this case is in the order of $100,000. He relies on the following cases; a common theme in them is knee injury:

1. *Tchir v. South Coast British Columbia Transportation Authority*, [*2014 BCSC 1119*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0YM-00000-00&context=);
2. *Majchrzak v. Avery*, [*2013 BCSC 1626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B2JD-00000-00&context=);
3. *Thomasson v. Moeller*, [*2014 BCSC 2465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S533-00000-00&context=);
4. *Zhang v. Graham*, [*2014 BCSC 1578*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G04X-00000-00&context=);
5. *Reddy v. Staples*, [*2015 BCSC 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4J7-00000-00&context=);
6. *Kathuria v. Wildgrove*, [*2014 BCSC 1274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B15H-00000-00&context=); and
7. *Graham v. Lee*, [*2004 BCSC 1287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S31X-00000-00&context=).

**139**  The defendant says that the plaintiff's injuries are modest and submits that an appropriate award is in the range of $8,000 to $10,000. In short, he says that there is insufficient evidence to establish that any morphological changes to Mr. Rycroft's right knee were caused by the incident. He says that, at most, the incident caused an exacerbation of knee pain that would have occurred in the absence of the incident. In addition, he says that the left knee was symptomatic prior to the incident and the elbow pain was not reported until some two months after the incident. Similarly, the defendant takes the position that the plaintiff has not satisfactorily established that the altercation caused any harm to his vision.

**140**  In the defendant's submission, the following cases are supportive of his position:

1. *Ross v. Dhillon*, [*2016 BCSC 945*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K56-XS31-FC6N-X374-00000-00&context=);
2. *Gatzke v. Sidhu*, [*2011 BCSC 988*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22NJ-00000-00&context=);
3. *Chrisgian v. Hatzisavva*, [*2002 BCSC 538*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0V9-00000-00&context=);
4. *Manering v. Imanian et al*, [*2006 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23NJ-00000-00&context=); and
5. *Khodadoost v. Wittkamper*, [*2013 BCSC 1717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-239T-00000-00&context=).

**141**  In my view, there were real injuries sustained by Mr. Rycroft. However, for the reasons I have set out, the extent of what he has proven does not warrant damages in the order of the quantum he seeks. In determining what I consider to be an appropriate award of damages, I have taken into account the disruption that these events have caused in his life, and that there will be further discomfort, particularly because of the pain and attendant disruption that will result from the knee replacement that will be required. I conclude that an appropriate award is $70,000.

**Past Income Loss**

**142**  A plaintiff is entitled to recover damages to compensate him for past income loss resulting from the defendant's wrongful conduct. As explained by the BC Court of Appeal in *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at paras. 30-31:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in ***Personal Injury Damages in Canada***, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

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

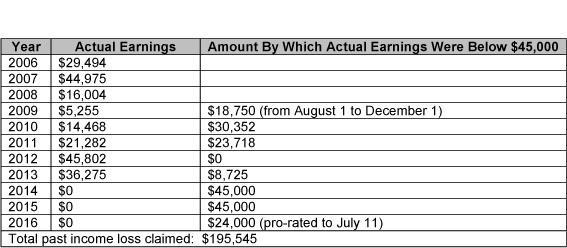
[My underscoring; other emphasis in original]

**143**  In this case, Mr. Rycroft's historical employment was principally as a truck driver and an equipment operator. In 2006, he sustained an injury to his left knee which interfered with his ability to work. In 2007, he experienced a heart arrhythmia which prevented him from working until 2008. In fact, he had returned to work only three weeks prior to the incident at bar.

**144**  Following the assault, Mr. Rycroft worked for a further two or three weeks and then was out of work until late in the year.

**145**  Over the subsequent years, up to trial, he worked sporadically. There were some years that he had no income at all.

**146**  Mr. Rycroft submits that an appropriate means of quantifying the damages he has sustained under this head is to go forward on the premise that he would be capable of earning $45,000 each year. He proposes that the Court would then subtract from that amount what his actual earnings were for the respective years in issue. The calculation that he advances is as follows:



**147**  In the result, the plaintiff seeks an award of $195,545 for income loss to the date of trial.

**148**  In my respectful view, that approach to the analysis is not warranted in the circumstances. I consider it necessary in making this assessment to take into account the problems that he was having with his left knee, including that, at the time of the incident, he was actively pursuing compensation and suggesting that he was unable to continue working. There were also other medical issues, namely his cardiac condition, plus the fact that his employment history is sporadic and uneven.

**149**  In the final analysis, it is my view that an appropriate award of damages to compensate the plaintiff for his loss of income prior to trial, due to the conduct of the defendant, is substantially less. I find an appropriate award to be $100,000.

**Loss of Earning Capacity**

**150**  The general principles that apply when determining a plaintiff's loss of earning capacity were outlined succinctly by the BC Court of Appeal in *Villing v. Husseni*, [*2016 BCCA 422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M37-6RB1-FJDY-X09R-00000-00&context=) at paras. 17-20:

Legal Principles Governing an Award for Loss of Earning Capacity

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari,* [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at paras. 30-32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[18] Using the capital asset approach does not mean the assessment is unstructured. Garson J.A.'s observations 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=) are apposite:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), [*1996 CanLII 2906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3P5-00000-00&context=) (BC CA), [*23 B.C.L.R. (3d) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3P5-00000-00&context=) at para. 24, [*75 B.C.A.C. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3P5-00000-00&context=); *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), [*1995 CanLII 1971*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (BC CA), [*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, [*63 B.C.A.C. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=).

[Emphasis added.]

[19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), [*1985 CanLII 149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (BC SC), [*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.), form the basis of the assessment. The questions are 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.

[20] The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, [*2007 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=) at para. 9, per Mackenzie J.A.

**151**  As of the date of trial, Mr. Rycroft is 63 years of age. He testified that he would like to continue to work as a long-haul trucker up until the age of 70. He says that he is aware of others in the industry who have done so.

**152**  On that basis, his submission is that the Court should calculate the value of his loss as being the present value of five years of future income at $45,000 per year, for a total of $215,217. Alternatively, he submits that, if the Court was to use a capital asset approach, then an award of two years income at $45,000 per year or $90,000 would appropriate.

**153**  Again, with respect, I am unable to accept those submissions as reasonable. Given Mr. Rycroft's employment history, and taking into account the other relevant considerations relating to his health that were unrelated to the conduct of the defendant, I am quite sceptical that Mr. Rycroft would have continued to work regularly at that job until his late 60s.

**154**  Using the capital asset approach, it is my conclusion that the appropriate award under this head is $45,000.

**Aggravated and Punitive Damages**

**155**  The plaintiff seeks additional awards under the heads of aggravated and punitive damages. The Supreme Court of Canada distinguished these two types of damages in *Vorvis v. Insurance Corp. of British Columbia*, [*[1989] 1 S.C.R. 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23P9-00000-00&context=) at para. 16:

[16] Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, The Law of Damages (2nd ed. 1983), at p. 562, para. 979, in these words:

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in Cassell & Co. Ltd. v. Broome, but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in H.L. Weiss Forwarding Ltd. v. Omnus. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

**156**  When assessing these types of damages, the BC Court of Appeal has made it clear that courts should consider aggravated damages before considering punitive damages: *Huff v. Price*, [*[1990] B.C.J. No. 2692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2W8-00000-00&context=) (BCCA). Consequently, I have followed that structure in my decision.

**157**  On the matter of aggravated damages, it is my view that the issue of intangible injuries was substantially addressed in the award of nonpecuniary damages. While the plaintiff seeks an award under this head in the amount of $10,000, it is my conclusion that an appropriate sum is $2,500.

**158**  In regard to punitive damages, Mr. Rycroft seeks an award under this head of damages in the amount of $15,000.

**159**  Before outlining my findings on this head of damages, it is important to further set out the law concerning punitive damages. Courts have made it clear that these damages apply when the defendant's conduct was especially malicious, and that such damages are not meant to be compensatory. On this point, the Supreme Court of Canada said the following in *Hill v. Church of Scientology of Toronto*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at para 196:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

**160**  In *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association*, [*2009 BCCA 457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B24T-00000-00&context=) at para. 23, the BC Court of Appeal summarized the following ten principles which the Supreme Court of Canada found, in *Whiten v. Pilot Insurance Co.*, [*2002 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=), to apply when considering punitive damages:

1. Punitive damages are not limited to particular "categories" of wrongs, although by their nature they will "largely be restricted to intentional torts";
2. The general objectives of punitive damages are punishment, deterrence of the wrongdoer and others, and denunciation;
3. Since the primary vehicle of punishment is criminal law, punitive damages should be resorted to only in "exceptional cases and with restraint";
4. The use of pejoratives such as "high-handed" or "oppressive" does not provide useful guidance (or discipline) to judges or juries and a more principled approach is desirable. (Notwithstanding this, the Court said at para. 94 that punitive damages are to be imposed only if there has been "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.");
5. In setting punitive damages, the court should ask itself "in particular" how an award would further one or other of the objectives of the law and what is the lowest award that would serve the purpose;
6. It is "rational" to use punitive damages to relieve a wrongdoer of its profits where compensatory damages would amount to "nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others."
7. A "formulaic" approach should be avoided. The court should focus not on the plaintiff's loss but on the defendant's misconduct;
8. The overall award should be rationally related to the objectives for which punitive damages are awarded;
9. Juries should receive more help from judges concerning the function of punitive damages and factors governing such awards and the assessment of a proper amount;
10. Punitive damages are not "at large" and an appellate court may intervene if an award exceeds the outer boundaries of a rational and measured response to the facts of the case.

**161**  In addition, as outlined in *Home Equity Development Inc. v. Crow*, [*2004 BCSC 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3BT-00000-00&context=) at para. 179, the proper award of punitive damages must be proportionate to the following factors:

1. The blameworthiness of the defendant's conduct; including
2. whether the misconduct was planned and deliberate
3. the intent and motive of the defendant
4. The degree of vulnerability of the plaintiff.
5. The harm or potential harm specifically directed at the plaintiff.
6. The need for deterrence.
7. Taking into account the other penalties, both civil and criminal, which have been or which are likely to be inflicted on the defendant for the same misconduct.
8. The advantage wrongfully gained by the defendant from the misconduct.

**162**  In my respectful view, while the conduct of the defendant was undoubtedly wrong and warrants sanction, I must also take into account that what occurred was in the nature of a foolish loss of temper and acting out. On the basis of my findings, Mr. Rego was angry at what he considered to be harsh treatment of his son. He confronted the party he thought was responsible and did so in an unacceptable way.

**163**  At the same time, this was not a planned, deliberate and calculated attempt to physically assault another person.

**164**  While I accept that it would be well within the realm of reason to impose punitive damages, I also take into account the findings that I have made in this case, together with the very substantial awards of damages that I have outlined above. Consequently, I find that adding punitive damages to those awards would constitute adding to what is already a very significant sanction upon Mr. Rego in circumstances where I do not expect that he will be able to rely on any insurance policy to satisfy the damages award.

**165**  There is no question that this Court's findings of the defendant's responsibility and the damage awards made will impose a substantial financial hardship upon him and constitutes a serious censure of his conduct.

**166**  In my view, this is an appropriate case in which to decline to make any award under this head of damages.

***Crime Victim Assistance Act and Health Care Costs Recovery Act***

**167**  The plaintiff briefly noted that he had received a $36,833.42 award through the operation of the *Crime Victim Assistance Act*. The Director of the Crime Victim Assistance Program has asserted a subrogated claim for this amount.

**168**  In addition, Mr. Rycroft notes that the Minister of Health, moving under the *Health Care Costs Recovery Act*, has provided a Minister's Certificate dated June 6, 2016 claiming the return of $5,783.45 in healthcare costs provided to him. The plaintiff claims that these costs were incurred as a result of the injuries he sustained during the altercation.

**169**  Neither of the parties provided substantive submissions on these two recovery claims. Similarly, in *Mittenen v. Dudley*, [*2015 BCSC 2247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HKY-0HR1-JPP5-254V-00000-00&context=) [*Mittenen*], the Court said the following at paras. 84-85:

[84] During the submissions there was reference to claims for subrogated costs under the *Health Care Recovery Act* or for Victim Services. However, the submissions I received in that respect were incomplete.

[85] As requested I will allow liberty to make further submission on the question of subrogated claims, provided that an application to deal with that is initiated within 30 days. That is by request to the trial scheduling manager to make further submissions. Submissions may be submitted in writing on a schedule that I will set if a request is made for further submissions. If counsel wish as well to have an oral hearing, they may so indicate in the written submission, or they may indicate that they are content to simply make written submissions.

**170**  Given the parties' lack of submissions on this point, I believe that the Court's approach taken by the court in *Mittenen* should also be adopted here.

**171**  If the parties wish to have me make a determination on these recovery claims, then they have 30 days from the date of the release of this decision to put in a request to trial scheduling to make further submissions. However, in these circumstances, I will only allow written submissions.

**Conclusion**

**172**  In summary, I have determined that the plaintiff has succeeded in making out his claim for battery. The defendant is liable to Mr. Rycroft for the injuries he suffered as a result of the altercation.

**173**  I have assessed Mr. Rycroft's award of damages as follows:

1. Non-pecuniary damages: $70,000;
2. Past Income loss: $100,000;
3. Loss of earning capacity: $45,000;
4. Aggravated Damages: $2,500; and
5. Punitive Damages: Nil

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $217,500 |  |

In addition, he is entitled to recover pre-judgement interest on the damages that were awarded for his past income loss.

**174**  Upon receipt of further written submissions by the parties, I will deal with the matter of any additional awards determinations regarding the *Crime Victim Assistance Act* and *Health Care Costs Recovery Act* claims.

J.W. WILLIAMS J.

**End of Document**

[***Strata Plan LMS 1328 v. Marco Polo Properties, [2000] B.C.J. No. 977***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61H5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Holmes J. (In Chambers)

Heard: March 23, 2000.

Written submissions received: April 12, 14 and 19, 2000.

Judgment: May 15, 2000.

Vancouver Registry No. C992293

**[2000] B.C.J. No. 977** | [*2000 BCSC 776*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2G-FSS1-JX3N-B0V8-00000-00&context=) | [*17 C.B.R. (4th) 149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2G-FSS1-JX3N-B0V8-00000-00&context=) | [*32 R.P.R. (3d) 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2G-FSS1-JX3N-B0V8-00000-00&context=) | [*97 A.C.W.S. (3d) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2G-FSS1-JX3N-B0V8-00000-00&context=) | [*[2000] B.C.T.C. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2G-FSS1-JX3N-B0V8-00000-00&context=)

Between The Owners, Strata Plan LMS 1328, plaintiff, and Marco Polo Properties and Marco Polo Development Co. Ltd., defendants

(55 paras.)

**Case Summary**

**Fraud and misrepresentation — Fraudulent conveyances and preferences — Conveyances and preferences impeachable by creditors or others — What constitutes a creditor or person entitled to impeach — Practice — Pleadings.**

|  |
| --- |
| Application by the defendant Marco Polo Properties for an order to strike the writ of summons and amended statement of claim. Application by the plaintiff Strata Plan LMS 1328 to amend it pleadings to add the strata lot owners as parties and to amend generally as required. Marco developed a residential condominium complex upon its land. It retained ownership of an adjacent lot. Strata Plan was the Strata Corporation. The individual parties sought to be added were individual buyers of strata lots. Marco remained the owner of the balance of 24 strata lots. In October 1998, Strata Plan notified Marco that it considered it to be liable to remedy construction deficiencies. In February 1999, Marco transferred title to the adjacent lot to the defendant Marco Polo Development. The companies had common officers and directors. Marco granted a mortgage to Marco Development for over $2 million over the strata lots it owned. The mortgage was registered against the title to each of the lots. The statement of claim was issued in February 1999. In January 2000, Strata Plan passed a special resolution authorizing the within action commenced in May 1999 for a declaration of invalidity concerning the transfer of the adjacent lot and the grant of the mortgage. Strata Plan alleged fraudulent preference or fraudulent conveyance and that the transactions were made to hinder or delay creditors of Marco, including Strata Plan and its owners. Strata Plan's alleged that Marco owed it and the owners a fiduciary duty that it breached. Marco and Marco development submitted that remedies under the Fraudulent Preference Act were available only to those who had a liquidated claim.  HELD: Applications allowed in part.  The claims under the Act were struck. The remaining claims were not maintainable. They failed to disclose a cause of action unless properly amended. The claims for breach of contract and ***negligence*** did not qualify as liquidated damages and therefore neither Strata Plan nor any owner qualified as a creditor under the Act. Marco did not owe a duty to Strata Plan or other owners to refrain from alienation or encumbrances of its assets pending judgment. Strata Plan and the owners' claims sounded in contract and tort. They were not legal but equitable. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24)(a), 19(24)(d), 57.

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

Condominium Act, s. 15, 15(1)(a), 15(7).

Fraudulent Conveyances Act, *R.S.B.C. 1996, c. 164*.

Fraudulent Preferences Act, *R.S.B.C. 1996, c. 163*., ss. 1(b), 3.

Strata Property Act, [*S.B.C. 1998, c. 43, s. 171*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B0SH-00000-00&context=), 171(1).

**Counsel**

John G. Mendes, for the plaintiff. Herbert S. Silber, for the defendants.

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| **HOLMES J.** |

**1**   The defendants' application is for an order pursuant to Rule 19(24)(a) and (d) and Rule 57 to strike out the Writ of Summons and Amended Statement of Claim in this action as disclosing no valid claim or cause of action, or otherwise being an abuse of court.

**2**  The plaintiff applies for an order to amend pleadings to add as parties the strata lot owners except the defendant Marco Polo Properties, and to amend generally as may be required to maintain a cause of action.

FACTS:

**3**  The defendant Marco Polo Properties ["MPP"] developed a residential condominium complex upon land in Surrey, B.C. it had purchased in 1993 ["Condominium"]. It retained ownership of an adjacent lot.

**4**  The Owners, Strata Plan LMS 1328, is the Strata Corporation of the Condominium complex MPP constructed.

**5**  The individual parties the plaintiff seeks to be added are individual purchasers of strata lots in the Condominium. The defendant MPP remains the owner of the balance of 24 strata lots comprising the condominium.

**6**  On October 26, 1998, the plaintiff notified MPP it considered it to be liable for construction deficiencies and that legal action would be taken if remediation of the deficiencies was not undertaken.

**7**  On February 1, 1999, MPP transferred title to the adjacent lot to the defendant Marco Polo Development Co. Ltd. ["MPD"]. MPP and MPD are companies with common officers and directors.

**8**  On February 22, 1999, MPP granted a mortgage to MPD for $2,050,001 over the strata lots it owned in the Condominium complex and the mortgage has been registered against the title to each of the strata lots.

**9**  On February 24, 1999, the plaintiff issued its Statement of Claim in the faulty construction action.

**10**  On January 12, 2000, at their annual general meeting the owners of the Strata Corporation passed a special resolution authorizing the prosecution of Supreme Court of British Columbia action C991659 commenced March 30, 1999 claiming damages and other relief from MPP and other parties concerning the construction deficiencies.

**11**  The resolution also authorized the within action commenced May 5, 1999 seeking a declaration of invalidity concerning the transfer by MPP of the adjacent lot and the grant of mortgages by MPP to MPD of the units it owned in the Condominium.

FOUNDATION OF THE ACTION:

**12**  The foundation for the plaintiff's cause of action is the Fraudulent Preference Act, *R.S.B.C. 1996, c. 163* and the Fraudulent Conveyance Act, *R.S.B.C. 1996, c. 164*.

**13**  The plaintiff alleges in its Amended Statement of Claim that the transfer of the adjacent lot and the creation of the mortgage on the strata lots owned by MPP was a fraudulent preference or a fraudulent conveyance. The plaintiff alleges the transactions were in order to hinder or delay creditors and others of MPP, including the plaintiff strata corporation and owners, in the exercise of their just and lawful rights and that the transactions in fact had that effect.

**14**  The plaintiff's claim against MPP in the underlying faulty construction action is for breach of contract and ***negligence***. It is an unliquidated claim, and the pleadings are not yet closed.

FRAUDULENT PRFERENCE ACT:

**15**  Section 3 of the Act provides:

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| --- | --- | --- | --- |
| 3 |  | Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made |  |

1. with intent to defeat, hinder, delay or prejudice creditors or some of them, and
2. to or for a creditor with intent to give the creditor preference over other creditors or some of them.

|  |  |
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| [emphasis added] |  |

**16**  The defendants' position is that remedies under the Fraudulent Preference Act are available only to those who have a liquidated claim. That proposition is well supported at law [Re Skinner [*(1960), 27 D.L.R. (2d) 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3NM-00000-00&context=) (B.C.S.C.) at p. 78].

**17**  The claims for breach of contract and ***negligence*** by the plaintiff against the defendants in the underlying faulty construction action do not qualify as liquidated damages and therefore neither the strata corporation nor any owner qualifies as a creditor under the Fraudulent Preference Act [DeGraaf v. Staniszkis Developments Ltd., [*[1988] B.C.J. No. 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60XW-00000-00&context=), Huddart J., B.C.S.C. January 8, 1988].

**18**  Creditor is not a defined term under the Act. The Act does however provide that the term creditor includes:

1. the beneficiary of a trust or other person to whom liability is equitable only.

**19**  The plaintiff argues that MPP owed the condominium corporation and the owners a fiduciary duty relying upon the decision of Owen-Flood J. in Strata Plan 1229 v. Trivantor Investments International Ltd. [*(1995), 4 B.C.L.R. (3d) 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X1HM-00000-00&context=) where he noted at p. 274:

It is true that the strata corporation is a separate legal entity from its members but, nevertheless, its members have a duty to the strata corporation to take reasonable steps to see that it complies with its statutory obligations.

**20**  The plaintiff alleges MPP breached its fiduciary duty by entering into a scheme to defeat or impair the corporation and the owners' ability to recover damages they claim for in the underlying faulty construction action.

**21**  The plaintiff argues they seek a declaration of constructive trust, which is a remedy for breach of a fiduciary duty, and they may therefore be said to be the beneficiaries of a trust.

**22**  On that reasoning the plaintiffs' claim they qualify both as the beneficiaries of a trust, and as a person to whom liability is equitable.

**23**  I find the plaintiff's reasoning inventive but not persuasive.

**24**  Trivantor, supra, involved a finding that owners have a duty to see that the corporation complies with statutory obligations. It was decided in the context of an owner who had title to all the units of a development, a parallel position to that of a developer prior to original sale of units in condominium development.

**25**  I do not see how MPP as but one of several owners in the condominium owed a duty to the plaintiff or other owners, who were suing it for breach of contract and ***negligence***, to refrain from alienation or encumbrance of its assets pending judgment. It is not alleged that the impugned acts derive from or are related to its position as an owner, rather it appears they relate to its business or corporate aspect.

**26**  MPP never held specific property or an identifiable fund in trust for the plaintiff. It would not be a trustee of property or funds for the plaintiff even if the impugned transactions were set aside.

**27**  It is clear the base claims of the plaintiff corporation and owners sound in contract and tort. They are legal, not equitable claims.

**28**  I do accept that the beneficiary of a trust or other person to whom liability is equitable only is also exempt from the need for claims of creditors to be liquidated or readily ascertainable. The plaintiff and owners' claims here, regardless of how categorized, are not for liquidated or readily ascertainable amounts.

**29**  The extended meaning of "creditor" given in Section 1(b) was intended to extend to a trust relationship, or a similar equitable relationship, the protection accorded to that of a debtor-creditor. In my view, the circumstances here do not disclose either a trust or other equitable relationship between the plaintiff and the defendants.

**30**  I do not dismiss the plaintiffs' arguments because they are unique, I do so because I do not accept their validity.

**31**  Neither the plaintiff strata corporation, nor any owner, is a creditor within the meaning of the Fraudulent Preference Act and the action in that regard is not maintainable.

FRAUDULENT CONVENYANCE ACT:

**32**  Huddart J. in DeGraaf, supra, noted "The case law distinguishes carefully between the "creditor" of the Fraudulent Preference Act and the "creditors and others" of the Fraudulent Conveyance Act." This is an important distinction in respect of the requisite status of a person to bring action.

**33**  Mackenzie J. in St. Gregor Mercantile Co. v. Halbach, [1927] 1 D.L.R. 761 (Sask.K.B.) confirmed the requirement that action under the Fraudulent Conveyance Act be in representative form. He did so by adopting the following summary from Halsbury's Laws of England, Vol. 15, p. 89, para. 184:

In an action to set aside the alienation under the statute [i.e. the Fraudulent Conveyance Act] a creditor should sue on behalf of himself and all other creditors of the grantor, except where he has recovered judgment on his debt, in which case he can obtain an order declaring the alienation void as against him, and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts.

**34**  The plaintiff here is not, and may never become, a judgment creditor. The action commenced is not representative of all creditors of MPP. The action must be dismissed as clearly failing to disclose a cause of action unless it is appropriately reconstituted or amended.

**35**  In the Law Reform Commission of British Columbia Report on Fraudulent Conveyances and Preferences, January 1988 at p. 59, the following comment was made as to "common error" experienced in commencement of actions under the Fraudulent Conveyance Act:

The requirement that those who are not judgment creditors should issue their writs on behalf of all creditors is often ignored. The irregularity appears to be one of form only, which can be cured at trial or even on appeal. It is difficult to imagine circumstances in which the defendant would be prejudiced by a conversion of the action into a class action.

ISSUES AS TO RELIEF CLAIMED:

**36**  The Prayer for Relief indicates that what the plaintiff seeks in this action is execution on a judgment the plaintiff has yet to obtain. That is clearly wrong. As the action must be representative of all creditors any appropriate relief granted would be for creditors as a class and not individually to the plaintiff corporation and owners.

THE PLAINTIFF'S CAPACITY TO SUE AND SECTION 15 OF THE CONDOMINIUM ACT:

**37**  Section 15(1)(a) of the Condominium Act allows a strata corporation to bring an action as representative of the owners of the strata lots "... for damages and costs for any damage or injury to the common property, common facilities and the assets of the strata corporation caused by any person...".

**38**  Secton 15(7) provides:

1. A strata corporation may sue on its own behalf and
2. on behalf of an owner about matters affecting the common property, common facilities and other assets of the strata corporation, and
3. if authorized by special resolution of the strata corporation, on behalf of those owners who consent in writing to the strata corporation so doing, about matters affecting individual strata lots even though the strata corporation, in the case of a contractual claim, was not a party to the contract about which the proceeding is brought.

**39**  There is ample authority this empowers a strata corporation with the capacity to sue a developer for construction deficiencies, as is the case here in respect of the underlying faulty construction action brought by the plaintiff against, inter alia, MPP.

**40**  Counsel provided no direct authority that the strata corporation had a capacity under the Act to bring an action, as it has here, claiming relief under the Fraudulent Conveyance Act and the Fraudulent Preference Act.

**41**  I concur with the position of the defendants that the wording of Sections 15(1) and (7) of the Act cannot be interpreted to include actions whose object is an attempt to obtain security for a contingent future award of damages that might result from the underlying construction deficiencies action.

**42**  It appears the legislature intended Section 15 to provide only a limited and closely defined representative capacity of strata corporations. This view is supported by the newly defined capacity for strata corporations contained in Part 10, Division 2, of the provisions of the Strata Property Act, *S.B.C. 1998, c. 43*, not yet in force. It is proclaimed to come into effect July 1, 2000.

**43**  The unproclaimed Section 171 dealing with Suits by the Strata Corporation provides:

1. The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
2. the interpretation or application of this Act, the regulations, the bylaws or the rules;
3. the common property or common assets;
4. the use or enjoyment of a strata lot;
5. money owing, including money owing as a fine, under this Act, the regulations, the bylaws or the rules.

**44**  The wider and more general capacity to sue in this section stands in stark contrast to the limited and specific capacity of the current Act.

**45**  The plaintiff however is prepared, and indeed has moved for leave to amend, to add the individual strata lot owners, except MPP, as parties plaintiff. I consider it appropriate to grant that application. The plaintiff also agrees to continue the action as representative of all creditors of MPP.

**46**  The defendants argue that continuation of the action for relief under the Fraudulent Conveyance Act requires it be on behalf of all creditors of MPP. The defendant MPD is a creditor of MPP and therefore the condition cannot be fulfilled as the plaintiff cannot represent a party with whom they are clearly in conflict. It would result in MPD being both plaintiff and defendant in the same suit.

**47**  The representative aspect of the action is procedural. It is intended all creditors will be present and represented in the proceeding. The presence of MPD as a defendant fulfills that necessary condition. All creditors will be before the court and their interests dealt with in the one action.

**48**  The representative action for all creditors contemplated for a Fraudulent Conveyance Act proceeding need not be a class action under the Class Proceedings Act, *R.S.B.C. 1996, c. 50*. It can be a representative action under the Rules of Court.

CONCLUSION:

**49**  The action in present form cannot be maintained. It is however capable of amendment. The plaintiff desires an opportunity to amend and it is appropriate they be allowed to do so.

**50**  The plaintiff has leave to add as parties plaintiff all strata lot owners except MPP.

**51**  The claims under the Fraudulent Preference Act are struck out and will be deleted in amended pleadings.

**52**  The pleadings will be amended to be representative of all creditors of MPP pursuant to the Fraudulent Conveyance Act, except MPD, an existing defendant.

**53**  Consequential amendments necessary to accord with the resulting re-cast pleadings by amendment are allowed. In particular, the Relief Claimed must accord with the cause of action.

**54**  I will allow the plaintiff 30 days to file and serve an Amended Writ and Statement of Claim in accordance with this Order. In the event the parties are in dispute as to the form of amendments allowed they are at liberty to apply.

COSTS:

**55**  Although success was divided it was appropriate for the defendants to bring the application and extensive amendments to pleadings are required. The defendants will have their costs on scale 3.

HOLMES J.

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